UNITED STATES REPORTS

VOLUME 125

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1887

J. C. BANCROFT DAVIS
REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1888

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON REMICK WAITE, Chief Justice.[1]
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.
LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

AUGUSTUS HILL GARLAND, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Chief Justice Waite died at Washington on the morning of March 23, 1888.

TABLE OF CONTENTS.

TABLE OF CASES REPORTED.

PAGE

Addington *v.* Burke 693
Arthur's Executors *v.* Butterfield 70
Attorney General of the Commonwealth of Massachusetts, Western Union Telegraph Company *v.* . . . 530

Baker, United States *v.* 646
Bank of Redemption *v.* Boston 60
Beidelman, Dow *v.* 680
Bissell, Wall *v.* 382
Bonahan *v.* Nebraska 692
Boston, Bank of Redemption *v.* 60
Bowerman *v.* Rogers 585
Bowman *v.* Chicago and Northwestern Railway Company 465
Bucher *v.* Cheshire Railroad Company 555
Burchard *v.* United States 176
Burchard, United States *v.* 176
Burke, Addington *v.* 693
Butterfield, Arthur's Executors *v.* 70

Carr, Doolan *v.* 618
Carter, Shreveport *v.* 694
Cheshire Railroad Company, Bucher *v.* 555
Chicago *v.* Taylor. 161
Chicago and Northwestern Railway Company, Bowman *v.* 465
Christian, Johnson *v.* 642
Cissel *v.* Dutch 171
Clement *v.* Packer 309
Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, St. Louis, Alton and Terre Haute Railroad Company *v.* 658

Table of Cases.

PAGE

Conger, Williams *v.* 397
Crooks, Shreveport *v.* 694
Cunningham *v.* Norton 77

Dale Tile Manufacturing Company *v.* Hyatt . . . 46
Davis, Davison *v.* 90
Davison *v.* Davis 90
De Wolf *v.* Hays 614
Doolan *v.* Carr 618
Dow *v.* Beidelman 680
Dutch, Cissel *v.* 171

East Tennessee, Virginia and Georgia Railroad Company *v.* Southern Telegraph Company 695

Felix *v.* Scharnweber 54
Fisher, Hoskin *v.* 217
Friedenstein *v.* United States 224

Hannibal and St. Joseph Railroad Company *v.* Missouri River Packet Company 260
Hartranft *v.* Langfeld 128
Hartranft *v.* Oliver 525
Hartranft *v.* Sheppard 337
Hatch, Willamette Iron Bridge Company *v.* . . . 1
Hays, De Wolf *v.* 614
Hill, Maynard *v.* 190
Holmes, Shreveport *v.* 694
Hoskin *v.* Fisher 217
Hyatt, Dale Tile Manufacturing Company *v.* . . . 46

In re Royall 696

James, Yale Lock Manufacturing Company *v.* . . . 447
Johnson *v.* Christian 642

Kreiger *v.* Shelby Railroad Company and others . . 39

Langfeld, Hartranft *v.* 128
Little Rock and Fort Smith Railway, Tompkins *v.* . 109

Table of Cases.

PAGE

Little Rock, Mississippi River and Texas Railway, Williams *v.* 109
Louisiana Sugar Refining Company, New Orleans Waterworks Company *v.* 18
Lyon *v.* Perin and Gaff Manufacturing Company . 698

Maynard *v.* Hill 190
Memphis and Little Rock Railroad Company *v.* Sage . 361
Memphis and Little Rock Railroad Company, Sage *v.* . 361
Merchant, Spencer *v.* 345
Missouri *ex rel.* Walker *v.* Walker 339
Missouri River Packet Company, Hannibal and St. Joseph Railroad Company *v.* 260
Morden, Weir *v.* 98
Morrison, Union Trust Company *v.* 591

Nebraska, Bonahan *v.* 692
New Orleans Waterworks Company *v.* Louisiana Sugar Refining Company 18
Norton, Cunningham *v.* 77
Nutt *v.* United States 650

Oliver, Hartranft *v.* 525
Origet *v.* United States 240

Packer, Clement *v.* 309
Pembina Consolidated Silver Mining and Milling Company *v.* Pennsylvania 181
Pennsylvania, Pembina Consolidated Silver Mining and Milling Company *v.* 181
Perin and Gaff Manufacturing Company, Lyon *v.* . 698
Potts *v.* United States 173
Proctor *v.* Tilghman 136
Proctor, Tilghman *v.* 136

Rogers, Bowerman *v.* 585
Royall, *In re* 696

Sage *v.* Memphis and Little Rock Railroad Company . 361
Sage, Memphis and Little Rock Railroad Company *v.* . 361

Table of Cases.

PAGE

St. Louis, Alton and Terre Haute Railroad Company *v.* Cleveland, Columbus, Cincinnati, and Indianapolis Railway Company 658
San Jacinto Tin Company, United States *v.* 273
Scharnweber, Felix *v.* 54
Shelby Railroad Company and others, Kreiger *v.* . . . 39
Sheppard, Hartranft *v.* 337
Shreveport *v.* Carter 694
Shreveport *v.* Crooks 694
Shreveport *v.* Holmes 694
Silva, Southern Development Company *v.* 247
Southern Development Company *v.* Silva 247
Southern Telegraph Company, East Tennessee, Virginia and Georgia Railroad Company *v.* 695
Spencer *v.* Merchant 345
Strong, United States *v.* 656

Taylor, Chicago *v.* 161
Tilghman *v.* Proctor 136
Tilghman, Proctor *v.* 136
Tompkins *v.* Little Rock and Fort Smith Railway . 109

Union Trust Company *v.* Morrison 591
United States *v.* Baker 646
United States *v.* Burchard 176
United States, Burchard *v.* 176
United States, Friedenstein *v.* 224
United States, Nutt *v.* 650
United States, Origet *v.* 240
United States, Potts *v.* 173
United States *v.* San Jacinto Tin Company . . . 273
United States *v.* Strong 656

Walker, Missouri *ex rel.* Walker *v.* 339
Wall *v.* Bissell 382
Washington Ice Co. *v.* Webster 426
Webster, Washington Ice Co. *v.* 426
Weir *v.* Morden 98

Table of Cases.

PAGE

Western Union Telegraph Company *v.* The Attorney General of the Commonwealth of Massachusetts . 530
Willamette Iron Bridge Company *v.* Hatch . . . 1
Williams *v.* Conger 397
Williams *v.* Little Rock, Mississippi River and Texas Railway 109

Yale Lock Manufacturing Company *v.* James . . 447

Index 703

TABLE OF CASES

CITED IN OPINIONS.

PAGE

Adams *v.* Burke, 3 Sawyer, 415 215
Adams *v.* Palmer, 51 Maine, 481 211
Adams County *v.* Burlington & Missouri Railroad, 112 U. S. 123 30, 44, 60
Airhart *v.* Massieu, 98 U. S. 491 426
Albright *v.* Teas, 106 U. S. 613 53
Allen *v.* McVeigh, 107 U. S. 433 273
Almonester *v.* Kenton, 9 How. 1 27
American Bridge Co. *v.* Heidelbach, 94 U. S. 798 378
Andrews *v.* Marshall, 26 Texas, 212 422
Arkansas *v.* Little Rock, Mississippi &c. Railway, 31 Arkansas, 701 115, 116
Arthur *v.* Morrison, 96 U. S. 108 75
Arthur *v.* Sussfield, 96 U. S. 128 77
Atherton *v.* Fowler, 96 U. S. 513 641
Attwood *v.* Small, 6 Cl. & Finn, 232 252, 259
Aurora *v.* Reed, 57 Illinois, 29 166
Bagnell *v.* Broderick, 13 Pet. 436 629
Bank of Augusta *v.* Earle, 13 Pet. 519 186, 188
Bank of West Tennessee *v.* Citizens' Bank of Louisiana, 13 Wall. 432; *S. C.* 14 Wall. 9 33, 34, 39, 46
Barbier *v.* Connolly, 113 U. S. 27 190
Barnett *v.* Stanton, 2 Alabama, 181 258
Bartemeyer *v.* Iowa, 14 Wall. 26 59
Bartemeyer *v.* Iowa, 18 Wall. 129 510
Batesville Institute *v.* Kauffman, 18 Wall. 151 392
Beard *v.* Burts, 95 U. S. 434 7
Beer Co. *v.* Massachusetts, 97 U. S. 25 510
Bellas *v.* Cleaver, 40 Penn. St. 260 335

PAGE

Bender *v.* Pitzer, 27 Penn. St. 333 324
Best *v.* Polk, 18 Wall. 112 625, 628, 635
Bethel *v.* Demaret, 10 Wall. 537 33
Bigelow *v.* Windsor, 1 Gray, 299 702
Binghampton Bridge, 3 Wall. 51 271
Birdsall *v.* Coolidge, 93 U. S. 64 149
Birdsell *v.* Shaliol, 112 U. S. 485 149
Black *v.* Thorne, 111 U. S. 122 149
Blake *v.* Robertson, 94 U. S. 728 151
Blum & Blum *v.* Welborne, 58 Texas, 157 85, 90
Boardman *v.* Lessees of Reed, 6 Pet. 328 321
Bosworth *v.* Swansea, 10 Met. 363; *S. C.* 43 Am. Dec. 441 577, 580
Boyd *v.* United States, 116 U. S. 616 238
Brashier *v.* Gratz, 6 Wheat. 528 95
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 29, 36, 352
Brown *v.* Atwell, 92 U. S. 327 29, 54, 60
Brown *v.* Houston, 114 U. S. 622 495, 508
Brown *v.* Maryland, 12 Wheat. 419 499, 505, 506, 507, 508, 512, 514, 518
Brown *v.* Shannon, 20 How. 55 52
Bucher *v.* Fitchburg Railroad, 131 Mass. 156 579
Buffington *v.* Harvey, 95 U. S. 99 7
Burdell *v.* Denig, 92 U. S. 716 144
Burgess *v.* Seligman, 107 U. S. 20 584
Burnham *v.* Bowen, 111 U. S. 776 621, 673
Butchers' Union *v.* Crescent City Co., 111 U. S. 746 517
Butler *v.* Pennsylvania, 10 How. 402 210

When a case is reported in the American Decisions, the volume and page of that series is given.

PAGE

Cardwell *v.* American Bridge Co., 113 U. S. 205 9, 10, 11, 522
Carpenter *v.* Going, 20 Alabama, 587 389
Carter *v.* Carter, 10 B. Monroe, 327 389
Caufman *v.* Presbyterian Congregation of Cedar Spring, 6 Binney, 59 322, 325
Cawood Patent, 94 U. S. 695 144, 146
Chambers *v.* Fisk, 22 Texas, 504 422
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 271
Cherry *v.* Boyd, Litt. Sel. Cases, 8 326
Chicago, Burlington & Quincy Railroad Co. *v.* Iowa, 94 U. S. 155 686, 687, 691
Chicago, Burlington & Quincy Railroad Co. *v.* McGinnis, 79 Illinois, 269 164
Chicago Life Insurance Co. *v.* Needles, 113 U. S. 574 352
Chicago, Milwaukee &c. Railroad *v.* Ackley, 94 U. S. 179 688
Chicago & Western Indiana Railroad *v.* Ayres, 106 Illinois, 518 168
Chorpenning *v.* United States, 94 U. S. 397 654
Chouteau *v.* Gibson, 111 U. S. 200 29
Chy Lung *v.* Freeman, 92 U. S. 275 492
Citizens' Bank *v.* Bank of Liquidation, 98 U. S. 140 29
City of Aurora *v.* Gillett, 56 Illinois, 132 166
City of Chicago *v.* Rumsey, 87 Illinois, 348 164
City of Chicago *v.* Union Building Association, 102 Illinois, 379 168
City of Jacksonville *v.* Lambert, 62 Illinois, 519 166
Clark *v.* Keith, 106 U. S. 464 418
Clement *v.* Northumberland Coal Co., 87 Penn. St. 291 332
Cleveland *v.* Chandler, 3 Stew. (Ala.) 489 389
Clifton *v.* United States, 4 How. 242 231, 234
Clinton *v.* Englebrecht, 13 Wall. 434 204
Coffey *v.* United States, 116 U. S. 427 230, 231, 234, 247
Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307 283
Columbus Insurance Co. *v.* Peoria Bridge Co., 5 McLean, 70 271
Confederate Note Case, 19 Wall. 548 33
Conn *v.* Penn., 1 Peters C. C. 496 324

PAGE

Continental Insurance Co. *v.* Rhoads, 119 U. S. 237 644
Cook *v.* Lillo, 103 U. S. 792 33
Cooley *v.* Port Wardens, 12 How. 299 481, 485, 508
Cooper *v.* Roberts, 18 How. 173 637
Corser *v.* Cartwright, L. R. 7 H. L. 731 393, 394
County of Mobile *v.* Kimball, 102 U. S. 691 485
Cousin *v.* Blanc, 19 How. 202 27
Crane *v.* Meginnis, 1 G. and J. 463; *S. C.* 19 Am. Dec. 237 207
Crescent City Co. *v.* Butchers' Union Co., 120 U. S. 141 27
Crommelin *v.* Minter, 9 Alabama, 594 639
Cronise *v.* Cronise, 54 Penn. St. 255 206
Crossley *v.* New Orleans, 108 U. S. 105 27
Crowell *v.* Randall, 10 Pet. 368 29
Dale Tile Manufacturing Co. *v.* Hyatt, 125 U. S. 46 58
Dartmouth College Case, 4 Wheat. 629 210
Davenport Bank *v.* Davenport Board of Equalization, 123 U. S. 83 67
Davidson *v.* New Orleans, 96 U. S. 97 355, 356
Day *v.* Green, 4 Cush. 433 32
Day *v.* Highland Street Railway Co., 135 Mass. 113 581
Dean *v.* Mason, 20 How. 198 144
Delmas *v.* Insurance Co., 14 Wall. 661 27, 34
Detroit Railway *v.* Guthard, 114 U. S. 133 30, 44
Ditson *v.* Ditson, 4 R. I. 87 212
Dixon *v.* Ramsay, 3 Cranch, 319 387
Dobson *v.* Hartford Carpet Co., 114 U. S. 439 151
Doe *dem.* Perry *v.* Newton, 5 Ad. & El. 514 413
Doll *v.* Meador, 16 Cal. 295 639
Donnell *v.* Columbian Insurance Co., 2 Sumner, 366 150
Donoho *v.* Fish, 58 Texas 164
Dow *v.* Memphis & Little Rock Railroad Co., 124 U. S. 652 377, 379, 612, 673
Drummond *v.* Ex'rs of Prestman, 12 Wheat. 515 446
Dubuque & Pacific Railroad *v.* Litchfield, 23 How. 66 271
Ducat *v.* Chicago, 10 Wall. 410 186, 188
Dugger *v.* Bocock, 104 U. S. 596 34
Durant *v.* Essex Co., 7 Wall. 107 702

PAGE

Easton *v.* Salisbury, 21 How. 425 625, 628, 635
Ehrhardt *v.* Hogaboom, 115 U. S. 67 638
Elgin *v.* Eaton, 83 Illinois, 535 167
Elizabeth *v.* Pavement Co., 97 U. S. 126 144, 147, 151
Ellicott *v.* Pearl, 10 Pet, 412 325, 326
Elliott *v.* Piersol, 1 Pet. 328 627
Elliott *v.* Swartwout, 10 Pet. 137 75
Escanaba Co. *v.* Chicago, 107 U. S. 678 6, 9, 14, 522
Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 271
Field *v.* Seabury, 19 How. 323 638
Fisher *v.* Cockerall, 5 Pet. 248 44
Fisk, *Ex parte*, 113 U. S. 713 583
Fletcher *v.* Holmes, 32 Indiana, 497 387
Floyd Acceptances (The), 7 Wall. 666 307
Fosdick *v.* Schall, 99 U. S. 235 612, 673
Foster *v.* Kansas, 112 U. S. 201 510
Four Packages *v.* United States, 97 U. S. 404 229
Friedenstein *v.* United States, 125 U. S. 224 245
Frisbie *v.* Whitney, 9 Wall. 187 640, 642
Fritz *v.* Brandon, 78 Penn. St. 342 328
Furman *v.* Nichol, 8 Wall. 44 352
Garretson *v.* Clark, 111 U. S. 120 149
Gay *v.* Minot, 3 Cush. 352 389
Gibbons *v.* Ogden, 9 Wheat. 1 488, 512, 519
Gildart *v.* Gladstone, 12 East, 668 271
Gillam *v.* Madison County Railroad, 49 Illinois, 484 166
Gillman *v.* Illinois & Mississippi Telegraph Co., 91 U. S. 603 378
Gilman *v.* Philadelphia, 3 Wall. 713 8, 15, 512, 522
Gleason *v.* Florida, 9 Wall. 779 59
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196 508
Gonzales *v.* Ross, 120 U. S. 605 422
Gordon *v.* Butler, 105 U. S. 553 256
Gordon *v.* United States, 7 Wall. 188 654
Grand Gulf Railroad *v.* Marshall, 12 How. 165 27, 29
Griffith *v.* Williams, 1 Crompton & Jervis, 47 413, 414
Gross *v.* United States Mortgage Co., 108 U. S. 481 44
Hagar *v.* Reclamation District, 111 U. S. 701 355, 356

PAGE

Hall *v.* De Cuir, 95 U. S. 485 486
Hall *v.* Russell, 101 U. S. 503 215
Hall *v.* Wisconsin, 103 U. S. 5 344
Hamilton *v.* City of Boston, 14 Allen, 475 580
Hamilton *v.* Menor, 2 S. & R. 70 325
Hamilton *v.* Vicksburg &c. Railroad Co., 119 U. S. 280 9, 10, 11, 522
Hanley *v.* Gandy, 28 Texas, 211 414
Hanrick *v.* Barton, 16 Wall. 166 422
Hartell *v.* Tilghman, 99 U. S. 547 52, 53
Hartnett *v.* Wendell, 60 N. Y. 346 389
Hatch *v.* Willamette Iron Bridge Co., 7 Sawyer, 127 6
Hayes *v.* Missouri, 120 U. S. 68 190
Hays *v.* Vickery, 41 Indiana, 583 389
Henderson *v.* Mayor of New York, 92 U. S. 259 482, 492
Hill *v.* Tucker, 13 How. 458 387
Hilton *v.* Dickinson, 108 U. S. 165 178
Home Insurance Co. *v.* City Council of Augusta, 93 U. S. 116 31
Home Insurance Co. *v.* New York, 119 U. S. 129 694
Hoofnagle *v.* Anderson, 7 Wheat. 212 636
Hoppet, (The,) 7 Cranch, 388 236
Hughes *v.* United States, 4 Wall. 232 281
Hunnicut *v.* Peyton, 102 U. S. 333 325
Hunt *v.* Rousmanier, 8 Wheat. 174 342
Hunter *v.* Bryson, 5 Gill. & Johns. 483; *S. C.* 25 Am. Dec. 313 392
Huse *v.* Glover, 119 U. S. 543 9, 11, 522
Illinois Central Railroad *v.* Illinois, 108 U. S. 541 688
Illinois Central Railroad *v.* Turrell, 110 U. S. 301 160, 161
Jacks *v.* Helena, 115 U. S. 288 44
Jeffries *v.* Mutual Life Insurance Co., 110 U. S. 305 344, 345
Jefferson Branch Bank *v.* Skelly, 1 Black, 436 36
Jennings *v.* Broughton, 5 De Gex, M. & G. 126 259
Jones *v.* Andover, 10 Allen, 18 577, 580
Jones *v.* Montes, 15 Texas, 351 422
Jordan *v.* Dobson, 4 Fisher Pat. Cas. 232 143
Kansas Pacific Railway Co. *v.* Dunmeyer, 113 U. S. 629 625, 635

PAGE

Keating *v.* Vaughan, 61 Texas, 518 87, 88
Kelly *v.* Pittsburgh, 104 U. S. 78 355
Kennebec Railroad *v.* Portland Railroad, 14 Wall. 23 37, 46
Kennedy *v.* Lubold, 88 Penn. St. 246 322
Ketchum *v.* St. Louis, 101 U. S. 306 122, 124, 125
Kinsman *v.* Parkhurst, 18 How. 289 54
Kirtland *v.* Hotchkiss, 100 U. S. 491 355
Kittredge *v.* Folsom, 8 N. H. 98 389
Klinger *v.* Missouri, 13 Wall. 257 29
Knox *v.* Exchange Bank, 12 Wall. 379 30
Kountze *v.* Omaha Hotel Co., 107 U. S. 378 378
Kramer *v.* Goodlander, 98 Penn. St. 366 323
Kreiger *v.* Shelby County Railroad, 125 U. S. 43 54
Krippendorf *v.* Hyde, 110 U. S. 276 646
Lafayette Insurance Co. *v.* French, 18 How. 404 186
Leavenworth, Lawrence &c. Railroad *v.* United States, 92 U. S. 733 271, 625, 630, 632, 635
Leffingwell *v.* Warren, 2 Black, 599 583
Leighton *v.* Brown, 98 Mass. 515 440
License Cases, 5 How. 504 476, 479, 489, 501, 507, 510
Lincoln *v.* Iron Co., 103 U. S. 412 232
Littlefield *v.* Perry, 21 Wall. 205 144, 160
Livingston *v.* Woodworth, 15 How. 546 144
Loan Association *v.* Topeka, 20 Wall. 655 205
Locke *v.* United States, 7 Cranch, 339 231
Louisville & Nashville Railroad *v.* Palmer, 109 U. S. 244 37
Luther *v.* Borden, 7 How. 1 583
McAllister *v.* McAllister, 7 B. Mon. 269 413
McCausland *v.* Fleming, 63 Penn. St. 36 324
McCulloch *v.* Maryland, 4 Wheat. 316 355
McDearmon *v.* Maxfield, 38 Arkansas, 631 389
McDonald *v.* Trafton, 15 Maine, 225 258
M'Elrath *v.* United States, 102 U. S. 426 181

PAGE

McManus *v.* O'Sullivan, 91 U. S. 578 44
McMillen *v.* Anderson, 95 U. S. 37 356
Maguire *v.* Maguire, 7 Dana, 181 212
Mahn *v.* Harwood, 112 U. S. 354 464
Malone *v.* Sallada, 48 Penn. St. 419 329
Manufacturing Co. *v.* Cowing, 105 U. S. 253 149
Marsh *v.* Seymour, 97 U. S. 348 149
Martin *v.* Peck, 2 Yerger, 298 389
Mason *v.* Crosby, 3 Woodb. & Min. 258 150
Mason *v.* Graham, 23 Wall. 261 144
Matthews *v.* Ironclad M'f'g Co., 123 U. S. 347 464
Maxwell, *Ex parte*, 37 Alabama, 362; *S. C.* 79 Am. Dec. 62 389
Maxwell Land Grant Case, 121 U. S. 325 300
Mechanics' & Traders' Bank *v.* Debolt, 18 How. 380 36
Medsker *v.* Bonebrake, 108 U. S. 66 150
Medway *v.* United States, 6 C. Cl. 421 413
Memphis & Charleston Railroad *v.* Gaines, 97 U. S. 697 36
Memphis Gas Co. *v.* Shelby County, 109 U. S. 398 37
Memphis & Little Rock Railroad *v.* Railroad Commissioners, 112 U. S. 609 689
Mercantile Bank *v.* New York, 121 U. S. 138 67, 68
Meriwether *v.* Garrett, 102 U. S. 472 31, 355
Mevs *v.* Conover, 11 Pat. Off. Gaz. 1111 144, 147
Miles *v.* Loomis, 75 N. Y. 288 413
Miller *v.* Brass Co., 104 U. S. 350 464
Miller *v.* Moses, 56 Maine, 128 445
Miltenberger *v.* Logansport Railroad, 106 U. S. 286 612, 673
Mima Queen *v.* Hepburn, 7 Cranch, 290 321
Minnesota Co. *v.* St. Paul Co., 2 Wall. 609 646
Missouri *v.* Lewis, 101 U. S. 22 190
Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512 190
Missouri River Packet Co. *v.* Hannibal & St. Joseph Railroad, 1 McCrary, 281 271
Mitchell *v.* Tilghman, 19 Wall. 287 138, 149
Mobile County *v.* Kimball, 102 U. S. 691 355, 485, 501, 508, 522
Moffat *v.* United States, 112 U. S. 24 282

PAGE

Monroe *v.* James, 4 Munford, 194 389
Mooney *v.* Miller, 102 Mass. 217 256
Moore *v.* Robbins, 96 U. S. 530 282
Moore *v.* United States, 91 U. S. 270 414
Morgan *v.* Gay, 19 Wall. 81 644
Moses *v.* Pittsburg, Fort Wayne & Chicago R. R. Co., 21 Ill. 516 164
Mowry *v.* Whitney, 14 Wall. 620 144, 151, 160, 281
Mugler *v.* Kansas, 123 U. S. 623 476, 502, 510, 516, 517
Munn *v.* Illinois, 94 U. S. 113 686
Murdock *v.* Memphis, 20 Wall. 590 44, 53, 273
Murphy *v.* Chicago, 29 Ill. 279; *S. C.* 81 Am. Dec. 307 164
Murray *v.* Charleston, 96 U. S. 432 31, 352
National Bank *v.* Commonwealth, 9 Wall. 353 551
Nevins *v.* City of Peoria, 41 Ill. 502 166
Newcomb *v.* Williams, 9 Met. 525 391
Newhall *v.* Sanger, 92 U. S. 112 625, 630, 631, 635
New Jersey *v.* Yard, 95 U. S. 104 36
New Orleans *v.* United States, 10 Pet. 662 625
New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650 517
New Orleans Water Works Co. *v.* Louisiana Sugar Refinery Co., 35 La. Ann. 1111 27
New Orleans Water Works *v.* Louisiana Sugar Refining Co., 125 U. S. 18 46
New Orleans Water Works *v.* Rivers, 115 U. S. 674 32
New York *v.* Ransom, 23 How. 487 144
Nickle *v.* Stewart, 111 U. S. 776 7
Noel *v.* Ewing, 9 Ind. 37 213
Northumberland Coal Co. *v.* Clement, 95 Penn. St. 126 330, 334
Ohio Life Ins. & Trust Co. *v.* Debolt, 16 How. 416 36
Osborne *v.* Nicholson, 13 Wall. 654 35
Pacific Railroad *v.* Missouri Pacific Railway, 111 U. S. 505 646
Packet Co. *v.* Sickles, 19 Wall. 611 144
Paddock *v.* Commercial Insurance Co., 104 Mass. 521 150
Palmer *v.* Marston, 14 Wall. 10 35, 46
Palmyra, (The,) 12 Wheat. 1 231, 247
Parker *v.* Simonds, 8 Met. 205 440

PAGE

Parker & Whipple Co. *v.* Yale Clock Co., 123 U. S. 87 223, 464
Parks *v.* Booth, 102 U. S. 96 160
Parmelee *v.* Lawrence, 11 Wall. 36 60
Pasley *v.* Freeman, 3 T. R. 51 252
Passaic Bridges, 3 Wall. 782, App. 8, 14, 15, 16
Passenger Cases, 7 How. 273 512
Patterson *v.* Kentucky, 97 U. S. 501 513
Paul *v.* Virginia, 8 Wall. 168 184, 186, 187
Peik *v.* Chicago & Northwestern Railway, 94 U. S. 164 688
Pekin *v.* Brereton, 67 Illinois, 477 167
Pekin *v.* Winkel, 77 Illinois, 56 167
Penn *v.* Butler, 4 Dall. 354 391
Pennsylvania Canal Co. *v.* Kunkel, 33 Leg. Int. 339 335
Pennsylvania *v.* Wheeling Bridge Co., 13 How. 519 584
Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1 185
People *v.* Commissioners, 4 Wall. 244 68
People *v.* Keyser, 28 N. Y. 226; *S. C.* 84 Am. Dec. 338 391
Permoli *v.* First Municipality, 3 How. 589 9
Philadelphia Fire Association *v.* New York, 119 U. S. 110 44, 54, 188
Philadelphia, Wilmington &c. Railroad *v.* Steam Towboat Co., 23 How. 209 581, 585
Philp *v.* Nock, 17 Wall. 460 144
Piatt *v.* McCullough, 1 McLean, 69 390
Pickard *v.* Pullman Southern Car Co., 117 U. S. 34 508
Pierce *v.* New Hampshire, 5 How. 504 523
Planters' Bank *v.* Union Bank, 16 Wall. 483 33
Pliny Jewell *v.* City of Boston, 101 Mass. 575 69
Polk's Lessee *v.* Wendall, 9 Cranch, 87 625, 629, 634
Pollard's Lessee *v.* Hagan, 3 How. 212 8, 9, 10
Post *v.* Supervisors, 105 U. S. 667 583
Potts *v.* United States, 125 U. S. 173 177, 179
Pound *v.* Turck, 95 U. S. 459 8, 10
Priest *v.* Watkins, 2 Hill (N. Y.), 225; *S. C.* 38 Am. Dec. 584 390
Providence Bank *v.* Billings, 4 Pet. 514 189, 355
Providence Institution for Sav-

PAGE
ings v. City of Boston, 101 Mass. 575 69
Provident Institution for Savings v. Jersey City, 113 U. S. 506 352
Pruner v. Brisbin, 98 Penn. St. 202 328, 335
Pumpelly v. Green Bay Co., 13 Wall. 166 164
Putnam v. Day, 22 Wall. 60 7
Railroad Co. v. Ellerman, 105 U. S. 166 32
Railroad Co. v. Husen, 95 U. S. 465 491, 492, 508, 513
Railroad Co. v. Peniston, 18 Wall. 5 550
Railroad Co. v. Richmond, 19 Wall. 584 484
Railroad Co. v. Rock, 4 Wall. 177 30
Railroad Companies v. Schutte, 103 U. S. 118 118
Railway Co. v. Root, 105 U. S. 189 160
Rand v. Hubbard, 4 Met. 252 389
Read v. Boston & Albany Railroad Co., 140 Mass. 199 581
Reichardt v. Felps, 6 Wall. 160 625, 628, 635
Reynolds v. Iron Silver Mining Co., 116 U. S. 687 625, 629, 636
Rice v. Railroad Co., 1 Black, 358 271
Richards v. Todd, 127 Mass. 167 150
Rigney v. City of Chicago, 102 Illinois, 64 165, 167, 168
Robbins v. Shelby Taxing District, 120 U. S. 489 496, 497, 508
Roberts v. Chicago, 26 Illinois, 249 164
Robertson v. Cease, 97 U. S. 646 644
Root v. Railway Co., 105 U. S. 189 144, 147, 148, 149
Rubber Co. v. Goodyear, 9 Wall. 788 144
Ruggles v. Illinois, 108 U. S. 526 688
Ryan v. Bindley, 1 Wall. 66 583
St. Clair v. Cox, 106 U. S. 350 186
St. Tammany Waterworks v. New Orleans Waterworks, 120 U. S. 64 32
Sage v. Memphis & Little Rock Railroad Co., 5 McCrary, 643; 18 Fed. Rep. 571 377
Sage v. Memphis & Little Rock Railroad Co., 125 U. S. 361 612, 673
Sands v. Manistee River Imp. Co., 123 U. S. 288 9, 12
Schoolher v. Hutchins, 66 Texas, 324 88
Seymour v. McCormick, 16 How. 480 144
PAGE
Shawneetown v. Mason, 82 Illinois, 337 167
Shelton v. Van Kleek, 106 U. S. 532 7
Sherlock v. Alling, 93 U. S. 99 513
Sherman v. Buick, 93 U. S. 209 625, 636
Silsby v. Foote, 20 How. 378 160
Simmons v. Wagner, 101 U. S. 260 634
Smelting Co. v. Kemp, 104 U. S. 636 625
Smelting Co. Cases, 106 U. S. 447 636
Smith v. Alabama, 124 U. S. 465 523
Smith v. Corporation of Washington, 20 How. 135 164
Smith v. Dillingham, 33 Maine, 384 442
Smith v. United States, 94 U. S. 97 692
Smythe v. Fiske, 23 Wall. 374 76
Snyder v. United States, 112 U. S. 216 231, 234
Soon Hing v. Crowley, 113 U. S. 703 190
Sparhawk v. Sparhawk, 116 Mass. 315 209
Spencer v. Lapsley, 20 How. 264 638
Spencer v. Merchant, 100 N. Y. 587 352
S. S. Osborne (The), 105 U. S. 447 178
Stack v. St Louis, 85 Illinois, 377 167
Stagg v. Green, 47 Missouri, 500 389
Stanton v. Metropolitan Railway Co., 14 Allen, 485 577, 580
State v. Fry, 4 Missouri, 120 209
State Bank v. Knoop, 16 How. 369 36
State Freight Tax Case, 15 Wall. 223 480, 483, 508
Steel v. Smelting Co., 106 U. S. 447 625
Steines v. Franklin County, 14 Wall. 15 29
Stetson v. Chicago & Evanston Railroad Co., 75 Illinois, 74 164
Stevens v. Tuite, 104 Mass. 328 441
Stevenson v. Williams, 19 Wall. 572 34, 46
Stockton v. Baltimore & New York Railroad Co., 32 Fed. Rep. 9 186
Stockton v. Bishop, 4 How. 155 232
Stoddard v. Chambers, 2 How. 284 625, 627, 634
Stone v. Fairburg, Pontiac & Northwestern Railroad Co., 68 Illinois, 394 164
Stone v. Farmers' Loan Trust Co., 116 U. S. 307 688

PAGE

Stone *v.* Illinois Central Railroad, 116 U. S. 347 689
Stone *v.* Mississippi, 101 U. S. 814 517
Stone *v.* New Orleans & Northeastern Railroad, 116 U. S. 352 689
Stone *v.* Pease, 8 Conn. 541 207
Stone *v.* Wisconsin, 94 U. S. 181 688
Stoval *v.* Banks, 10 Wall. 583 446
Strother *v.* Lucas, 6 Pet. 763 414
Stuart *v.* Palmer, 74 N. Y. 183 351, 357, 358, 360
Suffolk Co. *v.* Hayden, 3 Wall. 315 144
Sweigart *v.* Richards, 8 Penn. St. 436 335
Swift *v.* Barnes, 16 Pick. 194 439, 440
Swift *v.* Tyson, 16 Pet. 1 583
Tarver *v.* Keach, 15 Wall. 67 34
Teal *v.* Walker, 111 U. S. 242 378
Telegraph Co. *v.* Texas, 105 U. S. 460 548
Thomas *v.* Spofford, 46 Maine, 408 442, 445
Thompson *v.* Maxwell, 95 U. S. 391 7
Thomson *v.* Pacific Railroad Co., 9 Wall. 579 550
Thomson *v.* Wooster, 114 U. S. 104 147, 149
Thorington *v.* Smith, 8 Wall. 1 33
Tilghman *v.* Mitchell, 2 Fisher Pat. Cas. 518 138
Tilghman *v.* Mitchell, 9 Blatchford, 1; *S. C.* 4 Fisher Pat. Cas. 599 138
Tilghman *v.* Proctor, 102 U. S. 707 138
Tilghman *v.* Werk, 2 Fisher Pat. Cas. 229 138
Toledo, Wabash &c. Railroad *v.* Morrison, 71 Illinois, 616 166
Tompkins *v.* Little Rock & Fort Smith Railway, 18 Fed. Rep. 344; 21 Fed. Rep. 370 117
Tornado (The), 109 U. S. 110 178
Transportation Co. *v.* Chicago, 99 U. S. 635 164
Transportation Co. *v.* Parkersburg, 107 U. S. 691 9
Tremolo Patent, 23 Wall. 518 144
Trenouth *v.* San Francisco, 100 U. S. 251 641
Tuck *v.* Downing, 76 Illinois, 71 252, 259
Tuck *v.* Moses, 58 Maine, 461 441, 445
Turner *v.* Maryland, 107 U. S. 38 488
Union Trust Co. *v.* Illinois Midland Co., 117 U. S. 434 375, 612, 673
Union Trust Co. *v.* Morrison, 125 U. S. 591 673

PAGE

Union Trust Co. *v.* Souther, 107 U. S. 591 612, 673
United States *v.* D'Aguirre, 1 Wall. 311 276
United States *v.* Flint, 4 Sawyer, 42 304
United States *v.* Hess, 124 U. S. 483 235
United States *v.* Hughes, 11 How. 552 280
United States *v.* Minor, 114 U. S. 233 282, 284
United States *v.* New Orleans, 98 U. S. 381 31, 355
United States *v.* Ninety Demijohns of Rum, 4 Woods. 637 234, 239
United States *v.* Reid, 12 How. 361 582
United States *v.* Stone, 2 Wall. 525 281
United States *v.* Symonds, 120 U. S. 46 657
United States *v.* Three Parcels of Embroidery, 3 Ware. 75 232, 236
United States *v.* Throckmorton, 98 U. S. 81 281, 304
University *v.* People, 99 U. S. 309 36
Vance *v.* Burbank, 101 U. S. 514 216
Van Wyck *v.* McIntosh, 14 N. Y. 439 413, 414
Veazie Bank *v.* Fenno, 8 Wall. 533 355
Vicksburg &c. Railroad *v.* Dennis, 116 U. S. 665 37
Vigel *v.* Hopp, 104 U. S. 441 249
Vogel's Succession, 20 La. Ann. 81 390
Wabash &c. Railway *v.* Illinois, 118 U. S. 557 494, 508, 689
Wade *v.* Kalbfleisch, 58 N. Y. 282 212
Walling *v.* Michigan, 116 U. S. 446 495, 508, 517
Washington Ice Co. *v.* Webster, 62 Maine, 341 428
Washington Ice Co. *v.* Webster, 68 Maine, 449 430
Watrous *v.* McGrew, 16 Texas, 106 422
Welton *v.* Missouri, 91 U. S. 275 508
West of England Bank *v.* Murch, 23 Ch. D. 138 394
Wheaton *v.* Peters, 8 Pet. 591 584
Wheeling Bridge Case, 13 How. 518 15, 16, 17
White *v.* Hart, 13 Wall. 646 35
Whiting *v.* Bank of the United States, 13 Pet. 6 7
Wilcox *v.* Hunt, 13 Pet. 378 583
Wilcox *v.* Jackson, *dem.* McConnell, 13 Pet. 498 625, 626, 634

	PAGE
Willamette Iron Bridge Co. *v.* Hatch, 9 Sawyer, 643; *S. C.* 19 Fed. Rep. 347	7
Willard *v.* Presbury, 14 Wall. 676	355
Williams *v.* Bruffy, 96 U. S. 176	31
Williams *v.* Conger, 49 Texas, 582	399
Willson *v.* Black Bird Creek Co., 2 Pet. 245	8, 521, 522
Wilmington & Weldon Railroad *v.* King, 91 U. S. 3	33
Wilson *v.* Sandford, 10 How. 99	52, 53
Winona & St. Peter Railroad *v.* Blake, 94 U. S. 180	688
Wollensak *v.* Reiker, 115 U. S. 96	222
Wright *v.* Roseberry, 121 U. S. 488	636
Yale Lock Manufacturing Co. *v.* James, 22 Blatchford, 294	457
Yeaton *v.* Lynn, 5 Pet. 224	393
Yick Wo *v.* Hopkins, 118 U. S. 356	190
Yosemite Valley Case, 15 Wall. 77	640

TABLE OF STATUTES

CITED IN OPINIONS.

(A.) Statutes of the United States.

PAGE

1787, July 13, 1 Stat. 52.....9, 11, 209, 214
1789, Sept. 24, 1 Stat. 86, c. 20.. 27, 45, 232, 582
1789, Sept. 29, 1 Stat. 93, c. 21.. 280
1799, March 2, 1 Stat. 627, c. 22, 236, 237
1836, April 20, 5 Stat. 10..... 204
1836, July 4, 5 Stat. 124, c. 357.. 52
1842, Aug. 23, 5 Stat. 518, c. 188.. 232
1848, Aug. 14, 9 Stat. 323, c. 177.. 203, 214
1850, Sept. 27, 9 Stat. 496, c. 76.. 214
1850, Sept. 28, 9 Stat. 521..... 639
1851, March 3, 9 Stat. 631, c. 41.. 302
1854, March 28, 10 Stat. 270..... 529
1855, Feb. 28, 10 Stat. 616, c. 127, 179
1857, Jan. 16, 11 Stat. 134, c. 12, 179
1859, Feb. 14, 11 Stat. 383..4, 5, 6, 9
1862, Jan. 26, 12 Stat. 489..... 631
1862, June 2, 12 Stat. 410, c. 90.. 291
1862, July 16, 12 Stat. 583, c. 183, 648, 650
1863, March 3, 12 Stat. 808, c. 116, 640
1864, June 1, 13 Stat. 332, c. 194, 291
1864, July 2, 13 Stat. 356 631
1866, June 15, 14 Stat. 66..... 484
1866, July 24, 14 Stat. 221, c. 230, 185, 546
1866, July 25, 14 Stat. 244...263, 264, 265, 266, 268, 484
1867, Feb. 5, 14 Stat. 386, c. 28, 27, 45
1867, March 2, 14 Stat. 561, c. 197.....72, 74
1870, Feb. 2, 16 Stat. 64.....4, 13
1870, July 14, 16 Stat. 264, c. 255, 72, 74, 75
1870, July 15, 16 Stat. 330, c. 295, 647, 649, 650
1871, Jan. 30, 16 Stat. 592.....72, 75
1872, June 1, 17 Stat. 197, c. 255, 244
1872, June 6, 17 Stat. 231 72
1874, June 22, 18 Stat. 196 13

PAGE

1874, June 22, 18 Stat. 189, c. 391, 233, 234, 235, 239, 241, 242, 243, 244, 245
1874, June 23, 18 Stat. 281 13
1875, March 3, 18 Stat. 470, c. 137, 6, 53, 620
1882, Aug. 7, 22 Stat. 734...651, 653
1883, March 3, 22 Stat. 473..... 647, 648, 650
1883, March 3, 22 Stat. 488, c. 121.....129, 132, 135, 337, 338, 527, 529
1884, May 4, 23 Stat. 17, c. 37... 305
1884, July 5, 23 Stat. 552..... 652, 653, 655
1887, March 3, 24 Stat. 556, c. 376..... 641

Revised Statutes.

§ 346..... 278
§ 629..... 52
§ 709.....27, 29, 31, 45
§ 711..... 52
§ 721..... 582
§ 953..... 244
§ 954..... 232
§ 999..... 59
§ 1448..... 177
§ 1449..... 174
§ 1450..... 174
§ 1451..... 174
§ 1452..... 174
§ 1453..... 174
§ 1454..... 174
§ 1556..... 647
§ 1588.....175, 176, 177
§ 1593..... 174
§ 1594.....174, 175, 179
§ 2499.....76, 135, 338
§ 2502..... 338
§ 2503..... 338
§ 2504..... 527
§ 2513..... 338
§ 2802..... 226
§ 2809..... 226

PAGE

Rev. Stat. (*cont.*)
§ 2839 ..... 241, 243
§ 2864 ..... 241, 243
§ 2872 225
§ 2874 225
§ 2875 529
§ 2876 529
§ 2971 529
§ 3066 225
§ 3082 226
§§ 4252–4289 484
§ 5219 ..... 61, 69
§ 5263 ..... 546, 547
§§ 5263–5269 546

(B.) Statutes of the States and Territories.

Arkansas.
1867, March 18 127
1868, July 21 ..... 110, 111, 113, 115, 117, 121
1868, July 23 110
1869, April 10 ..... 111, 112, 113, 116, 117
1874, May 29 116
1887, April 4 690
Gantt's Dig. § 5048 119
§§ 5050–5054 119
§ 5066 119
§ 5133 119
§ 5137 119
§ 5139 119
§ 5153 119
§ 5173 119
§§ 5185–5188 119

Illinois.
1871, April 15, Laws 1871, p. 640 688

Indiana.
Rev. Stat. 1881, §§ 2222–2225, 2242, 2243 388
2 Gavin & Hord's Stat. 484–491, §§ 2, 4, 5, 19 388

Iowa.
1851, c. 43 687
1874, c. 68 687
1886, April 5 474
Code, § 1523 474
§ 1524 475
§ 1553 474
§ 1555 475

Kentucky.
1851, March 15 ..... 44, 45
1869, Feb. 3 ..... 44, 45, 46
1870, March 11 ..... 44, 45, 46
1873, Feb. 26 ..... 44, 45, 46
Code of Civil Procedure.
§ 765 44
Gen. Stat. c. 28, art. 2, § 10 .. 44
c. 16, art. 1, § 1 ... 44

Maine.
Rev. Stat. 1857 (1871), c. 96, § 11 ..... 437, 438

Massachusetts.
1877, May 15, c. 232 .... 577, 578
Gen. Stat. c. 84, § 2 ..... 577, 585
Pub. Stat. c. 11 63
c. 13, §§ 8, 9, 10 .. 61, 62
c. 13, § 54 554

Missouri.
1881, March 19 .... 339, 340, 342
1885, March 28 ..... 341, 342

New York.
1869, c. 217 .. 351, 357, 358, 359, 360, 361
1870, c. 619 ..... 358, 359
1881, Aug. 12, c. 689 .... 351, 352, 353, 357, 359, 360, 361

Oregon.
1852, Dec. 22 203
1878, Oct. 18 2

Texas.
1879, March 24 ..... 81, 82, 83, 84, 85, 88

Virginia.
1866, Feb. 187

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1887.

WILLAMETTE IRON BRIDGE COMPANY *v.* HATCH.

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

No. 80. Argued November 28, 29, 1887. — Decided March 19, 1888.

On a pure bill of review nothing will avail for a reversal of the decree but errors of law apparent on the record.

There must be a direct statute of the United States in order to bring within the scope of its laws obstructions and nuisances in navigable streams within a state; such obstructions and nuisances being offences against the laws of the States within which the navigable waters lie, but no offence against the United States in the absence of a statute.

The provision in the "act for the admission of Oregon into the Union," 11 Stat. 383, c. 33, § 2, that "all the navigable waters of said State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor," does not refer to physical obstructions of those waters, but to political regulations which would hamper the freedom of commerce.

Until Congress acts respecting navigable streams entirely within a state, the State has plenary power; but Congress is not concluded by anything that the State or individuals by its authority or acquiescence may have done, from assuming entire control, and abating any erections that may have been made, and preventing any other from being made except in conformity with such regulations as it may impose.

The appropriation by Congress of money to be expended in improving the navigation of the Willamette River was no assumption of police power over it.

Congress by conferring the privilege of a port of entry upon a municipality, does not come in conflict with the police power of a State exercised in bridging its own navigable rivers below such port. *Passaic Bridge Cases*, 3 Wall. 782, 793, App. applied.

State of Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, distinguished.

BILL OF REVIEW. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. John Mullan for appellant. *Mr. Rufus Mallory* filed a brief for same.

Mr. J. N. Dolph for appellees.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This is a bill of review filed by the appellants, a corporation of Oregon, to obtain the reversal of a decree made by the court below against them in favor of Hatch and Lownsdale, the appellees. The case is shortly this: On the 18th of October, 1878, the legislature of Oregon passed an act entitled "An act to authorize the construction of a bridge on the Willamette River between the city of Portland and the city of East Portland, in Multnomah County, State of Oregon;" by which it was enacted as follows, to wit: "*Be it enacted*, &c., That it shall be lawful for the Portland Bridge Company, a corporation duly incorporated under and in conformity with the laws of the State of Oregon, or its assigns, and that said corporation or its assigns be and are hereby authorized and empowered to construct, build, maintain, use, or cause to be constructed, built and maintained or used, a bridge across the Willamette River between Portland and East Portland in Multnomah County, State of Oregon, for any and all purposes of travel or commerce, said bridge to be erected at any time within six years after the passage and approval of this act, at such point or location on the banks of said river, on and along any of the streets of either of said cities of Portland and East Portland as may be selected or determined on by said corporation or its assigns, on or above Morrison Street of said city of Portland and M

Street of said city of East Portland, the same to be deemed a lawful structure: Provided, that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear in width of a passage way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge; and provided, that the approaches on the Portland side to said bridge shall conform to the present grade of Front Street in said city of Portland."

In the month of July, 1880, the appellants, the Willamette Iron Bridge Company, claiming to be assignees of the Portland Bridge Company, and to act under and by authority of said law, began the construction of a bridge across the Willamette River from the foot of Morrison Street, in the city of Portland, and proceeded in the work so far as to erect piers on the bed of the river, with a draw pier in the channel on which a pivot draw was to be placed with a clear passage way on each side, when open, of 100 feet in width, or, as the appellants allege, 105 feet in width.

On the 3d of January, 1881, whilst the appellants were thus engaged in erecting the bridge, Hatch and Lownsdale filed a bill in the Circuit Court of the United States for an injunction to restrain the appellants from further proceeding with the work, and to compel them to abate and remove the structures already placed in the river. This bill described the complainants therein as citizens of the United States residing at Portland, in the State of Oregon, and the defendants as a corporation organized under the laws of that State, having its office and principal place of business at Portland, and alleged that the Willamette River is a known public river of the United States, situate within the State of Oregon, navigated by licensed and enrolled and registered sea-going vessels engaged in commerce with foreign nations and with other States, upon the ocean and by way of the Columbia River, also a known public and navigable river of the United States, from its confluence with the Columbia River to the docks and wharves of the port of Portland, and that, up to and beyond the wharves and ware-

houses of the complainants, Hatch and Lownsdale, it is within the ebb and flow of the ocean tides. That, by the act of Congress of February 14th, 1859, admitting the State of Oregon into the Union, it is declared "that all the navigable waters of said State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor." 11 Stat. 383. That Congress has established a port of entry at the city of Portland, on the Willamette River, and has required vessels which navigate it to be enrolled and licensed, etc., and has frequently directed the improvement of the navigation of the said river, and appropriated money for that purpose; and by an act approved February 2d, 1870, giving consent to the erection of another bridge across said river from Portland to East Portland, asserted the powers of the United States to regulate commerce upon said river and to prevent obstruction to the navigation of the same, and in said act declared: "But until the Secretary of War approves the plan and location of said bridge and notifies the said corporation, association, or company of the same, the bridge shall not be built or commenced." The complainants further stated that Lownsdale was the owner and Hatch the lessee of a certain wharf and warehouses in Portland, situated about 750 feet above the proposed bridge, heretofore accessible to and used by sea-going vessels and others; and that Hatch is the owner of a steam tow-boat, used for towing vessels up and down the river to and from the said wharves and warehouses and others in the city; that vessels of 2000 tons have been in the habit of navigating the river for a mile above the site of the proposed bridge; and that the said river ought to remain free and unobstructed. But they charge that the bridge and piers will be a serious obstruction to this commerce; that the passage ways will not be sufficient for sea-going vessels with their tugs; that the bridge is being constructed diagonally, and not at right angles, to the current of the river; that it will arrest and pile up the floating ice and timber in high stages of water in such a way as to obstruct the passage of vessels; and, in various other particulars stated in the bill, it is charged that the bridge will be a

serious obstruction to the navigation of the river. The complainants contended that the act of the legislature, authorizing the bridge, contravenes the laws of the United States declaring the river free, and was not passed with the consent of Congress, and was a wrongful assumption of power on the part of the State; and alleged that the pretended assignment by the Portland Bridge Company to the defendants (the Willamette Iron Bridge Company) was not in good faith, and was not authorized by the directors of the former; and stated various other matters of alleged irregularity and illegality on the part of the Portland Company and the defendants. They also stated that the bridge was not being constructed in conformity with the requirements of the state law; that by reason of its diagonal position across the river, the thread of the current formed an acute angle with the line of the bridge, and that the draws do not afford more than 87 feet of a passage way for the passage of vessels; and that vessels will be unable to pass through said bridge for at least four months of the busiest shipping season of the year.

The defendants in that case, the Willamette Iron Bridge Company, filed an answer in which they admitted that they were building the bridge, and claimed to do so as assignees in good faith of the Portland Bridge Company, under and by virtue of the act of the legislature before mentioned, but denied the allegations of the bill with regard to the injurious effects of the bridge upon the navigation of the river, and averred that they were complying in every respect with the state law.

The cause being put at issue, and proofs being taken on the 22d of October, 1881, a decree was made in favor of the complainants for a perpetual injunction against the building of the bridge, and for an abatement of the portion already built. The decision of the case was placed principally on the ground that the bridge would be, and that the piers were, an obstruction to the navigation of the river, contrary to the act of Congress passed in 1859, admitting Oregon into the Union, and declaring "that all the navigable waters of the said State shall be common highways, and forever free, as well to the inhabi-

tants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor;" and that, without the consent of Congress, a state law was not sufficient authority for the erection of such a structure; and, even if it was, the bridge did not conform to the requirements of the state law. See *Hatch* v. *Willamette Iron Bridge Co.*, 7 Sawyer, 127, 141. The defendants took an appeal which was not prosecuted; but after the decision of this court in the case of *Escanaba Co.* v. *Chicago*, 107 U. S. 678, they filed the present bill of review for the reversal of the decree.

The reasons assigned for reversal are, amongst others, that the court erred in holding and decreeing as follows, to wit:

1st. That the bridge, where and as being constructed, was a serious obstruction to the navigation of the Willamette River, contrary to the act of Congress of February 14th, 1859, admitting the State of Oregon into the Union, which declares that all the navigable waters of the State shall be common highways and forever free to all citizens of the United States.

2d. That the said court, under § 1 of the act of March 3d, 1875, giving it jurisdiction of a suit arising under an act of Congress, has authority to restrain parties from violating said act by obstructing the navigation of any of said waters at the suit of any one injured thereby.

3d. That the proposed bridge is and will be a nuisance and serious impediment to the navigation of said river.

4th. That the legislature of the State of Oregon has not the power to say absolutely that a bridge may be built with only a draw of one hundred feet.

5th. That the Willamette Iron Bridge Company, as the assignee of the Portland Bridge Company, was not authorized by the act of the legislative assembly of Oregon to construct the said bridge, because it would be a violation of the said act of Congress of February 14th, 1859, admitting the State of Oregon in the Union, and was and is, therefore, void.

6th. That the defendant should be perpetually enjoined from constructing or proceeding with the construction of said bridge; and

7th. That the defendant should be required to abate and remove out of said river all piers, foundations, &c., which it has placed or constructed therein.

This bill was demurred to, and the court affirmed the decree in the original suit and dismissed the bill of review. *Willamette Iron Bridge Co.* v. *Hatch*, 9 Sawyer, 643; *S. C.* 19 Fed. Rep. 347. The present appeal is taken from this decree.

On a pure bill of review, like the one in this case, nothing will avail for a reversal of the decree but errors of law apparent on the record. *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95 U. S. 99; *Thompson* v. *Maxwell*, 95 U. S. 391, 397; *Beard* v. *Burts*, 95 U. S. 434; *Shelton* v. *Van Kleeck*, 106 U. S. 532; *Nickle* v. *Stewart*, 111 U. S. 776. Does any such error appear in the present case? The court below has decided in the negative. We are called upon to determine whether that decision was correct. It must be assumed that the questions of fact, at issue between the parties, were decided correctly by the court upon its view of the law applicable to the case. But the important question is, was its view of the law correct? The parties in the cause, both plaintiffs and defendants, were citizens of the State of Oregon. The court therefore must necessarily have held, as we know from its opinion that it did hold, that the case was one arising under the constitution or laws of the United States.

The gravamen of the bill was, the obstruction of the navigation of the Willamette River by the defendants, by the erection of the bridge which they were engaged in building. The defendants pleaded the authority of the state legislature for the erection of the bridge. The court held that the work was not done in conformity with the requirements of the state law; but whether it were or not, it lacked the assent of Congress, which assent the court held was necessary in view of that provision in the act of Congress admitting Oregon as a State, which has been referred to. The court held that this provision of the act was tantamount to a declaration that the navigation of the Willamette River should not be obstructed or interfered with; and that any such obstruction or interference, without

the consent of Congress, whether by state sanction or not, was a violation of the act of Congress; and that the obstruction complained of was in violation of said act. And this is the principal and important question in this case, namely, whether the erection of a bridge over the Willamette River at Portland was a violation of said act of Congress. If it was not, if it could not be, if the act did not apply to obstructions of this kind, then the case did not arise under the constitution or laws of the United States, unless under some other law referred to in the bill.

The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States. Such obstructions and nuisances are offences against the laws of the States within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offences against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different States, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson* v. *Black Bird Creek Co.*, 2 Pet. 245; *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229; *Passaic Bridges*, 3 Wall. 782 App.; *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *Pound* v. *Turck*,

95 U. S. 459; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Company*, 113 U. S. 205; *Hamilton* v. *Vicksburg &c. Railroad Co.*, 119 U. S. 280; *Huse* v. *Glover*, 119 U. S. 543; *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288; *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 700. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a federal one. The failure of state functionaries to prosecute for breaches of the state law, does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. But, as we have stated, the court below held that the act of Congress of 1859 was a law which prohibited any obstructions or impediments to the navigation of the public rivers of Oregon, including that of the Willamette River. Was it such an act? Did it have such an effect?

The clause in question had its origin in the 4th article of the compact contained in the Ordinance of the Old Congress for the government of the Territory North West of the Ohio, adopted July 13th, 1787; in which it was amongst other things declared that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor." 1 Stat. 52 *n*. This court has held, that when any new State was admitted into the Union from the North West Territory, the Ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original States. On the admission of any such new State, it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. See the cases of *Pollard's Lessee* v. *Hagan*, *supra*; *Permoli* v. *First Municipality*, 3 How. 589; *Escanaba Co.* v. *Chicago*; *Cardwell* v. *American Bridge Co.*; *Huse* v. *Glover*; *qua supra*. In admitting some of the new States,

however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the State was carved out of the Territory North West of the Ohio, or not; and it has been supposed that in this new form of enactment, it might be regarded as a regulation of commerce, which Congress has the right to impose. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 230. Conceding this to be the correct view, the question then arises, what is its fair construction? What regulation of commerce does it effect? Does it prohibit physical obstructions and impediments to the navigation of the streams? Or does it prohibit only the imposition of duties for the use of the navigation, and any discrimination denying to citizens of other States the equal right to such use? This question has been before this court, and has been decided in favor of the latter construction.

It is obvious that if the clause in question does prohibit physical obstructions and impediments in navigable waters, the state legislature itself, in a State where the clause is in force, would not have the power to cause or authorize such obstructions to be made without the consent of Congress. But it is well settled that the legislatures of such States do have the same power to authorize the erection of bridges, dams, etc., in and upon the navigable waters wholly within their limits, as have the original States, in reference to which no such clause exists. It was so held in *Pound* v. *Turck*, 95 U. S. 459, in reference to a dam in the Chippewa River in Wisconsin; in *Cardwell* v. *American Bridge Company*, 113 U. S. 205, in reference to a bridge without a draw, erected on the American River in California, which prevented steamboats from going above it; and in *Hamilton* v. *Vicksburg &c. Railroad Co.*, 119 U. S. 280, relating to railroad bridges in Louisiana; in all which cases the clause in question was in force in the States where they arose, and in none of them was said clause held to restrain in any degree the full power of the State to make, or cause to be made, the erections referred to, which must have been more or less obstructions and impediments to the navigation of the streams on which they were placed. In *Cardwell* v. *American Bridge Co.*, the two alter-

nate constructions of the clause above suggested, were brought to the attention of the court, and, on consideration, it was held as follows: "Upon the mature and careful consideration which we have given in this case to the language of the clause in the act admitting California, we are of opinion that, if we treat the clause as divisible into two provisions, they must be construed together as having but one object, namely, to insure a highway equally open to all without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the clause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public." In *Hamilton* v. *Vicksburg &c. Railroad Co.* it was said: "Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure, its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation;" and in the same case the construction given to the clause in question in *Cardwell* v. *American Bridge Company* was reiterated, namely, that it was intended to prevent any discrimination against citizens of other States in the use of navigable streams, and any tax or toll for their use. In *Huse* v. *Glover*, 119 U. S. 543, where a portion of the Illinois River had been improved by the State of Illinois, by the erection of locks in the river, and a toll was charged for passing through the same, it was held that this was no encroachment upon the power of Congress to regulate commerce, and that whilst the ordinance of 1787 was no longer in force in Illinois, yet, if it were, the construction given to the clause in the Cardwell case was approved, and the following observation was made: "As thus construed the clause would prevent any exclusive use of the navigable waters of the State — a possible farming out of the privilege of navigating them to particular individuals, classes, or corporations, or by vessels of a particular char-

acter." It was also held that the exaction of tolls for passage through the locks as a compensation for the use of the artificial facilities constructed, was not an impost upon the navigation of the stream. The same views are held in the recent case of *Sands* v. *Manistee River Improvement Co.*, 123 U. S. 288.

It seems clear, therefore, that according to the construction given by this court to the clause in the act of Congress relied upon by the court below, it does not refer to physical obstructions, — but to political regulations which would hamper the freedom of commerce. It is to be remembered that in its original form, the clause embraced carrying places between the rivers, as well as the rivers themselves; and it cannot be supposed that those carrying places were intended to be always kept up as such. No doubt that at the present time some of them are covered by populous towns, or occupied in some other way incompatible with their original use; and such a diversion of their use, in the progress of society, cannot but have been contemplated. What the people of the old States wished to secure was, the free use of the streams and carrying places in the North West Territory, as fully as it might be enjoyed by the inhabitants of that territory themselves, without any impost or discriminating burden. The clause in question cannot be regarded as establishing the police power of the United States over the rivers of Oregon, or as giving to the federal courts the right to hear and determine, according to federal law, every complaint that may be made of an impediment in, or an encroachment upon, the navigation of those rivers. We do not doubt that Congress, if it saw fit, could thus assume the care of said streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in

conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State. With regard to this very river, the Willamette, three acts of Congress have been passed in relation to the construction of bridges thereon, to wit: one, approved February 2d, 1870, which gave consent to the corporation of the city of Portland to erect a bridge from Portland to the east bank of the river, not obstructing, impairing or injuriously modifying its navigation, and first submitting the plans to the Secretary of War; another, approved on the 22d of June, 1874, which authorized the county commissioners of Marion County, or said commissioners jointly with those of Polk County, to build a bridge across said river at Salem; a third act, approved June 23d, 1874, which authorized the Oregon and California Railroad Company, alone, or jointly with the Oregon Central Railroad Company, to build a railroad bridge across said river at the city of Portland, with a draw of not less than 100 feet in the clear on each side of the draw abutment, and so constructed as not to impede the navigation of the river, and allow the free passage of vessels through the bridge. These acts are special in their character, and do not involve the assumption by Congress of general police power over the river.

The argument of the appellees, that Congress must be deemed to have assumed police power over the Willamette River in consequence of having expended money in improving its navigation, and of having made Portland a port of entry, is not well founded. Such acts are not sufficient to establish the police power of the United States over the navigable streams to which they relate. Of course, any interference with the operations, constructions or improvements made by the general government, or any violation of a port law

enacted by Congress, would be an offence against the laws and authority of the United States; and an action or suit brought in consequence thereof would be one arising under the laws of the United States. But no such violation or interference is shown by the allegations of the bill in the original suit in this case, which simply states the fact that improvements have been made in the river by the government, without stating where, and that Portland had been created a port of entry. In the case of *Escanaba Co.* v. *Chicago*, it was said: "As to the appropriations made by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges." 107 U. S. 690. In the present case there is no allegation, if such an allegation would be material, that any improvements in the navigation of the Willamette River have been made by the government at any point above the site of the proposed bridge.

As to the making of Portland a port of entry, the observations of Mr. Justice Grier in *The Passaic Bridge Cases*, 3 Wall. 782, 793, App., are very apposite. Those cases were decided in September, 1857, by dismissing the bills which were filed for injunctions against the erection of a railroad bridge across the Passaic River at Newark, New Jersey, and a plank-road bridge across the same river below Newark. The decrees were affirmed here by an equally divided court in December Term, 1861. It being urged, amongst other things, that Newark was a port of entry, and that the erection of these bridges, though under the authority of the state legislature, was in conflict with the act of Congress establishing the port, Mr. Justice Grier said: "Congress by conferring the privilege of a port of entry upon a town or city does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means

by which its commerce is carried on, why does it not extend to its turnpikes, railroads, and canals, — to land as well as water? Assuming the right (which I neither affirm nor deny) of Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the courts cannot assume to themselves such a power. There is no act of Congress or rule of law which courts could apply to such a case." p. 793. These views were adhered to by the same judge in the subsequent case of *Gilman* v. *Philadelphia*. The bridge which was the subject of controversy in that case was within the limits of the port of Philadelphia, which, by the act of 1799, included the city of Philadelphia, and by that of 1834, was extended northerly to Gunner's Run. See 3 Wall. 713, 718. That case arose soon after *The Passaic Bridge Cases*, and, so far as interference with navigation was concerned, was identical in character with them; and Mr. Justice Grier, upon the same grounds taken and asserted by him in those cases, dismissed the bill. The decree was affirmed in this court in December Term, 1865, by a vote of seven justices to three, Justices Clifford, Wayne, and Davis dissenting. So that Justice Grier's views were finally affirmed by a decided majority of the court.

It is urged that in *The Wheeling Bridge Case*, 13 How. 518, this court decided the bridge there complained of to be a nuisance, and decreed its prostration, or such increased elevation as to permit the tall chimneys of the Pittsburg steamers to pass under it at high water. But in that case this court had original jurisdiction in consequence of a State being a party; and the complainant (the State of Pennsylvania) was entitled to invoke, and the court had power to apply, any law applicable to the case, whether state law, federal law, or international law. The bridge had been authorized by the legislature of Virginia, whose jurisdiction extended across the whole river Ohio. But Virginia, in consenting to the erection of Kentucky into a State, had entered into a compact with regard to the free navigation of the Ohio,[1] confirmed by the act of Con-

[1] See Mr. Stanton's argument, 3 How. 523; 1 Bioren's Laws, U. S. p. 675, art. *seventh*.

gress admitting Kentucky into the Union, which the court held to be violated by authorizing the bridge to be constructed in the manner it was; and the bridge, so constructed, injuriously affected a supra-riparian State (Pennsylvania) bordering on the river, contrary to international law. Mr. Justice Grier, in *The Passaic Bridge Cases*, disposes of *The Wheeling Bridge Case* as follows: "This legislation of Virginia being pleaded as a bar to further action of the court in the case, necessarily raised these questions: Could Virginia license or authorize a nuisance on a public river, flowing, which rose in Pennsylvania, and passed along the border of Virginia, and which, by compact between the States, was declared to be 'free and common to all the citizens of the United States'? If Virginia could authorize any obstruction at all to the channel navigation, she could stop it altogether, and divert the whole commerce of that great river from the State of Pennsylvania, and compel it to seek its outlet by the railroads and other public improvements of Virginia. If she had the sovereign right over this boundary river claimed by her, there would be no measure to her power. She would have the same right to stop its navigation altogether as to stop it ten days in a year. If the plea was admitted, Virginia could make Wheeling the head of navigation on the Ohio, and Kentucky might do the same at Louisville, having the same right over the whole river which Virginia can claim. This plea, therefore, presented not only a great question of international law, but whether rights secured to the people of the United States by compact made before the Constitution, were held at the mercy or caprice of every or any of the States to which the river was a boundary. The decision of the court denied this right. The plea being insufficient as a defence, of course the complainant was entitled to a decree prostrating the bridge, which had been erected *pendente lite*. But to mitigate the apparent hardship of such a decree, if executed unconditionally, the court, in the exercise of a merciful discretion, granted a stay of execution on condition that the bridge should be raised to a certain height, or have a draw put in it which would permit boats to pass at all stages of the navigation. From this mod-

ification of the decree no inference can be drawn that the courts of the United States claim authority to regulate bridges below ports of entry, and treat all state legislation in such cases as unconstitutional and void. It is evident, from this statement," continues Justice Grier, "that the Supreme Court, in denying the right of Virginia to exercise this absolute control over the Ohio River, and in deciding that, as a riparian proprietor, she was not entitled, either by the compact or by constitutional law, to obstruct the commerce of a supra-riparian State, had before them questions not involved in these cases," [the Passaic bridges,] "and which cannot affect their decision. The Passaic River, though navigable for a few miles within the State of New Jersey, and therefore a public river, belongs wholly to that State. It is no highway to other States; no commerce passes thereon from States below the bridge to States above." 3 Wall. 792.

This exposition of *The Wheeling Bridge Case*, by one who had taken a decided part in its discussion and determination, effectually disposes of it as a precedent for the jurisdiction of the Circuit Courts of the United States in matters pertaining to bridges erected over navigable rivers, at least those erected over rivers whose course is wholly within a single State. The Willamette River is one of that description.

On the whole, our opinion is, that the original suit in this case was not a suit arising under any law of the United States; and since, on such ground alone, the court below could have had jurisdiction of it, it follows that the decree on the bill of review must be

Reversed, and the record remanded with instructions to reverse the decree in the original suit, and to dismiss the bill filed therein, without prejudice to any other proceeding which may be taken in relation to the erection of said bridge, not inconsistent with this opinion.

NEW ORLEANS WATERWORKS COMPANY *v.* LOUISIANA SUGAR REFINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 38. Argued October 26, 27, 1887. — Decided March 19, 1888.

The opinion of the Supreme Court of Louisiana is strictly part of the record, and is so considered on writ of error from this court.

The provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, is aimed at the legislative power of the State, and not at decisions of its courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals.

This court has no jurisdiction of a writ of error to the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State is upheld by the judgment sought to be reviewed; and when the state court gives no effect to a law of the State subsequent to the contract, but holds, upon grounds independent of that law, that the right claimed was not conferred by the contract, the writ of error must be dismissed for want of jurisdiction.

The legislature of Louisiana in 1877 having granted to a corporation the exclusive right of constructing waterworks to supply the city of New Orleans and its inhabitants with water, provided that nothing in this charter should prevent the city council from granting to any person, contiguous to the Mississippi River, permission to lay water pipes exclusively for its own use, an ordinance of the city council in 1883, granting such permission to a corporation whose property is separated from the river by a street and a broad quay or levee owned by the city, is but a license from the city council exercising an administrative power, and not a law of the State; and if the highest court of the State, in a suit between the waterworks company and the licensee, gives judgment for the latter, upon the construction and effect of the charter and the license, and not because of the provision of the state constitution of 1879 abolishing monopolies, this court has no jurisdiction on writ of error, although the question whether the licensee's property was contiguous to the river was in controversy.

THIS was a petition, filed March 30, 1883, in the Civil District Court for the Parish of New Orleans, by the New Orleans Waterworks Company against the Louisiana Sugar Refining Company and the City of New Orleans, to restrain the laying of water pipes from the factory of the Louisiana Sugar Refining Company through the streets and thorough-

fares of the city to the Mississippi River. The allegations of the petition are in substance as follows:

That the legislature of Louisiana, by an act of April 1, 1833, chartering the Commercial Bank of New Orleans, declared the chief object of that corporation to be "the conveying of water from the river into the city of New Orleans and its faubourgs, and into the houses of its inhabitants;" and enacted that it should "have forever the exclusive privilege, from and after the passing of this act, of supplying the city and inhabitants of New Orleans and its faubourgs with water from the river Mississippi, by means of pipes or conduits," and the right to construct the necessary works for that purpose; and provided that its works, rights and privileges might be purchased by the city of New Orleans at any time after thirty-five years from the passage of the act.

That in 1869 the city of New Orleans purchased the same accordingly, and took charge of and used the works for the purpose of supplying the city and its inhabitants with water.

That the act of the legislature of Louisiana of March 31, 1877, incorporating the plaintiff, contained the following provisions:

SEC. 2. "That immediately after the organization of the said Waterworks Company, as hereinafter provided, it shall be required to issue to the city of New Orleans stock to the amount of six hundred and six thousand six hundred dollars, as full paid, and not subject to assessment; and in addition thereto, one similar share for every one hundred dollars of waterworks bonds which said city may have taken up heretofore and extinguished by payment, exchange or otherwise; and that the residue of said capital stock shall be reserved for the benefit of all holders of waterworks bonds, to the extent of the amount now outstanding, who may elect to avail themselves of the provisions of this act."

SEC. 5. "That the said Waterworks Company shall own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it shall have for fifty years from the passage of this act the exclusive privilege of supplying the city of New Orleans and its inhabitants with water

from the Mississippi River, or any other stream or river, by means of pipes and conduits, and for erecting or constructing any necessary works or engines or machines for that purpose;" and have authority "to lay and place any number of conduits or pipes or aqueducts, and to cleanse and repair the same through or over any of the lands or streets of the city of New Orleans; provided the same shall not be an obstruction to commerce or free circulation."

SEC. 11. "That the city of New Orleans shall be allowed to use water from the pipes and plugs of said company now laid, or hereafter to be laid, free of any charge, for the extinguishment of fires, cleansing of the streets, and for the use of all public buildings, public markets and charitable institutions."

SEC. 17. That "at the expiration of fifty years from the organization of the company, the city shall have the right to buy the works, conduits, pipes, etc., of the company, at a valuation to be fixed by five experts;" "but should the city neglect or refuse to purchase said works, etc., as above provided, the charter of the company shall be *ipso facto* extended for fifty years longer, but without any exclusive privilege or right to supply water, according to the provisions of the charter."

SEC. 18. "That nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river, exclusively for his own or their own use."

That on April 9, 1878, the city transferred the waterworks and franchises aforesaid to the plaintiff.

That "since said transfer the petitioner has faithfully discharged the trust imposed on it, and complied with all its obligations; that, by virtue of the aforesaid exclusive privilege thus conferred upon it by the aforesaid charters, statutes and acts of transfer, the city of New Orleans cannot grant to any one the privilege of laying pipes to the river to convey water within her limits, without a flagrant violation of the aforesaid contracts and a breach of warranty, with the exception, however, of such privilege or facility as said city may think it expedient to extend to riparian owners of property lying contiguous to said river."

Statement of the Case.

That the city of New Orleans granted permission to the Louisiana Sugar Refining Company, a corporation domiciled in the parish of Orleans, to lay pipes from its factory to the Mississippi River, as appeared by the following ordinance, adopted by the city council on March 13, and approved by the mayor on March 15, 1883:

"An ordinance providing for the erection of all necessary machinery, boilers and engines, and laying of water and sewerage pipes in connection with the Louisiana Sugar Refining Company's works.

"Be it ordained that permission be, and is hereby, granted to the Louisiana Sugar Refining Company to erect all necessary machinery, boilers and engines in their factory in course of construction in the square bounded by Front, Clay, Bienville and Custom-House Streets, and to lay water and sewerage pipes from said factory to the Mississippi River, according to lines and grades for same to be furnished by the city surveyor: Provided, that all excavations and street crossings, paving, etc., broken up shall be replaced, repaired and relaid to the entire satisfaction of the commissioner of public works; revocable at the pleasure of the council."

That "under said permission the said Louisiana Sugar Refining Company has broken the grounds along and across the streets and thoroughfares of the said city in the direction of the said river from its aforesaid factory, and will, unless restrained by the equitable writ of injunction, complete said works, pipes and conduits, and proceed to draw therewith water from the Mississippi River, in violation of the exclusive privileges aforesaid of the petitioner, and to its great damage and injury;" and "that said Louisiana Sugar Refining Company has no riparian rights in the premises, and its property is not contiguous to said river."

The answer of the city of New Orleans denies all the allegations of the petition.

The answer of the Louisiana Sugar Refining Company also denies all those allegations, except that it admits that by the ordinance aforesaid "the city of New Orleans granted to it license and permission to lay water and sewerage pipes from

its factory to the Mississippi River; and that it has availed itself of the license therein granted, strictly in accordance with the ordinance aforesaid;" and "admits that it is the owner of certain property within the square bounded by Front, Clay, Bienville, and Custom-House Streets, in the city of New Orleans; and avers that said property is what is known as batture property, and that the rights, ways and privileges of the city of New Orleans were transferred by the title given by the said city of New Orleans to its vendors;" and "avers that said property fronts on a public street and the quay, a public place, and that it is contiguous and adjacent to the Mississippi River, and that the respondent has riparian rights to draw water therefrom for its own use and manufacturing purposes, and to convey and discharge its water therein;" "denies that the plaintiff corporation has any exclusive privilege and right to draw water from the Mississippi River by conduits and pipes, or otherwise, which could or would impair the use by this respondent and every other person of the said water for its own and their supply;" avers "that, if there be any such pretended exclusive privilege and right, it is null and void, as in derogation of common right and of law;" "denies that it has supplied, or is now supplying, or intends hereafter to supply, the city of New Orleans or any of its inhabitants with water, or to carry off and discharge any waste except its own; and expressly avers that the pipes laid are for its own exclusive use, and that it draws water from said river only for its own use and manufacturing purposes connected with its said factory;" and further avers "that the exclusive rights and privileges claimed by the plaintiff under its charter would constitute a monopoly, and are therefore null and void."

Upon a trial by jury, it appeared that the material provisions of the aforesaid statutes of Louisiana were as above set forth; and the evidence supported all the allegations of fact in the petition, except that the acts of the Louisiana Sugar Refining Company, and the situation of its factory in relation to the river, were proved to be as follows: The company was constructing a factory on its land, bounded by Front, Clay, Bienville and Custom-House Streets, and had begun to lay water

and sewerage pipes, exclusively for the use of its factory, and according to lines and grades furnished by the city surveyor, from its factory straight to the river, across Front Street, and thence across a broad quay or levee, owned by the city, and open to the public, except that some large sugar sheds occupied by lessees of the city stood upon it, and that the tracks of the Louisville, Nashville and Mobile Railroad were laid across it.

The plaintiff asked the court to instruct the jury: "1st. That the word 'contiguous,' as used in § 18 of the charter of the plaintiff company, means riparian, or on the edge of the river. 2d. That the city of New Orleans has no right to grant permission to any person or corporation whose property is not contiguous to the river to lay pipes or conduits to the Mississippi River to draw water therefrom through said pipes or conduits for manufacturing or other purposes." The court refused to give either of said instructions, "on the ground that the jury were judges both of the law and the facts of the case," and allowed a bill of exceptions. The jury returned a verdict for the defendants, and the court, with the verdict and the evidence before it, gave judgment for the defendants, dismissing the suit.

The plaintiff appealed to the Supreme Court of Louisiana, which affirmed the judgment; and in its opinion recapitulated the substance of the provisions of the statutes of Louisiana, above quoted, the conveyances from the Commercial Bank to the city of New Orleans in 1868 and from the city to the plaintiff in 1877, and the ordinance, passed by the city council in 1883, granting to the Louisiana Sugar Refining Company permission to lay pipes from its factory to the Mississippi River, and stated the question to be decided and the grounds of its decision as follows:

"The question which arises, under such state of facts, is simply, Whether the city of New Orleans had the right to grant the authority. If the city had such a right, the defendant company has a right to exercise it.

"In order to determine that question, it is essential, first, to ascertain what is the nature and extent of the privilege origi-

nally conferred by the State upon the Commercial Bank, and which passed to the city of New Orleans, by whom it was afterwards transferred to the defendant [plaintiff] company, organized, as it was, by a charter which is explicit as to its prerogatives and responsibilities."

"The right conferred by the legislature in 1833, and confirmed in 1877, was not to draw water from the river, nor was it to lay pipes and conduits on the lands and streets of the city of New Orleans. It was the *exclusive* privilege of supplying the city and its inhabitants with water drawn from the river by those means, the object in view being, on account of benefits derived by the city, the *exclusion* of all others, corporations and individuals, from making a similar supply, in other words, from selling and vending water.

"The Commercial Bank, in common with all the inhabitants of the city, possessed, independent of any legislative grant or concession, the right to draw water from the river for its own purposes, and to supply the city and its inhabitants with it; but it did not, any more than any of the inhabitants of the city, have the right of laying the pipes and conduits necessary to convey the water through or over any of the lands or streets of the city, and to do so it required special authority, either directly from the State, or from its functionary, the city herself. The right which it did not possess, and which no other inhabitant possessed, was the exclusive privilege of supplying the city and its inhabitants for ever, or a limited time, by means of pipes and conduits laid through the public soil.

"The moment that privilege was conferred by the State on the corporation, to supply the city and its inhabitants with water from the river, through pipes and conduits which it was authorized to lay through and over any of the lands or streets of the city, all preëxisting, as well as all subsequently arising rights, which could have otherwise been exercised, ceased to be available, and competition for such supply became an absolute legal impossibility.

"The right to that exclusive privilege, under the present constitution, is contested by the defendant; but it is entirely out of place to consider whether it exists or not, as, under the

pleadings and the facts, the question of competition is not at all at issue.

"The city of New Orleans does not claim to have conferred on the defendant company, and that company does not claim to have received from the city, the right or privilege of supplying the city and its inhabitants with water by means of pipes, conduits and hydrants.

"The city and the defendant company claim only that the former had a right to grant, and the latter has that to enjoy, the permission of laying pipes and conduits from the river to its factory, for the sole purpose of supplying itself with water for its own purposes, and for no other.

"It cannot be doubted for an instant that, as the city has, under general laws and by her charter, which emanates directly from the sovereign, the exclusive control and regulation of her public lands, quays, streets and avenues, she had the right of permitting the defendant company to lay pipes and conduits across the quay and through the streets, from the river to within its factory limits, for the purpose of supplying itself with the water needed for its objects. Rev. Civil Code, arts. 450, 453, 455, 457; *Brown* v. *Duplessis*, 14 La. Ann. 854; *Board of Liquidation* v. *New Orleans*, 32 La. Ann. 915.

"It is true, that section 18 of the charter of 1877 expressly protects riparian or contiguous proprietors against a possible effect of the *exclusive* privilege granted; but the provision there found is not to be construed as one conferring a privilege or right which otherwise would have had no existence. It is indisputable, that such riparian or contiguous owners would, independently of the declarations in section 18, have enjoyed that right, which could, under no contingency, have thus been abridged.

"They had clearly, not only the privilege, in common with all others, to draw the running water from the river for domestic purposes, *ad lavandum et potendum*, but also, on principle, that, without the need of a previous permission, of laying pipes from the river to their premises, to draw the water necessary for their use. The State and her functionaries — political corporations — however have the right, in the exer-

cise of the police power, of regulating the enjoyment of that right, denying or permitting it, according as public security and good may or may not demand.

"If section 18 was designed for any practical object, it could only have been to secure to the contiguous owners, beyond the possibility of a doubt, their indisputable rights, subjecting them, however, to the control of the municipal authorities, as the improvident or careless exercise of such rights across the river bank and through the public street of a populous metropolis might be attended with great calamitous consequences, inflicting incalculable wrong and injury." 35 La. Ann. 1111.

A writ of error from this court was allowed by the Chief Justice of the Supreme Court of Louisiana, upon the plaintiff's petition representing "that said plaintiff set up to its charter as a contract between it and said city of New Orleans and the State of Louisiana; and that the ordinance of said city in favor of said defendant, the Louisiana Sugar Refining Company, was a violation of said contract, which was protected by the Constitution of the United States; and said Supreme Court in its decree maintained the legality of said ordinance, and decreed it to be no violation of said contract."

Mr. J. R. Beckwith for plaintiff in error.

Mr. S. Teakle Wallis for defendant in error.

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

The plaintiff in its original petition relied on a charter from the legislature of Louisiana, which granted to it the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi River, but provided that the city council should not be thereby prevented from granting to any person "contiguous to the river" the privilege of laying pipes to the river for his own use. The only matter complained of by the plaintiff, as impairing the obligation of the contract contained in its charter, was an ordinance of the city council, granting to the Louisiana Sugar Refining Com-

pany permission to lay pipes from the river to its factory, which, the plaintiff contended, was not contiguous to the river.

The Louisiana Sugar Refining Company in its answer alleged that its factory was contiguous to the river, that it had the right as a riparian proprietor to draw water from the river for its own use, that its pipes were being laid for its own use only, that the plaintiff had no exclusive privilege that would impair such use of the water by the defendant company, and that the rights and privileges claimed by the plaintiff would constitute a monopoly and be therefore null and void.

The evidence showed that the pipes of the defendant company were being laid exclusively for the use of its factory, and that no private ownership intervened between it and the river, but only a public street, and a broad quay or levee, owned by the city and open to the public, except that some large sugar sheds, occupied by lessees of the city, stood upon it, and that the tracks of a railroad were laid across it.

The grounds upon which the Supreme Court of Louisiana gave judgment for the defendants appear by its opinion, which, under the practice of that state, is strictly part of the record, and has always been so considered by this court on writs of error, as well under the Judiciary Act of 1789, which provided that "no other error shall be assigned or regarded as a ground of reversal than such as appears on the face of the record," as under the later acts, in which that provision is omitted. Acts of September 24, 1789, c. 20, § 25, 1 Stat. 86; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat. § 709; *Almonester* v. *Kenton*, 9 How. 1, 9; *Grand Gulf Railroad* v. *Marshall*, 12 How. 165; *Cousin* v. *Blanc*, 19 How. 202; *Delmas* v. *Insurance Co.*, 14 Wall. 661, 663, 667; *Crossley* v. *New Orleans*, 108 U. S. 105; *Crescent City Co.* v. *Butchers' Union Co.*, 120 U. S. 141, 146.

That opinion, as printed in 35 La. Ann. 1111, and in the record before us, shows that the grounds of the judgment were, that the right conferred by the legislature of the State upon the Commercial Bank by its charter in 1833, and confirmed to the plaintiff by its charter in 1877, was the exclusive privilege

of supplying the city and its inhabitants with water by means of pipes and conduits through the streets and lands of the city; that by the general law of Louisiana, independently of anything in those statutes, riparian or contiguous proprietors had the right of laying pipes to the river to draw the water necessary for their own use, subject to the authority of the State and the city, in the exercise of the police power, to regulate this right, as the public security and the public good might require; that section 18 of the plaintiff's charter had no other object than to secure, beyond the possibility of doubt, this right of the contiguous owners and the control of the municipal authorities; and that the city was authorized to permit the defendant company to lay pipes across the quay and through the streets from the river to its factory, for the purpose of supplying it with water for its own use.

The Constitution of Louisiana of 1879 does provide, in article 258, that "the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished." But the opinion of the Supreme Court of the State shows that it thought it unnecessary and "entirely out of place" to consider the effect of that provision upon the exclusive privilege of the plaintiff; and it was not suggested, either in the petition for the writ of error, or in the assignment of errors, or in any of the briefs filed in this court, that any effect was given by the judgment of the State court to that provision of the Constitution of the State.

The only grounds, on which the plaintiff in error attacks the judgment of the State court, are that the court erred in its construction of the contract between the State and the plaintiff, contained in the plaintiff's charter; and in not adjudging that the ordinance of the city council, granting to the defendant company permission to lay pipes from its factory to the river, was void, because it impaired the obligation of that contract.

The arguments at the bar were principally directed to the question whether upon the facts proved the factory of the defendant company was contiguous to the river. But that is

not a question which this court upon this record is authorized to consider.

This being a writ of error to the highest court of a State, a federal question must have been decided by that court against the plaintiff in error; else this court has no jurisdiction to review the judgment. As was said by Mr. Justice Story, fifty years ago, upon a full review of the earlier decisions, "it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment," and "it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State court to the case." *Crowell* v. *Randall*, 10 Pet. 368, 398. The rule so laid down has been often affirmed, and constantly acted on. *Grand Gulf Railroad* v. *Marshall*, 12 How. 165, 167; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 143; *Steines* v. *Franklin County*, 14 Wall. 15, 21. In *Klinger* v. *Missouri*, 13 Wall. 257, 263, Mr. Justice Bradley declared the rule to be well settled that "where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one." And in many recent cases, under § 709 of the Revised Statutes, this court, speaking by the Chief Justice, has reasserted the rule, that to give it jurisdiction of a writ of error to a State court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that "its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Brown* v. *Atwell*, 92 U. S. 327; *Citizens' Bank* v. *Bank of Liquidation*, 98 U. S. 140; *Chouteau* v. *Gibson*,

111 U. S. 200; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit Railway* v. *Guthard*, 114 U. S. 133.

In order to come within the provision of the Constitution of the United States which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the State. The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

This court, therefore, has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. "It must be the Constitution or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or constitution of the State, in the matter in which the conflict is supposed to exist; or the case for this court does not arise." *Railroad Co.* v. *Rock*, 4 Wall. 177, 181. "We are not authorized by the Judiciary Act to review the judgments of the State courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

As later decisions have shown, it is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law.

In *Williams* v. *Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice Field, delivering judgment, "Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court;" (Rev. Stat. § 709;) and it was therefore held that a statute of the so called Confederate States, if enforced by one of the States as its law, was within the prohibition of the Constitution.

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

For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. Accordingly, where the city council of Charleston, upon which the legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay, this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the State. *Murray* v. *Charleston*, 96 U. S. 432, 440. See also *Home Ins. Co.* v. *City Council of Augusta*, 93 U. S. 116.

But the ordinance now in question involved no exercise of legislative power. The legislature, in the charter granted to the plaintiff, provided that nothing therein should "be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying

pipes to the river, exclusively for his or their own use." The legislature itself thus defined the class of persons to whom, and the object for which, the permission might be granted. All that was left to the city council was the duty of determining what persons came within the definition, and how and where they might be permitted to lay pipes, for the purpose of securing their several rights to draw water from the river, without unreasonable interfering with the convenient use by the public of the lands and highways of the city. The rule was established by the legislature, and its execution only committed to the municipal authorities. The power conferred upon the city council was not legislative, but administrative, and might equally well have been vested by law in the mayor alone, or in any other officer of the city. *Railroad Co.* v. *Ellerman*, 105 U. S. 166, 172; *Day* v. *Green*, 4 Cush. 433, 438. The permission granted by the city council to the defendant company, though put in the form of an ordinance, was in effect but a license, and not a by-law of the city, still less a law of the State. If that license was within the authority vested in the city council by the law of Louisiana, it was valid; if it transcended that authority, it was illegal and void. But the question whether it was lawful or unlawful depended wholly on the law of the State, and not at all on any provision of the Constitution or laws of the United States.

The cases of *New Orleans Waterworks* v. *Rivers*, 115 U. S. 674, and *St. Tammany Waterworks* v. *New Orleans Waterworks*, 120 U. S. 64, on which the plaintiff relied in support of its bill, were essentially different from the case at bar. In each of those cases, the validity of the article of the Constitution of 1879 abolishing monopolies was drawn in question by the bill, and relied on by the defendants. Rivers did not contend that his property was contiguous to the river. The St. Tammany Waterworks Company had been incorporated since the New Orleans Waterworks Company, under a general statute of the State, for the purpose of supplying the whole city and its inhabitants with water. And both those cases were appeals from the Circuit Court of the United States, upon which this court was not restricted to the consideration

of federal questions decided below, but had jurisdiction to determine the whole case.

The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a State, and on appeal from a Circuit Court of the United States — as affected by the ground of the decision of the court below — is illustrated by the cases of contracts payable in Confederate currency, or made in consideration of loans of Confederate currency, during the war of the rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves.

In *Thorington* v. *Smith*, 8 Wall. 1, this court, reversing a judgment of the Circuit Court of the United States in Alabama, held that a contract for the payment of money in Confederate currency was not unlawful. Like decisions have often been made in later cases brought here from the Circuit Courts of the United States. *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 497; *Confederate Note Case*, 19 Wall. 548; *Wilmington & Weldon Railroad* v. *King*, 91 U. S. 3; *Cook* v. *Lillo*, 103 U. S. 792. Yet in *Bethel* v. *Demaret*, 10 Wall. 537, where a suit on a mortgage to secure the payment of promissory notes given for a loan of Confederate currency had been dismissed by the Supreme Court of Louisiana, on the ground that the notes and mortgage were nullities, because the Confederate currency, which constituted the consideration, was illegal by the general law of the State, this court dismissed the writ of error, because no statute of the State was drawn in question. And in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, 13 Wall. 432; *S. C.* 14 Wall. 9; where the Supreme Court of Louisiana, affirming a judgment rendered by an inferior court of the State before the adoption of article 127 of the State Constitution of 1868, by which "all agreements, the consideration of which was Confederate money, notes or bonds, are null and void, and shall not be enforced by the courts of this state," dismissed a suit to recover money payable in Confederate notes, basing its judgment both upon that article of the Constitution and upon adjudications in that state before its adoption, this court, speaking by Mr. Justice Swayne, dismissed

a writ of error, and said: "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question. This brings the case within the authority of *Bethel* v. *Demaret*," above cited. In another case at the same term, the disposition by this court of the case of *Bank of West Tennessee* v. *Citizens' Bank of Louisiana* was thus explained by Mr. Justice Miller: "As it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control, and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse." *Delmas* v. *Insurance Co.*, 14 Wall. 661, 666. In *Delmas* v. *Insurance Co.* just cited, where the judgment of the Louisiana court was put wholly upon that article of the Constitution, this court therefore took jurisdiction, and reversed the judgment, but said that where a decision of the highest court of a State, "whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review." And in *Tarver* v. *Keach*, 15 Wall. 67, as well as in *Dugger* v. *Bocock*, 104 U. S. 596, 601, the proposition thus stated was affirmed, and was acted on by dismissing a writ of error to a State court. So in *Stevenson* v. *Williams*, 19 Wall. 572, where a judgment of the Supreme Court of Louisiana, annulling a judgment of a lower court, on the ground that the promissory notes on which it was rendered had been given for a loan of Confederate money, was brought here by writ of error, this court, speaking by Mr. Justice Field, after disposing of a distinct federal question, and observing that the aforesaid ground would not be deemed, in a federal court, sufficient to set aside the judgment, said: "But the ruling of the State court, in these particulars, however erroneous, is not subject to review by us. It presents no federal question for our examination. It conflicts with no part of the Constitution, laws or treaties of the United States.

Had the State court refused to uphold the judgment because of the provision in the Constitution of the State, subsequently adopted, prohibiting the enforcement of contracts founded upon Confederate money, a federal question would have been presented. That provision, however, does not appear to have caused the ruling." 19 Wall. 576, 577. Those cases clearly establish that, on a writ of error to a State court, this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the State Constitution; but that if it was based on the previous law of the State, this court had no jurisdiction to review it, although the view taken by the State court was adverse to the view taken by this court in earlier and later cases coming up from a Circuit Court of the United States.

In actions brought upon promissory notes given for the purchase of slaves before the war, the same distinction has been maintained. The Constitutions adopted in 1868, by the States of Arkansas, Georgia and Louisiana respectively, provided that the courts of the State should not enforce any contract for the purchase or sale of slaves. In *Osborn* v. *Nicholson*, 13 Wall. 654, a judgment rendered for the defendant by the Circuit Court of the United States for the District of Arkansas, in an action on a promissory note for the purchase of a slave, was reversed, because this court was of opinion that the contract was valid at the time when it was made, and therefore its obligation was impaired by the subsequent constitution. For like reasons, this court, in *White* v. *Hart*, 13 Wall. 646, reversed a similar judgment rendered by the Supreme Court of the State of Georgia, and based upon the provision of its constitution. But in *Palmer* v. *Marston*, 14 Wall. 10, where the Supreme Court of Louisiana, in a similar action, had placed its judgment for the defendant upon the law of the State, as established and acted upon before the adoption of the Constitution of 1868 and since adhered to, and had declined to pass upon the question whether the provision of that constitution was valid or invalid as an act of legislation and in relation to the article of the Constitution of the United States against impairing the obligation of contracts,

because it was unnecessary and could have no practical influence upon the result, this court dismissed a writ of error, for want of jurisdiction, saying: "It thus appears that the provision of the State constitution upon the subject of slave contracts was in no wise drawn in question. The decision was governed by the settled principles of the jurisprudence of the State. In such cases this court has no power of review." "Substantially the same question arose in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, heretofore decided. The writ of error was dismissed for want of jurisdiction. The same disposition must be made in this case."

These cases are quite in harmony with the line of cases, beginning before these were decided, in which, on a writ of error upon a judgment of the highest court of a State, giving effect to a statute of the State, drawn in question as affecting the obligation of a previous contract, this court, exercising its paramount authority of determining whether the statute upheld by the State court did impair the obligation of the previous contract, is not concluded by the opinion of the State court as to the validity or the construction of that contract, even if contained in a statute of the State, but determines for itself what that contract was. Leading cases of that class are *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, in which the State court affirmed the validity of a statute authorizing a railway viaduct to be built across a river, which was drawn in question as impairing the obligation of a contract, previously made by the State with the proprietors of a bridge, that no other bridge should be built across the river; and cases in which the State court affirmed the validity of a statute, imposing taxes upon a corporation, and drawn in question as impairing the obligation of a contract in a previous statute exempting it from such taxation. *State Bank* v. *Knoop*, 16 How. 369; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416; *Mechanics & Traders' Bank* v. *Debolt*, 18 How. 380; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *New Jersey* v. *Yard*, 95 U. S. 104; *Memphis & Charleston Railroad* v. *Gaines*, 97 U. S. 697, 709; *University* v. *People*, 99 U. S. 309; *Louisville & Nashville Railroad* v. *Palmes*,

109 U. S. 244; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665. In each of those cases, the State court upheld a right claimed under the later statute, and could not have made the decision that it did without upholding that right; and thus gave effect to the law of the State drawn in question as impairing the obligation of a contract.

The distinction between the two classes of cases — those in which the State court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract — as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23. That was a writ of error to the Supreme Judicial Court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence. Now, if the State court was right in their view of the law as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the Supreme Court of Maine

was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the State court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. *Rector* v. *Ashley*, 6 Wall. 142; *Klinger* v. *Missouri*, 13 Wall. 257; *Steines* v. *Franklin County*, 14 Wall. 15. The writ of error must therefore be dismissed for want of jurisdiction." 14 Wall. 25, 26.

The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a State court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, that when the record shows that a federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the State court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the State court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the State court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the State court gives no

effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.

In the present case, the Supreme Court of Louisiana did not, and the plaintiff in error does not pretend that it did, give any effect to the provision of the Constitution of 1879 abolishing monopolies. Its judgment was based wholly upon the general law of the State, and upon the construction and effect of the charter from the legislature to the plaintiff company, and of the license from the city council to the defendant company, and in no degree upon the Constitution or any law of the State subsequent to the plaintiff's charter. The case cannot be distinguished in principle from the cases above cited, in which writs of error to State courts have been dismissed for want of jurisdiction. As was said in *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, above cited, "The result in this case would have been necessarily the same if the Constitution had not contained the provision in question."

Writ of error dismissed for want of jurisdiction.

KREIGER *v.* SHELBY RAILROAD COMPANY and Others.

SAME and Others *v.* SAME and Others.

SAME and Another *v.* SAME and Others.

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

Nos. 948, 949, 950. Submitted December 12, 1887. — Decided March 19, 1888.

Upon a writ of error to the highest court of a State, under Rev. Stat. § 709, the opinion of that court, recorded as required by the statutes of the State, may be examined by this court to ascertain the ground of the judgment.

Statutes of a State authorized a district in a county, defined by exact boundaries, to determine by the vote of its inhabitants to subscribe for stock

Statement of the Case.

in a railroad company, and required bonds to be executed in its name by the county judge to the railroad company for the amount of stock so subscribed for. By later statutes, it was enacted that this district should be entitled to vote on the amount of its stock, and in so doing be represented by certain magistrates of the county; and that it should have a certain corporate name, and by that name might sue and be sued. The highest court of the State held that by the earlier statutes the district was made a corporation, and entitled to vote and to receive dividends on its stock in the railroad company, and that the later statutes made no change in the contract created by the earlier statutes. *Held*, that this court had no jurisdiction on writ of error.

These were three suits in equity, one brought by the Shelby Railroad Company, another by the Shelby Railroad District of Shelby County in the State of Kentucky, and the third by Kreiger and other individual stockholders in the railroad company. The plaintiffs in each suit were made defendants in each of the other suits. All the cases were argued together in the courts of the State of Kentucky and in this court, and presented the question whether the Shelby Railroad District had the right of voting at stockholders' meetings upon stock held by it in the Shelby Railroad Company, under the following circumstances:

By an act of the legislature of Kentucky of March 15, 1851, the Shelby Railroad Company was incorporated; its capital stock was fixed at $600,000, in shares of $50 each, to be subscribed for by any individual or corporation; at any meeting of the stockholders, each stockholder was to be "allowed one vote for every share owned by him, her, or it;" on every share subscribed, one dollar was to be paid at the time of the subscription, and the residue in instalments and at times to be fixed by the president and directors; all payments made on the stock were to bear interest until a dividend made, certificates of stock were to be issued to the persons entitled, in addition to the shares subscribed or held by them, and no certificates of stock were to be issued until they were paid for; the county court of Shelby County was empowered to subscribe for stock for all such interest in behalf of the county, its subscription was to be made payable at such times and places and upon such terms as might be agreed on between it and the

commissioners or directors taking its subscription, and, for the purpose of paying that subscription, it was authorized to levy and collect a tax on all the property subject to taxation within the county; and every person paying any part of the tax was to be entitled to his *pro rata* share of stock, and to receive a certificate thereof on paying, or producing transfers from those who had paid, for a full, half or quarter share.

An act of February 3, 1869, amending the original charter, authorized a certain portion of Shelby County, included in a boundary defined in this act, to subscribe for any amount of the stock not exceeding $300,000, and also authorized other counties to subscribe for certain amounts of stock, and further enacted as follows:

"SEC. 3. Upon the written application of the president and directors of said company and of ten taxpayers of any of said counties, the county judge of such county shall, within thirty days thereafter, cause a vote of the legal voters residing in the county, or portion of county, to be taxed, to be taken at the several places of voting therein, to ascertain whether the voters of said counties, or portion of Shelby County, are in favor of said subscription."

"SEC. 5. If a majority of the votes cast shall be in favor of said subscription, it shall be the duty of the county judge forthwith to cause the subscription to be made in the name of said county, or portion of Shelby County, as the case may be.

"SEC. 6. Where any such subscription to the capital stock of said company shall have been ordered, and the conditions aforesaid complied with, bonds shall be executed in the name of and under the seal of or scroll of said portion of Shelby County, or said counties, as the case may be, in such form and in such amounts, the entire amount of said bonds not to exceed the sum subscribed, and payable at such places, and bearing interest payable semi-annually, at such rates, not exceeding eight per centum per annum, as the president and directors may elect. The bonds shall be due and payable twenty years from their date, with the privilege reserved to the said counties to pay them after three years from date. The bonds shall be signed by the judge of the county court

and countersigned by the county clerk. When so executed, said bonds shall be delivered to the president and directors of said company, in payment of said subscription, and they may be by them negotiated, hypothecated or sold, upon such terms and at such times as may by said president and directors be deemed expedient, and may be transferred by endorsement.

"SEC. 7. When any such subscription shall have been made, it shall be the duty of the county judge and the justices of the peace of the precincts or the counties in which the vote is taken, to levy annually a direct tax upon all the property in such county, or portion of county, subject to taxation for state revenue, to pay the interest when due, and the principal at maturity; and they may levy a tax to pay any portion of said bonds at any time after three years: Provided, that no greater tax than one per cent shall be levied in any one year, except to pay the bonds at maturity." "The collecting officer shall execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and, when they amount to fifty dollars or more, shall entitle the holder, upon presentation to the proper officers of the company, to certificates of stock at the rate of one share for fifty dollars, and every multiple of fifty."

"SEC. 9. The several counties and portion of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders."

An act of March 11, 1870, further amending the charter of the railroad company, contained the following section:

"SEC. 3. When any county, or part of a county, city, town or precinct, shall have delivered its bonds in payment for stock subscribed, it shall be entitled to representation, and to vote the amount of such stock in any meeting of the stockholders of said company. The stock owned by a county shall be represented by the county judge and all of the justices of the peace of the county; stock owned by a part of a county, or a precinct, by the county judge and by the justices of the peace residing in the district or precinct taxed; stock owned by a city or town, by its general council or board of trustees; and

these several bodies may designate a suitable person or persons as their proxies to represent them in any meeting of the stockholders of said company. It shall be the duty of the county judge to call together at the county seat the justices entitled to vote, and to cause their action to be spread upon the records of the county court."

Another act, passed February 26, 1873, enacted that "the part of Shelby County embraced in the boundary given" in the act of 1869 should "have the corporate name of The Shelby Railroad District of Shelby County," and by that name might sue and be sued.

In accordance with the provisions of the act of 1869, that portion of Shelby County therein defined forthwith subscribed $300,000 to the stock of the railroad company, and its bonds for that amount were issued and delivered to the railroad company on June 1, 1869, and were sold by the company and the proceeds applied to the construction of its road; and a tax was annually levied and collected, amounting in all to more than $300,000, which was applied to the payment of interest becoming due on the bonds, and of part of the principal, leaving such bonds, or others given in renewal thereof, now remaining unpaid to the amount of $248,000; and the district holds certificates of stock to that amount, and always voted upon its stock until these suits were brought. Certificates of stock to a large amount have also been issued to taxpayers and are held by Kreiger and others. The first dividend on the stock was declared in December, 1881, and was paid to all the stockholders, including the district.

The Court of Appeals of Kentucky, affirming the judgments of a lower court of the State, adjudged that the Shelby Railroad District of Shelby County was a stockholder in the Shelby Railroad Company to the extent of the principal of the bonds of the district, issued and delivered to the railroad company, and still outstanding and unpaid, and was entitled to vote and receive dividends accordingly.

Kreiger and others sued out these writs of error, which the railroad company and the district now moved to dismiss for want of jurisdiction.

Mr. J. C. Beckham and *Mr. P. J. Foree* for the motions.

Mr. B. F. Buckner and *Mr. John L. Dodd* opposing.

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

It is contended for the plaintiffs in error, that the statutes of 1851 and 1869 created a contract by which the stockholders of the Shelby Railroad Company were those persons who had become so by subscribing for stock or by the payment of taxes, and the right to vote upon stock subscribed for by counties or other municipal subdivisions was in taxpayers only; and that the statutes of 1870 and 1873 first granted to the Shelby Railroad District of Shelby County the right to vote as a stockholder in the railroad company, and thereby impaired the obligation of the contract created by the earlier statutes.

But the insuperable difficulty in the way of sustaining these writs of error is, that it does not appear that the Court of Appeals of Kentucky gave effect to the statutes of 1870 and 1873 as making any change in that contract.

The statutes of Kentucky require written opinions to be delivered by the Court of Appeals in all cases, and to be recorded by its clerk. Code of Civil Procedure, § 765; Gen. Stat. c. 28, art. 2, § 10; c. 16, art. 1, § 1. By the settled course of decision under the existing judiciary acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the State court. *Murdock* v. *Memphis*, 20 Wall. 590, 633; *McManus* v. *O'Sullivan*, 91 U. S. 578; *Gross* v. *United States Mortgage Co.*, 108 U. S. 481, 487: *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123, 129; *Detroit Railway* v. *Guthard*, 114 U. S. 133, 137; *Jacks* v. *Helena*, 115 U. S. 288; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110. The decision in *Fisher* v. *Cockerall*, 5 Pet. 248, 255, cited by one of the defendants in error, in which, on a writ of error to the Court of Appeals of Kentucky, this court held that the

opinion of that court could not be taken into consideration, was decided under the judiciary act of 1789, which contained a provision, omitted in the later acts, expressly requiring the error assigned as a ground of reversal to appear on the face of the record. Acts of September 25, 1789, c. 20, § 25, 1 Stat. 86; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat. § 709.

In the cases now before us, the opinions delivered in writing by the Court of Appeals of Kentucky, recorded by its clerk, and sent up with the transcript, consist of an elaborate opinion upon the original hearing, and a shorter one upon a petition for a rehearing.

The original opinion makes no mention of the acts of 1870 and 1873, but, proceeding wholly upon the construction of the charter of 1851, as amended by the act of 1869, holds, for reasons stated at length, that by the legal effect of the act of 1869, defining by boundaries a district in Shelby County, authorizing it to determine by popular vote of its inhabitants to subscribe for stock in the railroad company, and requiring bonds to be executed in its name by the county judge to the railroad company for the amount so subscribed for, the district was made a corporation, and entitled to all the rights and privileges of other stockholders in the railroad company, and had the right to vote and to receive dividends upon the stock thus subscribed for, except so far as owners of property within the district, having paid taxes assessed upon them towards paying the principal sum so subscribed, had received certificates of stock for the sums so paid by them; and that the right of the district to vote and to receive dividends upon so much of its stock as had not been so paid for was not displaced or affected by the issue of certificates of stock to taxpayers for sums paid by them to meet the accruing interest on the sum subscribed by the district, because the stock so issued for interest was, by the express provisions of the charter constituting the contract between the stockholders, to be in increase of the original capital stock.

The opinion delivered on overruling the petition for a rehearing reaffirms the positions of the former opinion, and declares

that, while the provisions of the act of 1869, amending the original act of incorporation, were indefinite as to the manner in which stock held by the district should be voted on, the acts of 1870 and 1873 did no more than make that certain which was before uncertain, or had been omitted from the original act of incorporation, by giving the district a distinct name and authorizing it to be represented by the county judge and justices of the county, and providing a remedy by which the rights of the corporation might be asserted and its liabilities enforced; but that there had been no change of contract.

It thus appears that the State court, upon full consideration, decided that the acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes should be exercised; and that it based its judgments entirely upon the construction and effect of the earlier statutes, and upon grounds which would have been equally controlling if the later acts had not been passed. The necessary conclusion is that this court has no jurisdiction to review those judgments. *Bank of West Tennessee* v. *Citizens' Bank of Louisiana*, 13 Wall. 432; *S. C.* 14 Wall. 9; *Palmer* v. *Marston*, 14 Wall. 10; *Kennebec Railroad* v. *Portland Railroad*, 14 Wall. 23; *Stevenson* v. *Williams*, 19 Wall. 572; *New Orleans Waterworks* v. *Louisiana Sugar Refining Co.*, *ante*, 18.

Writs of error dismissed for want of jurisdiction.

DALE TILE MANUFACTURING COMPANY *v.* HYATT.

ERROR TO THE CITY COURT OF NEW YORK.

No. 1232. Submitted January 9, 1888. — Decided March 19, 1888.

An action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain reissues thereof, and promises to pay certain royalties so long as the

Statement of the Case.

patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the State courts; and the correctness of a decision of the highest court of a State upon the merits of the case, based upon the effect of the agreement, without passing upon the validity of a reissue, or any other question under those laws, cannot be reviewed by this court on writ of error.

THE original action was brought in a court of the State of New York by Elizabeth A. L. Hyatt, a citizen of New York, and the owner of letters patent for an improvement in illuminated basement and basement-extensions, against the Dale Tile Manufacturing Company (Limited), a corporation organized by the laws of New York, upon a written agreement between the parties, dated December 28, 1880, which contained, either in itself, or by reference to previous agreements, the following provisions:

The agreement began by reciting that letters patent for this invention had been issued to the plaintiff on August 27, 1867, and reissued on August 6, 1878. The plaintiff, on her part, licensed the defendant to make and sell, within certain states and districts, during the full term of the patent, and of any extension or renewal thereof, illuminated basements, and basement-extensions and materials therefor; and agreed not to manufacture herself, or to license others to manufacture, within the same territory. The defendant, on its part, acknowledged the validity of the said letters patent; consented that the plaintiff might obtain further reissues thereof when and as often as she should choose, without prejudice to this agreement; and promised to pay her a fee of seventy cents for each square foot of surface in gratings made by the defendant to be used in illuminated basements or basement-extensions made and sold by it under the license; provided, however, that "until a court shall have given a decree sustaining the validity of the above-named patents," the plaintiff should receive a fee of thirty cents only, in lieu of the fee of seventy cents; and that "if at any time an adverse decision shall be rendered against the validity of the patent, which shall not be appealed from for three months," the fees under this

license should cease; and the defendant agreed to make such payments and render accounts to the plaintiff quarterly. It was further stipulated that either party, knowingly violating the agreement, should forfeit all rights under it.

The defendant, in its answer, admitted the agreement, and set up sundry breaches thereof by the plaintiff, and, among others, that on September 27, 1881, she obtained from the United States a reissue of her patent, whereby a discontinuance of actions previously brought by her against infringers in the Circuit Court of the United States became necessary, and she refused to bring new suits against them.

The plaintiff afterwards, by leave of court, amended her complaint by alleging the reissue of 1881.

By order of the City Court of New York, the case was referred to a referee, who found that the plaintiff was the owner of the letters patent issued and twice reissued as aforesaid; that there had been no breach of the agreement on her part; that the defendant made and sold the invention under the license, and rendered quarterly accounts for the royalties down to and including the quarter ending October 31, 1881; that by the account for that quarter there appeared to be due to the plaintiff the sum of $524.55, which the defendant refused to pay; and that in December, 1881, the plaintiff gave notice to the defendant that it had forfeited its license, and withdrew the notice upon its promising to pay the royalties.

The defendant requested the referee to find, as a conclusion of law, that by the plaintiff's surrender of the patent, on taking out the reissue of 1881, the license held by the defendant was cancelled and became of no effect; and also that the court had no jurisdiction of the action, because it involved necessarily and directly the construction of letters patent of the United States. The referee declined so to find, and reported, as his conclusion of law, that the plaintiff was entitled to judgment against the defendant for the sum of $524.55, with interest from November 1, 1881.

The referee filed with his report an opinion, in which he said that the defence, at first, proceeded upon the theory that the plaintiff had violated her agreement by not prosecuting

and restraining infringers, but that defence was abandoned, because it appeared that she had assumed no such duty; and that "the defence was finally rested upon this sole ground: That the reissue of the patent in 1881 was entirely void, because it covered much more ground than the patent of 1867 as reissued in 1878, and that therefore the surrender of 1878 left no patent whatever existing;" but that the defendant was not in a position to raise this question, because it could not, in this action to recover the royalties agreed upon, deny the validity of the original patent or of any reissue thereof, so long as it had not been declared void by a court of competent jurisdiction, and while the defendant retained and acted under its license from the plaintiff.

The City Court of New York gave judgment for the plaintiff on the referee's report. That judgment was affirmed by the Court of Common Pleas, and the defendant appealed to the Court of Appeals, which affirmed the judgment, and remitted the case to the City Court of New York. The opinion filed by the Court of Appeals, and included in the transcript sent up to this court, is mentioned, but not reported in full, in 106 N. Y. 651, and is copied in the margin.[1]

---

[1] PECKHAM, J. We think this case is controlled by that of *Marston* v. *Swett*, reported upon two appeals to this court. See 66 N. Y. 206; 82 N. Y. 526.

The general and material features of the two cases are similar. In both there was an agreement on the part of the plaintiff to refrain from manufacturing, in consideration, among other things, of the promise of the defendant to pay the royalties. While continuing the manufacture under the license, the defendant ought not to escape liability to pay the royalties.

The defendant's counsel, it is true, seeks to distinguish this case from *Marston* v. *Swett*, *supra*, because, as he says, since the reissue of the patent in 1881, which he insists was wholly void, the defendant has no protection from the manufacture by others, for the reason that by the surrender of the patent of 1878 and the reissue of 1881 there was no valid patent in existence, and the consideration for the promise to pay royalties had therefore wholly failed.

There was consideration enough for the promise to pay such royalties, in that the plaintiff bound herself not to manufacture, and because the defendant could not be called to account as an alleged infringer while manufacturing under the license.

If it were a question of the validity of the reissue of 1881, and a

Statement of the Case.

The defendant sued out this writ of error; and assigned for error, that the State courts, both of original and of appellate

---

decision of that question were necessary to the decision of this case, the defendant is, of course, correct in his claim that a state court has no jurisdiction to determine such an issue; but within the decision of the *Marston case* no such question arises. The defendant has protection enough to base its promise to pay royalty upon, as long as it so conducts itself towards the plaintiff as to prevent her from treating it as an infringer. In other words, so long as the defendant continues to manufacture under its license (the patent not having been legally annulled), and thus elects to treat the agreement as in existence, it prevents the plaintiff from treating the defendant in any other light than that of a licensee. If the defendant desired to repudiate any obligation under this agreement, it should have given notice to the plaintiff that it refused to longer recognize its binding force, and that it would thereafter manufacture under a claim of right founded upon the alleged invalidity of the patent. Otherwise, the defendant in claiming to manufacture under the license and refusing to pay the royalties thereunder would, if successful, prevent the plaintiff from recovering anything from it. She could not treat the defendant as an infringer, because it was manufacturing under a license from her; and she could not collect the royalties under the license (although herself refraining from manufacturing, as she had agreed), because the defendant would allege the invalidity of the patent, although continuing to manufacture under cover of a license from its owner. Such doctrine cannot stand a moment. Of course, as is said in the *Marston case*, from the time that the patent is annulled by proper legal proceedings no royalties could be collected, even though no notice of a repudiation of the agreement had been thereafter served.

There is another ground, upon which it seems to me this judgment might well rest. Under the clause in the agreement between the parties, which provided for a forfeiture of all rights thereunder if one party should wilfully violate one of its provisions, the plaintiff gave notice of such forfeiture to the defendant, based upon its refusal to pay the royalties which it had acknowledged to be due for the quarter ending October 31, 1881 (the very quarter in question here), an account of which it had rendered under the oath of its secretary, as provided for in such agreement. Subsequently to the service of such notice, the plaintiff withdrew the same at the request of the defendant and upon its promise to pay these very royalties which it had already acknowledged to be due. A failure to carry out such promise gives, as it seems to me, a good cause of action.

The defendant says, there was no consideration for such a promise, because there was no patent upon which to ground a license, and the defendant therefore had no license and no protection; but the plaintiff of course contended that the reissued patent was valid, and at the request of the defendant the plaintiff withdrew her notice of forfeiture of the license, and thus reinstated the defendant in its possession, and freed it from the liability to be proceeded against as an infringer and put to expense and

jurisdiction, had no power to entertain the issues in this action, because they involved directly and solely the validity of the letters patent reissued by the United States to the plaintiff on September 27, 1881. The defendant moved to dismiss the writ of error for want of jurisdiction, and also moved to affirm the judgment.

Mr. George W. Van Slyck for the motions.

Mr. Edward D. McCarthy opposing.

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

The defendant contended in the courts of New York that those courts had no jurisdiction, because the plaintiff's right to maintain her action depended upon the question whether the second reissue of her patent was valid or invalid under the patent laws of the United States, and that of that question the courts of the United States had exclusive jurisdiction. The judgments of each court of the State, holding that the question of the validity of that reissue could not be contested in this action, and assuming jurisdiction to render judgment against the defendant, necessarily involved a decision against the immunity claimed by the defendant under the Constitution and laws of the United States, which this court has jurisdiction to review.

The motion to dismiss must therefore be denied. But the decision was so clearly right, that the motion to affirm is granted.

The action was upon an agreement in writing, by which the plaintiff, as owner of letters patent, already once reissued, granted to the defendant an exclusive license to make and sell the patented articles within a certain territory, during the

---

inconvenience in the defence of such a litigation. This was saved at the request of the defendant, and upon its special promise to pay the royalties. Plainly here was a good and sufficient consideration for the defendant's promise.

The judgment should be affirmed, with costs. All concur.

term of the patent and of any extension or renewal thereof; and the defendant expressly acknowledged the validity of the letters patent, and stipulated that the plaintiff might, without prejudice to this agreement, obtain further reissues, and promised to pay to the plaintiff certain royalties so long as no decision adverse to the validity of the patent should have been rendered.

The defendant contended that this was a case arising under the patent laws, of which the courts of the United States have exclusive jurisdiction. Rev. Stat. § 629, cl. 9; § 711, cl. 5. But it is clearly established by a series of decisions of this court, that an action upon such an agreement as that here sued on is not a case arising under the patent laws.

It has been decided that a bill in equity in the Circuit Court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of Congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; Rev. Stat. § 699; *Wilson* v. *Sandford*, 10 How. 99; *Brown* v. *Shannon*, 20 How. 55.

Following those decisions, it was directly adjudged in *Hartell* v. *Tilghman*, 99 U. S. 547, that a bill in equity by a patentee, alleging that the defendants had broken a contract by which they had agreed to pay him a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition, and he filed this bill charging them as infringers, and praying for an injunction, an account of profits, and damages, was not a case arising under the patent laws, and therefore, the parties being citizens of the same State, not within the jurisdiction of the Circuit Court of the United States. And the judges who dissented from that conclusion admitted it to be perfectly well settled "that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises

on the contract, or out of the contract, and not under the patent laws." 99 U. S. 558.

In the still later case of *Albright* v. *Teas*, 106 U. S. 613, a patentee filed a bill in equity in a State court, setting up a contract by which he agreed to assign his patent to the defendants and they agreed to pay him certain royalties, and alleging that the defendants had refused to account for or pay such royalties to him, and had fraudulently excluded him from inspecting their books of account. The defendants answered that the plaintiff had been paid all the royalties to which he was entitled, and that, if he claimed more, it was because he insisted that goods made under another patent were an infringement of his. This court held that it was not a case arising under the Constitution or laws of the United States, removable as such into the Circuit Court under the act of March 3, 1875, c. 137, § 2. 18 Stat. 470.

It was said by Chief Justice Taney in *Wilson* v. *Sandford*, and repeated by the court in *Hartell* v. *Tilghman*, and in *Albright* v. *Teas*, "The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles." 10 How. 101, 102; 99 U. S. 552; 106 U. S. 619.

Those words are equally applicable to the present case, except that, as it is an action at law, the principles of equity have no bearing. This action, therefore, was within the jurisdiction, and, the parties being citizens of the same State, within the exclusive jurisdiction, of the State courts; and the only federal question in the case was rightly decided.

Upon the merits of the case, it follows from what has been already said, that no question is presented, of which this court, upon this writ of error, has jurisdiction. *Murdock* v. *Memphis*, 20 Wall. 590. The grounds of the judgment below appear in the opinion of the Court of Appeals, to which, under the existing acts of Congress, this court is at liberty to refer.

Philadelphia Fire Association v. *New York*, 119 U. S. 110; *Kreiger* v. *Shelby County Railroad*, *ante*, 43. Whether that court was right in its suggestion that it would have no jurisdiction to determine the validity of the second reissue if incidentally drawn in question in an action upon an agreement between the parties, we need not consider; inasmuch as it expressly declined to pass upon any such question, because it held that, in this action to recover royalties due under the agreement, the defendant, while continuing to enjoy the privileges of the license, was estopped to deny the validity of the patent, or of any reissue thereof. The decision was based upon the contract between the parties; and the court did not decide, nor was it necessary for the determination of the case that it should decide, any question depending on the construction or effect of the patent laws of the United States. *Kinsman* v. *Parkhurst*, 18 How. 289; *Brown* v. *Atwell*, 92 U. S. 327.

Judgment affirmed.

FELIX *v.* SCHARNWEBER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 1255. Submitted January 16, 1888. — Decided March 19, 1888.

At the time of an action in a State court upon an agreement to pay royalties for making and selling a patented machine, evidence that the plaintiff afterwards made improvements in the machine, and that machines made and sold by the defendant upon a later model furnished by a third person were substantially like that mentioned in the agreement, was admitted, notwithstanding the defendant objected to it as going to show that the plaintiff invented the new machine, and as collaterally attacking a patent to the third person. No patent had then been introduced; and no ruling was requested or made upon the validity or construction of any patent, or upon the legal effect of the evidence. The jury were instructed that the plaintiff was entitled to recover royalties only upon machines substantially like that mentioned in the agreement. A verdict was returned for the plaintiff, and judgment rendered thereon, which was affirmed by the highest court of the State. *Held*, that the record presented no federal question within the jurisdiction of this court on writ of error.

Statement of the Case.

A federal question, within the jurisdiction of this court on writ of error to the highest court of a State, cannot be originated by a certificate of the chief justice of that court, if no such question appears by the record to have been involved in the judgment.

THIS was an action of assumpsit, brought in the Circuit Court of Cook County in the State of Illinois by Scharnweber against Felix to recover royalties under the following contract signed by both parties:

"Memorandum of agreement between Benjamin F. Felix and William Scharnweber, both of the city of Chicago, made this 12th day of February, 1878, witnesseth: That whereas the said Benjamin F. Felix and William Scharnweber are joint proprietors of a certain patent for an improved rope reel, and it is mutually decided between them that the interests of both are best subserved by one of them having exclusive control of the manufacture and sale of said reel: It is hereby agreed that the said Benjamin F. Felix shall make such arrangements as may appear most desirable to him for their manufacture, and supervise and direct solely their sale. On each and every rope reel sold, the said William Scharnweber is to receive a royalty of one dollar, to be paid to him on the last business day of each and every month. The said William Scharnweber agrees not to manufacture any rope reels whatever, or cause them to be manufactured, but can make sales and report the same to Benjamin F. Felix, or Felix, Marston & Blair, who will deliver and collect for the same."

The defendant pleaded non assumpsit, with notice that he would prove a failure of consideration by the plaintiff's manufacturing rope reels and selling them to third persons.

At the trial, the plaintiff offered evidence that at first the reels made under the contract worked satisfactorily, but afterwards the defendant complained to him that they had too many coils and needed larger rolls; that thereupon, in January, 1879, he made and showed to the defendant a model of a reel with little pieces of cast iron on the wooden roller, so as to form a screw to hold the flanges; and that reels subsequently sold by the defendant, made from a later model furnished by one Mason, were of the same construction, except in

being wholly of iron, and that there was no difference in principle between them. The defendant objected to the admission of this evidence, as going to show that the plaintiff invented the new style of reel, and as collaterally attacking another patent. The court admitted the evidence, and the defendant excepted to its admission.

The defendant afterwards offered in evidence a patent issued to Mason on June 10, 1879, for the iron reel, "for the purpose of showing, or tending to show, that this reel was not the same reel as that patented on January 29, 1878, and referred to in the contract." The plaintiff objected to its admission, on the ground that it had nothing whatever to do with this suit on the contract. But the court admitted it.

The defendant also put in evidence the patent of January 29, 1878, to Felix and Scharnweber; as well as evidence tending to show that the old style of reel did not work well, and was unsatisfactory to purchasers; and called Mason as a witness, who testified that he invented the reel described in his patent.

It was admitted on both sides that the defendant had made and sold 335 of what he called the old style or original style of rope reels, on which he had paid the plaintiff a royalty of one dollar each, and 2164 of what the defendant called the new style, on which no royalty had been paid.

The court instructed the jury that if they should find from the evidence that the plaintiff and defendant executed the contract sued on, and that the defendant thereafter sold rope reels such as or substantially like the rope reel mentioned in the contract, the plaintiff was entitled to recover under the contract for all such rope reels sold by the defendant, if any.

The defendant excepted to this instruction, and requested the court to instruct the jury as follows:

"This is an action on a contract for royalty claimed upon the sale of certain rope reels invented by the plaintiff and sold by defendant or his firm. Under this contract, as alleged in the declaration, the defendant is liable only for royalty unpaid, if any, on such reels sold by him or his said firm as are contemplated or covered by the terms of the contract. He is not

liable in this suit for royalty on any other [and] different reels, whether invented by him, by the plaintiff, or any one else."

The court at first refused to give this instruction; and the defendant excepted to the refusal. The court then modified the instruction requested, by inserting the word "and," as above printed in brackets, and gave the instruction so modified. The bill of exceptions contained these further statements:

"To which action of the court in modifying said instruction the defendant duly excepted.

"Thereupon the court further charged the jury for the defendant as follows: Therefore, unless you find from the evidence that the defendant owes to the plaintiff royalty upon a sale of the original Scharnweber reels made substantially as these reels were made at the date of the contract between the parties, then your verdict should be for the defendant.

"No other instructions were given to the jury by the court."

The jury returned a verdict for the plaintiff in the sum of $2255. The defendant moved for a new trial; but, upon the plaintiff's remitting the sum of $91 from the verdict, the court overruled the motion. The defendant excepted to this ruling, and judgment was rendered upon the verdict.

The defendant appealed to the Appellate Court for the First District of Illinois, assigning for error the admission of incompetent evidence for the plaintiff, and the charge to the jury. The Appellate Court affirmed the judgment.

The defendant then appealed to the Supreme Court of Illinois, which affirmed the judgment of the Appellate Court, and in the opinion filed with its clerk held, that the charge of the court to the jury was as full and favorable to the defendant as the law would warrant, inasmuch as it confined the issue to the number of reels sold under the contract, and the question of fact how many machines were sold by the defendant under the contract was conclusively settled by the findings of the lower courts; and that in the admission of the testimony objected to by the defendant there was no error, certainly none that could affect the merits of the case under the instructions given to the jury. 119 Illinois, 445.

A writ of error was allowed by the acting Chief Justice of the Supreme Court of Illinois, upon the petition of the defendant, representing that in said case in that court the defendant set up and relied on the patent granted by the United States to Mason on June 10, 1879, the validity of that patent was assailed, and the decision was against the rights and privileges set up by the defendant under it; and also that in said proceedings he alleged that the jurisdiction to try the questions so involved was exclusively in the courts of the United States, and the decision of the court was against him. The plaintiff moved to dismiss the writ of error for want of jurisdiction.

Mr. Henry Decker for the motion.

Mr. Preston C. Cook and *Mr. John A. Jameson* opposing.

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

This record does not present any federal question. No such question is stated in the pleadings, involved in the rulings at the trial or in the final judgment, or mentioned in the opinion of the Supreme Court of Illinois.

The action was brought upon a contract in writing between the parties, being the joint owners of a patent for an improved rope reel, by which it was agreed that the defendant should have the exclusive control of the manufacture and sale of the reel, paying to the plaintiff a certain royalty on each reel sold. This was not a case arising under the patent laws of the United States, within the exclusive jurisdiction of the federal courts; *Dale Tile Manufacturing Co.* v. *Hyatt*, *ante*, 46; and no suggestion that it was appears by the record to have been made in either of the courts of the State.

The only exceptions taken by the defendant at the trial were to the admission of evidence offered by the plaintiff, and to the instructions given by the court to the jury.

But that evidence does not appear to have been admitted for any other purpose than to show that the reels made and

sold by the defendant were substantially like those mentioned in the agreement sued on. At the time of its admission, no letters patent were in the case. The question at issue was not of priority of invention, or of the validity or construction of any patent, but simply whether the reels made and sold by the defendant were such as, or substantially like, those mentioned in his contract with the plaintiff; and in the instructions to the jury the plaintiff's right of recovery was carefully limited to such reels. The patent to Mason was introduced in evidence afterwards, and by the defendant himself, against the plaintiff's objection; and no ruling upon the validity or the construction of either patent, or upon the legal effect of the evidence, was requested by the defendant, or made by the court.

The petition, upon which the writ of error was allowed by the acting Chief Justice of the Supreme Court of Illinois, does indeed represent that the patent to Mason was set up by the defendant and its validity assailed, and that the defendant also alleged that the jurisdiction to try the questions involved was exclusively in the courts of the United States, and that the decision of the State court was against him on both these points.

But in allowing a writ of error from this court to the highest court of a State, and in issuing a citation, the Chief Justice of that court does but exercise an authority vested by Congress in him concurrently with each of the Justices of this court. Rev. Stat. § 999; *Gleason* v. *Florida*, 9 Wall. 779; *Bartemeyer* v. *Iowa*, 14 Wall. 26. When counsel applying for the allowance of the writ of error insist that a federal question has been decided against the plaintiff in error, the Chief Justice of the State court may feel bound to allow the writ, for the purpose of submitting to the final determination of this court whether such a question was necessarily involved in the judgment sought to be reviewed. But his certificate that such a question arose and was decided against the plaintiff in error cannot supply the want of all evidence to that effect in the record. As has been more than once observed by this court, "the office of the certificate, as it respects the

federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question." *Parmelee* v. *Lawrence*, 11 Wall. 36, 39; *Brown* v. *Atwell*, 92 U. S. 327, 330. See, also, *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123, 129.

Writ of error dismissed for want of jurisdiction.

BANK OF REDEMPTION *v.* BOSTON.

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

No. 1324. Argued February 14, 1888. — Decided March 19, 1888.

The question of exemption from taxation of deposits in savings banks, as affecting the rule for the state taxation of national bank shares, was very deliberately considered by this court in *Mercantile Bank* v. *New York*, 121 U. S. 138; and the conclusion reached in that case was reaffirmed in *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83; and it is impossible to distinguish this case from those cases.

The laws for the taxation of national banks in Massachusetts, Mass. Pub. Stats. c. 13, §§ 8, 9, 10, do not deny to the banks as taxpayers the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States; and do not impose a disproportionate and unequal tax upon them in violation of the provisions of the constitution of that State.

It is the manifest intent of Rev. Stat. § 5219, to permit the State in which a national bank is located to tax all the shares in its capital stock without regard to ownership, subject only to the limitations prescribed in that section; and in this case the law permits the taxation of the shares in the bank of the plaintiff in error which are owned by other national banks, on the same footing with all other shares.

This was an action at law, in contract, to recover taxes alleged to have been illegally assessed. Judgment for defendant. Plaintiff sued out this suit of error. The case is stated in the opinion of the court.

Mr. George S. Hale for plaintiff in error. *Mr. Willard Brown* and *Mr. Charles W. Wells* were with him on the brief.

Mr. G. F. Hoar and *Mr. A. J. Bailey* for defendant in error.

Opinion of the Court.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

This is an action at law, brought by the plaintiff in error, a national bank located in Boston, to recover from the city of Boston the amount of $14,464, paid to the tax collector of the city, upon demand, he then holding a tax list and warrant for its collection, after a protest in writing; being an amount which it alleges was illegally assessed on its shares at $12.80 per $1000 of valuation, in violation of § 5219 of the Revised Statutes, of the 14th Amendment to the Constitution, and of the provisions of the Constitution of the State of Massachusetts. The cause was submitted to the court without the intervention of a jury. Judgment was rendered in favor of the defendant upon an agreed statement of facts. That judgment is brought here upon this writ of error.

The tax in question was levied under c. 13 of the Public Statutes of Massachusetts, relative to the taxation of bank shares, as follows:

"SEC. 8. All the shares of stock in banks, whether of issue or not, existing by authority of the United States or of the Commonwealth and located within the Commonwealth, shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere, in the assessment of all state, county, and town taxes, imposed and levied in such place, whether such owner is a resident of said city or town or not; all such shares shall be assessed at their fair cash value on the first day of May, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate and no greater than that at which other moneyed capital in the hands of citizens and subject to taxation is by law assessed. And the persons or corporations who appear from the records of the banks to be owners of shares at the close of the business day next preceding the first day of May in each year, shall be taken and deemed to be the owners thereof for the purposes of this section.

"SEC. 9. Every such bank or other corporation shall pay to the collector, or other person authorized to collect the taxes of the city or town in which the same is located, at the time in

each year when other taxes assessed in the said city or town become due, the amount of the tax so assessed in such year upon the shares in such bank or other corporation. If such tax is not so paid, the said bank or other corporation shall be liable for the same; and the said tax, with interest thereon at the rate of twelve per cent per annum from the day when the tax became due, may be recovered in an action of contract brought by the treasurer of such city or town.

"SEC. 10. The shares of such banks or other corporations shall be subject to the tax paid thereon by the corporation or by the officers thereof, and the corporation and the officers thereof shall have a lien on all the shares in such bank or other corporation, and on all the rights and property of the shareholders in the corporate property for the payment of said taxes."

From these sections it appears that —

1st. The shares in national banks are to be assessed at their fair cash value, after deducting therefrom the proportionate part of the value of the real estate belonging to the bank.

2d. They are to be assessed at the same rate and no greater than that at which other moneyed capital in the hands of citizens and subject to taxation is by law assessed.

3d. The bank itself, as a corporation, is made liable in the first instance for the payment of the taxes so assessed upon its shares belonging to its shareholders.

4th. If not paid when due, the bank is liable to an action for the recovery of the same, brought by the treasurer of the city or town in which it is located, with interest thereon at the rate of twelve per cent per annum from the day when the tax became due.

5th. For the payment of said taxes the corporation has a lien on all the shares in the bank and on all the rights and property of the shareholders in the corporate property, as an indemnity.

It further appears, from a comparison of the statutes on the subject, that the action given by § 9, for the recovery of the taxes, with interest at twelve per cent per annum, is the only mode of collection provided in case of default, no power being

given to any collecting officer to proceed by distraint or other seizure of the property of the bank or the shares of the stock for that purpose.

Chapter 11 of the Public Statutes of Massachusetts provides that personal property, for the purposes of taxation, shall include goods, chattels, money, and effects wherever they are, money at interest, and other debts due the persons to be taxed more than they are indebted or pay interest for, but not including in such debts or indebtedness any loan on mortgage of real estate taxable as real estate, except the excess of such loan above the assessed value of the mortgaged real estate; public stocks and securities; stocks in turnpikes, bridges, and moneyed corporations within or without the State; the income from an annuity, from ships and vessels engaged in the foreign-carrying trade, and so much of the income from a profession, trade, or other employment as exceeds the sum of $2000 a year; but no income shall be taxed derived from property subject to taxation, and no taxes shall be assessed upon the shares in the capital stock of a corporation organized or chartered in the Commonwealth which pays a tax upon its corporate franchises, except for school, district, and parish purposes. It is not disputed but that under these and other provisions of the law all personal estate included within this enumeration and real estate are taxable and were taxed upon their fair cash value at the same rate of $12.80 for each $1000 of value levied during the same period upon shares of capital stock of national banks located in Boston. The amount of personal property in the city of Boston taxed during that period and at that rate is stated to be $189,605,672. The aggregate value of shares in national banks in that city for the same year was $60,428,000.

Corporations chartered by the Commonwealth or organized under general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks, are subject to a tax upon their corporate franchises. For purposes of taxation, the law requires the corporate franchise in each case to be estimated at a valuation thereof equal to the aggregate value of the shares in its capital stock. The rate

of taxation is determined by an apportionment of the whole amount of money to be raised by taxation upon property in the Commonwealth during the same current year, as returned by the assessors of the several cities and towns, upon the aggregate valuation of all the cities and towns for the preceding year. From the valuation of the corporate franchise, there is to be deducted, in case of railroad and telegraph companies whose lines extend beyond the limits of the Commonwealth, such a portion of the whole valuation of their capital stock as is proportional to the length of that part of their line without the Commonwealth, and also an amount equal to the value of their real estate and machinery located and subject to local taxation within the Commonwealth; the same deduction as to real estate and machinery being made in case of other corporations.

Savings banks are required to pay to the treasurer of the State a tax on account of their depositors of one-half of one per cent per annum on the amount of their deposits, excluding so much of the deposits as are invested in real estate used for banking purposes, or in loans secured by mortgages on taxable real estate, and also for a certain period so much of the deposits as are invested in real estate, the title to which has been acquired by the completion of foreclosure or by purchase, and such deposits so taxed are otherwise exempt from taxation in the hands of their owners.

Life insurance companies are required to pay an excise tax at the rate of one-quarter of one per cent per annum upon a valuation equal to the aggregate net value of all policies, in force on the last day of the year next preceding, held by residents of the Commonwealth. All other insurance companies pay a tax, by way of excise, of one per cent on all premiums received during the year for insurance, and one per cent on all assessments made by such companies upon policy holders.

The Massachusetts Hospital Life Insurance Company is required to pay a tax upon all deposits, trust funds, or funds held for purposes of investment, except upon deposits invested in loans secured by mortgages on taxable real estate, the same

rate of tax imposed upon savings banks on account of deposits; and the same rule applies to all trust companies, safe deposit and trust companies, banking and trust companies, loan and trust companies, and other moneyed corporations incorporated in the Commonwealth. The American Bell Telephone Company is subjected to a franchise tax, based upon an apportionment made upon the number of telephones in use by it, or under its authority, or with its permission, or under letters patent owned or controlled by it, within and without the Commonwealth, respectively, deducting the market value of all stocks in other corporations held by it upon which a tax has been assessed and actually paid, either in Massachusetts or in other States, for the preceding year.

Savings banks, under the laws of the Commonwealth, are authorized to receive deposits from any person until they amount to $1000, and to allow interest thereon to be compounded until the principal with the accrued interest amounts to $1600, no interest to be paid on any greater sum. The deposits are to be invested only as follows: 1st. In first mortgages of real estate situated in the Commonwealth to an amount not to exceed sixty per cent of the valuation of such real estate, but not exceeding seventy per cent of the whole amount of deposits. 2d. In public funds of the United States and of certain enumerated States and municipal corporations, or in the notes of any citizen of the Commonwealth secured by a pledge of any such securities at their par value. 3d. In the first mortgage bonds of certain descriptions of railroad companies, or in the notes of any citizen of the Commonwealth, secured by a pledge of any such securities at not less than eighty per cent of the par value thereof. 4th. In certain bank stocks, including the stocks of national banks located in the New England States, or in the notes of any citizen with such bank stocks as collateral security, at not more than eighty per cent of the market value thereof, and not exceeding the par value thereof, but the amount of such investments in such bank stocks is specifically limited. 5th. In loans upon the personal notes of depositors of the corporation, not exceeding one-half of the amount of the deposit, in which case

the deposit is held as collateral security for the payment of the loan. 6th. If the deposits cannot be conveniently invested in the modes heretofore named, not exceeding one-third part thereof may be invested in bonds or other personal securities payable at a time not exceeding one year, with at least two sureties, all of whom are to be citizens of the Commonwealth and residents therein. 7th. Ten per cent of the deposits of any such corporation, not exceeding $200,000, may be invested in the purchase of a suitable site and building for the transaction of its business. 8th. Any such corporation may hold real estate acquired by the foreclosure of any mortgage owned by it or by purchase at sales made under the provisions of any such mortgage, or for the satisfaction of debts due to it, but all such real estate shall be sold within five years after the title is vested in the corporation.

The particular in which the plaintiff in error chiefly insists that the tax imposed upon its shares is at a greater rate than that assessed upon other moneyed capital in the hands of individual citizens of Massachusetts, is the alleged inequality existing in favor of that imposed upon savings banks. The contrast of which this inequality is the result is stated to be as follows, viz.: That in 1885 a tax of $1,564,995 was collected upon national bank shares in Massachusetts of the value of $113,000,000, while upon $163,000,000 of savings bank deposits in the same year there was collected as a tax only $815,930.

In view of the state of the question, as fixed by the previous decisions of this court, it is not perhaps very material now to inquire whether this alleged contrast between the taxation of national bank shares and of savings banks in Massachusetts is real or only apparent. There are several particulars which might be mentioned, and which, when properly allowed for, would certainly reduce the apparent inequality. There is only one, however, which we deem it important to notice. The tax on savings banks is based upon deposits merely. This is because deposits furnish the only capital which is invested and employed. The institutions themselves, although corporations, have no capital stock, and are managed by trustees, not selected by the depositors, but by public authority. The

whole amount of the deposits, with the exceptions noted, are subjected to a tax of one-half of one per cent. On the other hand, the national banks pay a tax assessed upon the market value of the shares as personal property, upon a valuation and at a rate exactly equal to that of all other personal property subject to taxation in the State. But shares of the national banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these deposits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the two modes of taxation. The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of national bank shares, was very deliberately considered by this court in the case of *Mercantile Bank* v. *New York*, 121 U. S. 138, 160; and the conclusion reached in that case was reaffirmed in the case of *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83. In the former case deposits in savings banks in the State of New York to the amount of $437,107,501, with an accumulated surplus, in addition, of $68,669,001, were exempted by the laws of the State from all taxation, neither the bank itself nor the individual depositor being taxed on account thereof. It was said in that case (p. 161): "However much, therefore, may be the amount of moneyed capital in the hands of individuals in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens, otherwise subject to taxation."

It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or of those of Iowa considered in the case of the Davenport Bank. The

principal distinction, indeed, between the case of the New York savings banks and those of Massachusetts, involved in the present inquiry, is that the latter pay a tax of one-half of one per cent on the amount of their deposits, while the New York banks were exempt from all taxation whatever.

The argument on behalf of the plaintiff in error, indeed, seeks to establish another distinction. It is alleged that in Massachusetts savings banks are permitted to transact a banking business in the way of loans upon personal securities, which assimilates them more closely to national banks, and takes away the reason for the application of the rule to them which was applied to the case of the savings banks of New York. But the difference mentioned, if it exists at all, is immaterial; the main purpose and chief object of savings banks, as organized under the laws of Massachusetts, are the same as those in New York, as considered in the case of the Mercantile Bank. They are substantially institutions, under public management, in pursuance of a great and beneficial public policy, organized for the purpose of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided, which forecloses further discussion as to the present point in this case.

A similar objection to the tax in question, founded on a comparison of the taxation of national bank shares with that of insurance companies and trust companies, the American Bell Telephone Company, and the Massachusetts Hospital Life Insurance Company, is equally untenable. Within the definition of that phrase, established in the case of the *Mercantile Bank* v. *New York*, 121 U. S. 138, the interest of individuals in these institutions is not moneyed capital. The investments made by the institutions themselves, constituting their assets, are not moneyed capital in the hands of individual citizens of the State. *People* v. *Commissioners*, 4 Wall. 244.

It is further contended, however, on the part of the plaintiff in error, that the taxation in question is not only at a greater rate than that imposed upon other moneyed capital held by individual citizens, but that it is repugnant to the 14th Amend-

ment to the Constitution of the United States, because it operates to deny to the taxpayer the equal protection of the laws, and also that it is disproportionate and unequal, in violation of the provisions of the constitution of Massachusetts. The two branches of this proposition are equivalent; if the tax is not disproportionate and unequal, within the meaning of the constitution of the State, the taxpayer is not denied the equal protection of the laws within the sense of the 14th Amendment. The point is fully met by the reasoning and judgment of the Supreme Judicial Court of Massachusetts in the cases of the *Providence Institution for Savings* v. *City of Boston*, and *Pliny Jewell* v. *City of Boston*, 101 Mass. 575, 585.

Another point to be noticed arises upon the third count of the declaration. It is therein alleged that other national banking associations, some located in Massachusetts and others in the several New England States, are the owners of 1448 shares of the capital stock of the National Bank of Redemption, on which the amount of tax paid was $2051. It is urged in argument that these shares are not taxable by virtue of § 5219 of the Revised Statutes. The language of the section is: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It is contended that no tax is thereby authorized upon the national bank itself as a corporation, nor upon the personal property of any such, and that, therefore, these shares in the National Bank of Redemption are exempt from taxation by virtue of their ownership. This, however, is not a reasonable

interpretation of the language of the section. The manifest intention of the law is to permit the State in which a national bank is located to tax, subject to the limitations prescribed, all the shares of its capital stock without regard to their ownership. The proper inference is, that the law permits, in the particular instance, the taxation of the national banks owning shares of the capital stock of another national bank by reason of that ownership, on the same footing with all other shares.

Other questions have been raised by counsel for the defence. The right of the plaintiff to sue is denied, on the ground that the right of action belongs to the owners of the shares taxed; the right of recovery is denied, on the ground that the payment by the plaintiff was voluntary, and the right of action, if it exists, it is alleged is against the collecting officer, and not the city of Boston. These questions we have not considered it necessary to examine or decide, preferring to rest our judgment upon the validity of the tax.

The judgment of the Circuit Court is accordingly

Affirmed.

MR. JUSTICE BRADLEY, MR. JUSTICE GRAY, and MR. JUSTICE BLATCHFORD did not sit in this case or take any part in the decision.

ARTHUR'S EXECUTORS *v.* BUTTERFIELD.

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

No. 167. Argued February 6, 1888. — Decided March 19, 1888.

"Goat's hair goods," composed of 80 per cent of goat's hair and 20 per cent of cotton, used chiefly for women's dresses, and which were imported into the United States between January 24, 1874, and June 25, 1874, were subject to the duty imposed by the act of July 14, 1870, 16 Stat. 264, c. 255, § 21, upon "manufactures of hair not otherwise herein provided for," as modified by the act of June 6, 1872, 17 Stat. 231, and

not to the duty imposed by the act of March 2, 1867, 14 Stat. 561, c. 197, § 2, upon "women's and children's dress goods and real or imitation Italian cloths, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other like animals"—it being found by the jury that they were not known in commerce among merchants and importers as "women's and children's dress goods."

In the absence of a settled designation of a cloth by merchants and importers, its designation as hair, silk, cotton, or woolen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material.

The words "not otherwise herein provided for" in a section in a customs revenue act, mean not otherwise provided for in that act.

To place an article among those designated as "enumerated," so as to take it out of the operation of the similitude clause of the customs revenue laws, Rev. Stat. § 2499, it is not necessary that it should be specifically mentioned.

The words "manufactures of hair" are a sufficient designation to place such manufactures among the enumerated articles.

THIS was an action at law to recover customs duties alleged to have been illegally exacted. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiffs in error.

Mr. George Bliss for defendants in error.

MR. JUSTICE FIELD delivered the opinion of the court.

This action was brought by the plaintiffs below to recover of the late collector of the port of New York certain sums of money alleged to have been illegally exacted as duties on goods imported by them. It was tried in the Circuit Court of the United States for the Southern District of New York, where the plaintiffs recovered a verdict, and to review the judgment entered thereon the executors of the collector, since deceased, have sued out this writ of error.

The complaint describes the goods imported in general terms as manufactures of hair. There were fourteen importations between the 24th of January and the 25th of June, 1874. Upon the goods, which were styled "goat hair goods," the

collector assessed duties under provisions of the act of March 2, 1867, c. 197, § 2, 14 Stat. 561, "to provide increased Revenue from imported Wool, and for other Purposes," relating to women's and children's dress goods, and real or imitation Italian cloths, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other like animals, at six cents a square yard and thirty-five per centum *ad valorem* upon such as were valued at not more than twenty cents a square yard, and at eight cents a square yard and forty per centum *ad valorem* upon such as were valued at more than twenty cents a square yard.

The plaintiffs contended that this assessment of duties was erroneous; that the duties should have been assessed under the 21st section of the act of July 14, 1870, "to reduce internal Taxes, and for other Purposes," 16 Stat. 264, c. 255, § 21, as the goods were within its terms "manufactures of hair not otherwise provided for," and that a reduction thereon should be made of ten per centum, under the act of June 6, 1872. 17 Stat. 231. That section provides that "after the thirty-first day of December, eighteen hundred and seventy, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties, that is to say: . . . On hair cloth of the description known as hair seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard. On hair cloth known as crinoline cloth, *and on all other manufactures of hair not otherwise provided for*, thirty per centum *ad valorem*."

By the joint resolution of January 30, 1871, this clause was amended by the insertion of the word "herein," between the words "otherwise" and "provided." 16 Stat. 592.

The reduction of ten per cent under the act of June 6, 1872, was made upon such of the invoices as were produced, but most of the invoices had been mislaid. It was not, therefore, shown that such reduction had been made upon all of them.

On the trial it appeared that the "goat hair goods" are

fabrics manufactured of cotton, and the hair of the angora, or other goat, the warp being cotton and the woof being goat's hair; that their chief use is for women's dresses; that they are known in the trade under such specific names as brilliantines, lustrines, alpacas, and mohairs; that the goat's hair of which they are composed in part constitutes eighty per cent of the whole value, and the cotton twenty per cent.

It also appeared that crinoline cloth is made of cotton and hair, the long hair being from the tail or mane of the horse and woven into a cotton warp, the width being governed by the length of the hair, and that it is used for ladies' underwear; that hair seating is a similar fabric to crinoline cloth, the only difference being that it is more closely woven, and is used mainly for upholstering purposes.

Evidence was offered by the defendant tending to show that the goat hair goods are generally known in the trade and commerce of the country under the name of women's dress goods; but on this point the evidence was conflicting, some of the witnesses stating that they were known by their specific names as brilliantines and alpacas, and some that they were at the time of importation known as women's dress goods.

It was stipulated, for the purpose of the trial, that if the jury should render a verdict for the plaintiff it should be subject to adjustment as to formal requisites and amounts at the custom-house, under the direction of the court. And to raise the questions involved it was also stipulated, as to one of the importations that the plaintiffs had paid the duties assessed and in due time filed their written protest, appealed to the Secretary of the Treasury, and brought this action.

When the evidence was closed, the court was requested to direct a verdict for the defendant on the ground that such goat hair goods were:

1st. Women's dress goods, composed wholly or in part of the hair of the alpaca, goat, or other like animal;

2d. That they were not manufactures of hair, but were manufactures of mixed materials, and by the similitude clause were liable to duty as manufactures of cotton, the latter being assessed at a higher rate of duty than that prescribed for manufactures of hair; and,

3d. That under the act of 1870, the terms "all other manufactures of hair not otherwise provided for," meant other manufactures of hair, like those enumerated in the same section, namely, crinoline cloth or hair seating, and that there was no evidence that the goat hair goods were like them.

The court overruled the motion, and the defendant excepted. It then instructed the jury in substance as follows: That under the act of 1867, which remained in force until 1870, there was assessed a certain duty on women's and children's dresses composed wholly or in part of wool, worsted, hair of the alpaca, goat, and other like animals; that in 1870 the law was changed in some respects, so as to make the duty assessable on hair cloth, known as crinoline cloth, and all other manufactures of hair, at a less rate; that the goods upon which the duties were assessed in this case were manufactures principally of hair; that the principal value of them was of hair; that according to the evidence eighty per cent was of hair and twenty per cent of cotton; that the general language of the act of 1870 would control and guide in the assessment of duties upon them, unless they had, before the passage of the act, come to be specifically known as dress goods among merchants and importers; that the question, therefore, was whether they had acquired such a name in the trade and commerce of the country as to be specifically known by it, instead of the general name of manufactures of hair; that if they had not acquired such specific name, and were not known by it, they would come under the general name of manufactures of hair, and the plaintiffs would be entitled to recover; and that on the other hand if they had acquired such specific name, and were known by it in trade and commerce, the defendant would be entitled to a verdict.

The defendant took various exceptions to this charge, and in this court presents anew the questions raised upon the instructions refused.

The instructions were in our opinion properly refused, and the case was presented to the jury as fully as was required for their appreciation of the question involved. The goods were composed of eighty per cent of hair, and there is no provision

of law, to which our attention has been drawn, that takes goods thus composed, not having a specific commercial designation, from the general designation as manufactures of hair. The finding of the jury is conclusive that they were not known in commerce, among merchants and importers, as women's and children's dress goods. It is well settled that a designation of an article of commerce by merchants and importers, when clearly established, determines the construction of a revenue law when that article is mentioned. It was so held in *Arthur* v. *Morrison*, 96 U. S. 108, and in many other cases, which are cited in the opinion of the court in that case. In *Elliott* v. *Swartwout*, 10 Pet. 137, 151, the court said that "laws imposing duties on importations of goods are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. This rule is fully recognized and established by this court in the case of *Two Hundred Chests of Tea*, reported in 9 Wheat. 438."

The fact that twenty per cent of cotton entered into the composition of the goods, and only eighty per cent of them are of hair, does not change their character as manufactures of hair within the meaning of the act of 1870. Crinoline and hair seating, both of which are in that act specifically designated as hair cloth, have also cotton in their composition. The designation of a cloth, as hair, silk, or cotton, depends on the predominance of such article in its composition, and not upon absence of any other material.

The 21st section of the act of 1870 having been, as mentioned above, amended in 1871 by the insertion of the word "herein" between "otherwise" and "provided," the clause of the section is to be construed as though its language was that "after the 31st of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall be levied, collected, and paid the following duties and rates of duties,

that is to say: . . . On hair cloth of the description known as hair seating, eighteen inches wide or over, forty cents per square yard; less than eighteen inches wide, thirty cents per square yard. On hair cloth known as crinoline cloth, and *on all other manufactures of hair not otherwise herein provided for*, thirty per centum *ad valorem*." The words "all other manufactures of hair not otherwise herein provided for" mean not otherwise provided for in the act of which they are a part. *Smythe* v. *Fiske*, 23 Wall. 374. There is no provision in that act for other manufactures of hair than crinoline and hair seating. It therefore necessarily follows that if the goat hair goods in question are to be deemed manufactures of hair the duties are to be assessed in conformity with that act, and not according to the provisions of any other act.

The construction of the clause for which the government contends, if admitted, would lead to great embarrassment, if not insurmountable difficulty, in determining the duties to be assessed on many articles. Its position is, that by "all other manufactures of hair not otherwise provided for," is meant all other manufactures of hair similar to crinoline cloth and hair seating. If this be correct it would be impossible to say at what rate of duty such other manufactures of hair are to be assessed, whether by the square yard rate or the *ad valorem* rate. The two rates could not be indifferently applied. The natural meaning of the section is that on crinoline cloth an *ad valorem* duty shall be assessed, and a similar duty on all other manufactures of hair not otherwise provided for in the act.

The similitude clause can have no bearing on the question. That clause only provides that there shall be levied on each non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated as chargeable with duty, the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars mentioned. Rev. Stat. § 2499. To place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles. Thus the

words "manufactures of which steel is a component part," and "manufactures of which glass is a component part," have been held a sufficient designation to render the goods enumerated articles under the statute, and take them out of the similitude clause. *Arthur* v. *Sussfield*, 96 U. S. 128. Upon the same principle "manufactures of hair" must be held a sufficient designation to place such manufactures among the enumerated articles.

Judgment affirmed.

CUNNINGHAM *v.* NORTON.

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

No. 74. Argued November 17, 1887. — Decided March 19, 1888.

Whether, in a deed of assignment by a debtor for the benefit of creditors made under a state statute, a disregard of and departure from some directions of the statute shall invalidate the assignment or only make the varying provision in it void, will depend upon the general policy of the statute — whether it is intended to restrain or to favor such assignments.

A provision in an assignment by a debtor for the benefit of his creditors under the statute of the State of Texas of March 24, 1879, Rev. Stat. Texas, 1879, App. 5, that any surplus shall be paid to the debtor, made in violation of the direction in § 16 of the statute that such surplus shall be paid into court, does not affect the validity of the assignment, but only invalidates the violating provision.

The words "all his lands, tenements, hereditaments, goods, chattels, property, and choses in action of every name, nature and description, wheresoever the same may be, except such property as may be by the constitution and laws of the State exempt from forced sale," are a sufficient description to convey all the debtor's estate, under the Texas statute of March 24, 1879, regulating assignments by insolvent debtors.

A statement in a deed of assignment by a debtor for the benefit of his creditors, that he "is indebted to divers persons in considerable sums of money which he is at present unable to pay in full" is a declaration of the insolvency of the grantor.

THIS was an action in the nature of trespass brought by an assignee of an insolvent debtor against a marshal of the

United States for levying upon goods of the debtor covered by the deed of assignment. The defendant contested the validity of the assignment. Judgment for defendant. 15 Fed. Rep. 853. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. W. Hallett Phillips for plaintiff in error.

Mr. D. A. McKnight for defendants in error. *Mr. E. John Ellis* and *Mr. John Johns* were with him on the brief.

Mr. M. L. Crawford also filed a brief for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

This action is in the nature of an action of trespass, brought by an assignee for the benefit of creditors against the marshal of the United States for the Northern District of Texas, for seizing, levying on and converting certain goods of one Wallace, which had been assigned to the plaintiff. The seizure by the marshal was made under an attachment issued out of the Circuit Court, at the suit of Naumberg, Kraus, Lauer & Co., who are also defendants in the present action. The plaintiff, in his petition, sets out his ownership, as derived under a deed of assignment, a copy of which is attached, and is in the words and figures following, to wit:

"The State of Texas, Kaufman County:

"This indenture, made the 24th day of October, A.D. 1881, between S. W. Wallace, of the first part, I. G. Lawrence, of the second part, and the several creditors of the party of the first part who shall hereafter accede to these presents, of the third part, witnesseth: That whereas the party of the first part is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full, and he is desirous to convey all his property for the benefit of his creditors:

"Now, the party of the first part, in consideration of the

premises and of one dollar paid to him by the party of the second part, hereby grants, bargains, sells, assigns and conveys unto the party of the second part and his heirs and assigns all his lands, tenements, hereditaments, goods, chattels, property and choses in action of every name, nature and description, wheresoever the same may be, except such property as may be by the constitution and laws of the State exempt from forced sale; to have and to hold the said premises unto the said party of the second part, his heirs and assigns, but in trust and confidence to sell and dispose of said real and personal estate, and to collect said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate as it respects making sales for cash or on credit, at public auction or by private contract, taking a part for the whole where the trustee shall deem it expedient so to do, then in trust to dispose of the proceeds of said property in the manner following, viz.:

"First. To pay the costs and charges of these presents and the expenses of executing the trusts herein declared, together with all taxes which are a charge upon any of said property.

"Second. To distribute and pay the remainder of the said proceeds to and among all the parties of the third part who will accept thereof in full satisfaction of their claims against said party of the first part ratably in proportion to their respective debts.

"Third. To pay over any surplus, after paying all the parties of the third part who shall accede hereto as aforesaid, in full, to the party of the first part, his executors, administrators or assigns; and the party of the first part hereby constitutes and appoints the party of the second part his attorney irrevocable, with power of substitution, authorizing him, in the name of the party of the first part or otherwise, as the case may require, to do any and all acts, matters and things to carry into effect the true intent and meaning of these presents which the party of the first part might do if personally present; and the party of the second part, hereby accepting these trusts, covenants to and with each of the other parties hereto to execute the same faithfully; and the party

of the first part hereby covenants with the said trustee, from time to time and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel to be necessary in order to carry into full effect the true intent and meaning of these presents; and the parties of the third part, by acceding hereto and by accepting the benefits herein conferred, hereby and thereby agree to and with the said party of the first part to release him from any and all claim or claims, debt or debts, demand or demands, of whatever nature, which they respectively have and hold against him; and this assignment is made for the benefit of such of the parties of the third part only as will consent to accept their proportional share of said estate of the said party of the first part, and discharge him from their respective claims.

"Witness our hands this 24th day of October, A.D. 1881.

"(Signed) "S. W. WALLACE.

"I. G. LAWRENCE."

The defendants filed an exception to the petition, in the nature of a demurrer, assigning therefor the following reasons, to wit:

"1st. Because the paper appended thereto and called an assignment or deed of assignment is not such in fact and does not on its face purport to convey to the creditors of S. W. Wallace, the grantor, all of his estate not exempt from forced sale for the benefit of his creditors.

"2d. Said deed is, only purports to be, for the benefit of such creditors as will accept it and release the said Wallace from his debts due to them, reserving to said Wallace all of the estate not used in the payment of said accepting creditors, and directing the plaintiff Lawrence to pay to him all that part of the estate not appropriated by the accepting creditors.

"3d. Said deed shows on its face that it was and is not an assignment under the statute, and that the trust was to be administered out of the court.

"4th. It is not shown or assigned that any creditors have accepted such assignment.

"5th. The petition shows that the creditors at whose suit the attachment was levied, to wit, Naumberg, Kraus, Lauer & Co., were and are non-residents of the State of Texas, and that they reside in New York.

"6th. Said deed does not show that said Wallace was insolvent or in contemplation of insolvency.

"7th. Said deed shows that the property pretended to be conveyed was to be disposed of by agents appointed by said Wallace or by his authority, and that Lawrence was but an agent and not a grantee."

This demurrer being sustained, the petitioner had leave to amend, and did so by an averment that after the execution of the assignment, and within the time allowed by law, the following named creditors of Wallace had come in and accepted under the same, to wit: Holt, Rivers & Corley, $108.40, [and 21 others named,] the total amount of whose claims aggregated over $14,000; and it was averred that the indebtedness so proven up against Wallace was largely in excess of the assets that came to the plaintiff's hands, including the property attached by the marshal.

The demurrer was still sustained, notwithstanding the amendment, and judgment was rendered for the defendants: to reverse which this writ of error was brought.

The assignment in question was made under a law of the State of Texas passed on the 24th of March, 1879, immediately after the repeal of the national bankrupt law, and evidently intended to take the place of that law, as well for the benefit of creditors as that of insolvent debtors. Its main object seems to have been to secure a speedy appropriation of all the property of an insolvent debtor, willing to make an assignment, to the payment of his debts, so far as it might be adequate for that purpose. As an encouragement to the making of such assignments, the law provides that, if the debtor so desires, he may make his assignment for the benefit of such creditors as will accept their proportional share of his estate and discharge him from their respective claims. And the

whole statute is evidently framed with a view to make the proceedings as simple as possible, and to obviate technical objections to their validity.

The principal provisions of the act, bearing upon the questions raised in this case, are as follows, to wit:

Section 1 declares that "every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided for, a distribution of all his real and personal estate, other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made or expressed shall have the effect aforesaid, and shall be construed to pass all such estate whether specified or not."

Section 2 requires an inventory to be annexed containing a list of all the creditors of the debtor, with their residence, the amount due to each, and the consideration thereof, and whether any judgment or security exists therefor, and an inventory of all the debtor's estate, with an affidavit of the truth thereof; but it is declared in § 10, that no assignment shall be declared fraudulent or void for want of any inventory or list; but it may be required by the assignee.

Section 3 enacts as follows: "Any debtor, desiring so to do, may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto; the debtor shall thereupon be and stand discharged from all further liability to such consenting creditors, on account of their respective claims, and when paid they shall execute and deliver to the assignee for the debtor a release therefrom."

Section 4 provides for notice of his appointment to be given by the assignee.

Section 5. "The creditors of the assignor consenting to such assignment shall make known to the assignee their consent in writing, within four months after publication of the notice provided in the preceding section, and no creditor not assent-

ing shall receive or take any benefit under the assignment; provided, however, that any creditor who had no actual notice of such assignment may make known his assent at any time before any distribution of assets, under the assignment, has been made."

Section 8. "Any creditor not consenting to the assignment may garnishee the assignee for any excess of such estate remaining in his hands after the payment of consenting creditors the amount of their debts, and the costs and expenses of executing the assignment."

Section 9 provides that property conveyed in contemplation of an assignment, with intent to defeat, delay or defraud creditors, or to give preferences, shall pass to the assignee notwithstanding such transfer, without affecting the validity of the assignment.

Section 16 declares that: "Whenever any assignee shall have fully performed the duties of his trust, and desires to be finally discharged therefrom, he may make a report of his proceedings under the assignment, showing the money and assets that have come into his hands, and how the same have been disbursed and disposed of, the truth of which shall be verified by his affidavit, and such report shall thereupon be filed and recorded in the office of the county clerk of the county in which the assignment is recorded, and no action shall be brought against such assignee by reason of anything done by him under the assignment, as shown by his report, unless the same be brought within twelve months from the time of the filing thereof, as aforesaid; and any moneys or funds on hand shall be deposited in the District Court subject to be paid out upon the decree of said court."

The assignment in the present case was made under the 3d section of the act, namely, for the benefit of such creditors of the debtor as would consent to accept their proportional share of his estate, and discharge him from their claims; and the principal objection made to it is, that it directs the assignee to pay over to the assignor any surplus remaining after paying all the consenting creditors in full, instead of paying such surplus into court, as required by the 16th section of the act.

It is contended that this not only violates the law, but is a reservation for the benefit of the debtor, tending to delay and hinder those creditors who do not accede to the terms of the assignment, in the collection of their debts. We do not see the force of the latter part of the objection, namely, that the stipulation referred to tends to delay and hinder creditors. The law itself, in § 8, takes care that the remedy of non-consenting creditors shall not be suspended for a moment. By that section it is provided, that any such creditor may garnishee the assignee for any excess of the estate remaining in his hands after the payment of the consenting creditors, and the costs. Of course, the stipulation in the assignment, that the balance should be paid to the assignor, was intended and understood to be subject to this right of garnishment. Such a qualification of the stipulation would be a condition in law. We do not see, therefore, how it can be said that the terms of the assignment were intended to delay and hinder creditors. The surplus referred to in the stipulation must, by intendment of law, have been only such surplus as might remain after satisfying the garnisheeing, as well as the consenting, creditors.

But conceding that, as to the surplus still remaining, the stipulation in the deed is not in conformity with the requirement of the 16th section, the question still remains whether the stipulation only is to be regarded as void, or whether the whole deed is void by reason of the stipulation. And the answer to this question depends upon the general policy of the statute. Is it intended to restrain assignments, or to aid and encourage them? If restraint is the object, the regulations prescribed may, according to a well-settled course of decisions in the state and federal courts, be regarded as conditions precedent, necessary to be observed in order to render an assignment valid. If aid and encouragement are intended to be given to assignments, in the interest of creditors as well as debtors, as a substitute for the bankrupt act, the courts may well disregard incidental variations from the law as void under its operation and sustain the assignment itself if it contains the main thing — the transfer of the entire property of

the debtor for the benefit of his creditors — and carry it out in accordance with the law for the purposes intended. A careful examination of the act convinces us that its policy is to favor assignments, and to give them such construction that they may stand rather than fall; and this, in the interest of creditors, quite as much if not more than in that of debtors. It will be noted that some of its express features look in that direction; and the whole act taken together corroborates this view. And such is the light in which it is viewed by the supreme court of Texas.

In the case of *Blum & Blum* v. *Welborne et al.*, 58 Texas, 157, decided in December, 1882, it was held that when an assignment for the benefit of creditors is made under the statute, the rights of the creditors attach to it, and no act of the assignor or of the assignee, or of both, at the time the assignment is made, or preceding it, but in contemplation of it, done with intent to defeat, delay, or defraud creditors, will authorize a creditor to treat the assignment as void, or justify his attachment of the assigned property to the prejudice of the other creditors. In that case, as in this, the assignment was made under the 3d section of the act, for the benefit of such creditors as would accept their dividends in satisfaction of their claims. One of the non-consenting creditors attached the property assigned. The assignee having died, a substituted assignee sued the attaching creditors for damages. They pleaded that the debtor fraudulently disposed of a large amount of goods to his assignee, immediately before the assignment, with intent to hinder, delay and defraud the creditors. This plea was overruled on the ground above mentioned. The court said: "The manifest purpose of the act of March 24, 1879, (General Laws of 1879, p. 57,) was to provide a mode by which such debtors as were contemplated thereby might make assignments of their property, simple in form, and yet effective to pass all of their property, real and personal, to an assignee for the benefit of creditors, except such as might be exempt from forced sale. It further manifests an intention to make such assignments effective without reference to the form of the deed of assignment, provided it evi-

dences an intention to pass to the assignee all the property of the debtor subject to forced sale, for the purpose of distribution among creditors, and is executed in substantial compliance with the requirements of the act. It also evidences an intention to avoid much of the difficulty heretofore met with by the courts, in determining whether assignments were valid or not, and to supply, by the law itself, much in which the deed of assignment might be deficient under the rules applicable to ordinary assignments." p. 16. The court then proceeds to the particular case, and in view of the provisions of the first and ninth sections of the act declares that "the assignment passed all the property of the debtor except that exempt; as well that in his possession or owned by him at the time the assignment was made, as that which he may have fraudulently attempted to convey; and neither the fraud of the assignor, nor of the assignee, could annul the assignment, in which all creditors might have an interest. When the assignment is completed, the rights of the creditors attach to it." p. 162. Again, "No act of the assignee, nor of the assignor, after the assignment is made, or preceding it, but in contemplation of it, however fraudulent the act may be, shall divest the right of the creditors to have the trust estate administered for their benefit in accordance with the spirit of the statute; and the act itself provides means by which such administration may be enforced in default of the faithful performance of his trust by the assignee. To permit one or more of the creditors, whenever in their opinion the estate was not all delivered to the assignee, or when the assignee might, in their opinion, be acting in violation of his duty, to disregard the assignment and seize and have sold the trust estate, or any part of it, for the satisfaction of such dissatisfied creditors, would contravene the very purpose of the law, which was intended to provide for the equitable distribution of the proceeds of the estate of an insolvent or failing debtor." p. 164.

In another case, decided at the same time, *Donoho* v. *Fish*, 58 Texas, 164, where the whole property of the debtor was not assigned, as where two partners made an assignment of their partnership property only, (and not their individual

property,) for the benefit of such creditors only as would accept their proportional share thereof, under the third section of the act, it was held that such an assignment failed to comply with the fundamental requisite of the act, that all the debtor's property, not exempt from forced sale, must be assigned; and, therefore, that it was void as against attaching creditors. The same views, however, were expressed by the court, as in the previous case, as to the liberal construction which would be placed upon an assignment which purported to convey all the property of the debtors, however defective it might be in form.

In the case of *Keating* v. *Vaughan*, 61 Texas, 518, decided in May, 1884, the very point now under consideration came before the court, and it was held that the stipulation that the assignee should pay the surplus to the assignor after the consenting creditors were paid in full, did not vitiate the deed of assignment. The court say:

"Under the statute it is unimportant whether the assignor, by the assignment, reserves to himself any surplus which may remain after payment of the consenting creditors, for the statute itself regulates that matter, independent of what the terms of the deed may be in this respect, if the assignment be, as is this, under the third section of the act which, with some of the following sections, refers to assignments made for the benefit of consenting creditors only. Under such an assignment strictly, other creditors than those consenting to the release of the debtor do not take at all, but the eighth section of the act provides that non-consenting creditors may garnishee the assignee for any excess of such estate remaining in his hands after the payment to the consenting creditors of their debts and the costs and expenses of executing the assignment.

"If non-consenting creditors should not pursue that course, in case of an excess, the sixteenth section of the act, when the trust has been executed and the assignee desires to be discharged therefrom, provides that the excess shall be paid into the District Court, subject to be paid out upon the decree of that court, which would, no doubt, be so made as to protect

non-consenting creditors who might show themselves entitled thereto, and take the necessary steps to fix a legal claim on the fund, in so far as the fund would go; if, however, no claim to such a fund was made by any creditor, the court after the lapse of a reasonable time, would certainly direct the excess to be delivered to the assignor. Thus the statute regulates the whole matter, and must control if there be any conflict between its provisions and the deed. If the property passes to the assignee for the benefit of creditors generally, or for the benefit of consenting creditors alone, no provision which the assignee can make in the deed can interfere with the distribution of the estate as the statute requires." p. 523.

It is suggested by the defendants' counsel that this decision was made in view of an amendatory statute passed in April, 1883, which declares "that no fraudulent act, intent or purpose of the assignor or assignee shall have the effect to defeat the assignment, or to deprive the creditors consenting thereto from the benefits thereof, but any such fraudulent act, intent or purpose on the part of the assignee shall be a sufficient cause for his removal, as being an unsuitable person to perform the trust, and any consenting creditor may be or become a party to prosecute or defend in any suit or proceeding necessary or proper for the enforcement of his rights under such assignments, or for the protection of his interests in the assigned property." It is contended that this provision renders null and void stipulations like the one in question, so that the deed of assignment may have the effect and operation intended by the statute of 1879, notwithstanding such stipulation; and that the decision in *Keating* v. *Vaughan* was based on the amendment. But this cannot be true, inasmuch as the assignment in that case was made on the 9th of May, 1883, and the amendment did not go into effect until the 12th of July of that year. It carries out, however, the policy which we have supposed to pervade the act of 1879, of securing to the creditors of an insolvent debtor, making an assignment, a speedy and just appropriation of all his property to the payment of his debts.

In the case of *Schoolher* v. *Hutchins*, 66 Texas, 324, the most

recent reported case on the subject, the deed of assignment (which was also executed before the amendment of 1883 took effect) authorized the assignee to sell the property at public or private sale, to employ the assignors to aid in the disposition of the property, with such compensation as he might deem proper, and to do various other things which the defendants contended were not lawful. But the court said: "If the deed of assignment attempted to confer powers which, under the law, an assignee could not legally exercise in the execution of the trust, this would not be a sufficient reason for holding an assignment invalid. When an assignment is made under the statute the rights of creditors vest, and they can compel the assignee to exercise the powers which the law expressly, or by implication, confers upon him, as can they restrain him if he attempts to exercise powers which the law does not confer upon him." p. 329.

This view of the proceeding, as being wholly governed and controlled by law, and regarding as null and inoperative stipulations and powers in the deed contrary to, or not in conformity with, the provisions of the statute, and not as affecting the validity of the deed itself, so long as the main purpose is accomplished, of appropriating the whole of the debtor's property to the payment of his debts, seems to us so in harmony with the spirit and purpose of the act, that we do not hesitate to adopt it. We have given careful attention to the opinion of the Circuit Court in the present case, but have failed to be convinced by it, and feel constrained to express our concurrence in the line of decisions of the Supreme Court of Texas.

One or two other points are made in the briefs of counsel against the validity of the deed, which require but a brief notice. They are substantially met by the considerations already adverted to.

First. It is objected that the deed does not convey all the debtor's estate, not exempt from forced sale, for the benefit of his creditors. It is a sufficient answer to say that it does, in terms, convey "all his lands, tenements, hereditaments, goods, chattels, property and choses in action of every name,

nature and description, wheresoever the same may be, except such property as may be by the constitution and laws of the state exempt from forced sale." According to the decisions of the Supreme Court of Texas, this general description is sufficient, under the statute of 1879, to convey all the debtor's property. *Blum & Blum* v. *Welborne et al.*, 58 Texas, 157, 161. The first section of the act declares that the assignment, however expressed, shall be construed to pass all the debtor's real and personal estate, whether specified therein or not.

Secondly. It is objected that the deed of assignment does not, on its face, show that the assignor was insolvent, or in contemplation of insolvency. The obvious answer is, that if this is a necessary requirement, the deed does state that the assignor "is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full." When a person is unable to pay his debts, he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency. The objection is without foundation.

We do not observe any other objection which it is necessary specially to notice.

The judgment of the Circuit Court is reversed, and the cause remanded, with instructions to proceed therein according to law.

DAVISON *v.* DAVIS.

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

No. 100. Argued December 6, 7, 1887. — Decided March 19, 1888.

The payee of a promissory note gave to the promisor a receipt acknowledging it as given for the purchase of personal property to be delivered to the promisor on payment of his note. The note not being paid at maturity, the payee notified the promisor that he should not recognize his further claim to the property, and, after a further lapse of time without hearing from him, destroyed the note. *Held*, that the sale was conditional, not to be completed until payment of the note.

The remedy by bill in equity to compel a specific performance of a contract

to sell personal property upon the payment of a promissory note given by the other party, payable at a date after the making of the contract, is lost through the laches of the complainant, if he wait five years after the maturity of the note before filing his bill, and the property meanwhile greatly increases in value.

The court holds as the result of the transactions between the parties which are recited in its opinion, that, each being a holder of shares in a railroad company, they agreed that their respective interests should be joint and equal, and that the appellant should pay to the appellee the sum necessary to equalize the difference in cost between them; and that, this agreement not being carried out by the appellant, the parties substituted a new agreement, based upon the principal feature of the old one (that the appellee should sell to the appellant enough of his stock to make the holdings equal), but that each holding under the new agreement was to be in severalty and free from conditions.

In Equity. Decree dismissing the bill. The case is stated in the opinion of the court.

Mr. Samuel Shellabarger and *Mr. Marc Mundy* for appellants. *Mr. J. M. Wilson* was with Mr. Shellabarger on his brief.

Mr. Alexander P. Humphrey, *Mr. St. John Boyle*, and *Mr. George F. Comstock* for appellee submitted on their briefs.

Mr. Justice Bradley delivered the opinion of the court.

The bill in this case was filed by Charles G. Davison and Marc Mundy to compel the defendant Davis to deliver to said Mundy 379½ shares of capital stock of the Louisville City Railroad Company, alleged to belong to said Mundy as assignee of said Davison, and to be held by Davis as security for the payment of a certain note of Davison for $6521.36, dated November 10th, 1876, and payable in one year, with interest at seven per cent, Mundy offering to pay the amount due on said note, and praying for an account to be taken to ascertain said amount.

The transaction out of which the controversy grew was as follows:

In November, 1873, Davison, residing in Louisville, Ken-

tucky, and Alexander H. Davis, of New York City, were each large owners of the capital stock of the Louisville City Railway Company, Davison owning about 800 shares and Davis about 1200, and they entered into the following agreement for the purpose of equalizing their interest, to wit:

"Memorandum of an agreement made this tenth day of November, 1873, between Chas. G. Davison, of the city of Lou., Ky., and Alex. Henry Davis, of the city of New York, N. Y., witnesseth:

"Whereas the said parties of the first and second parts, respectively, are the actual and equitable owners of certain shares of the capital stock of the Lou. City R. W., the said Davison holding or being entitled to hold about eight hundred and the said Davis holding or being equitably entitled to hold about twelve hundred shares of the said stock; and whereas the said parties of the first and second parts are desirous of equalizing their respective interests as between themselves, and also of acquiring possession of a greater amount of the said stock, now, therefore, it is hereby agreed that the stock now actually or equitably held by the parties of the first and second parts, respectively, shall be regarded as common property, each party being entitled to the one-half ownership of said stock for the considerations hereinafter to be mentioned.

"It is also agreed that all purchases of the said stock that may be made hereafter shall be thus made for the joint account of the parties to this contract, and shall be likewise held by them in common.

"It is furthermore agreed, as the consideration for the equalization of their respective interests, by the said parties to this contract, that the actual cost of the stock held by each party shall be computed as of this date, and a note given by the said Davison at any time upon demand for the amount which would be due from him for the equalization of said joint stock account, it being understood that two hundred and fifteen (215) shares of said stock now held by the said second party shall offset in the account a like number of shares held by the said first party.

"And it is furthermore agreed that in case of the death of

either of the parties to this contract, the survivor shall be entitled to purchase the stock of said deceased party, within one year from the time of such decease, at a price not exceeding twenty-five (25) dollars per share, if within twelve months from the date of this agreement, with an advance of ten (10) dollars per share for each succeeding twelve months.

"In witness whereof the parties of the first and second parts hereby attach their hands and seals this tenth day of November, 1873.

"(Signed) ALEX. HENRY DAVIS.

"(Signed) C. G. DAVISON.

"Witness: (Signed) E. H. SPOONER."

On the 11th of November, 1876, Davis made out a report or statement of the account between him and Davison, showing that he, Davis, held 1571 shares which cost $32,723.41, and that Davison held 812 shares which cost $19,680.69; and that to make them equal, Davis must transfer to Davison 379½ shares, and Davison must pay therefor the sum of $6521.36, or, as Davis expressed it, in the report, "That is the result as I make it — that I owe you 379½ shares of stock, and you owe me $6521.36, as of November 10, 1876."

This account was assented to by Davison, and on the 29th of January, 1877, the parties met, and Davison delivered to Davis his promissory note for said sum of $6521.36, dated November 10th, 1876, payable one year from date, with interest at seven per cent, and Davis, retaining the stock, delivered to Davison a receipt for the note in the words following, to wit:

"Syracuse, N. Y., Jan. 29, 1877.

"Received of C. G. Davison his note, dated Nov. 10th, 1876, for $6521.36, payable one year from date, with interest at 7 per cent. Said note is given me for the purchase of three hundred and seventy-nine and one-half shares of stock of the Louisville City Railway Co., now held by me, and to be delivered, upon payment of his note, to said Davison.

"ALEX. HENRY DAVIS."

The note became due on the 12th of November, 1877, but was not paid. On the 16th of September, 1882, Davison, by an indorsement on the receipt, transferred the 379½ shares mentioned therein to Mundy, who assumed to pay the debt due to Davis therefor; and in January, 1883, Mundy offered to pay Davis the amount due on Davison's note, and demanded the 379½ shares of stock — which Davis refused. Thereupon, on the 27th of March, 1883, the present bill was filed. It sets forth the circumstances of the transaction substantially as above stated, but contains allegations to the effect that the stock in controversy was regarded by the parties as belonging to Davison, and that he agreed and consented that the defendant might hold it by way of pledge or collateral security, for the payment of his note; whereas the defendant insists that the transaction was an agreement for a sale of the stock, to be assigned and transferred to Davison when it was paid for. The former take their stand on the terms of the original agreement of November, 1873; the latter on the receipt given in January, 1877. If the transaction relating to the 379½ shares of stock was a sale upon condition of payment of the note at maturity, the non-performance of the condition defeated it, if the vendor saw fit to avail himself of the breach, which he did. If it was only an agreement for a sale, the delay of the complainants in offering to pay the note and demanding a delivery of the stock would preclude them from asking for a specific performance of the agreement, even if the frame of the bill were adapted to such a decree — which is very doubtful, although it contains a prayer for further and other relief. The delay was upwards of five years after the note became due; and the circumstances which occurred enhance the right of the defendant to rely on that defence against any claim for specific performance. Both Davison and Davis were examined as witnesses, and the latter states positively that shortly before the maturity of the note, he wrote to Davison that if he did not meet the note at maturity he (Davis) should not recognize any further claim of his to the stock in question; and that some time in the year 1878 he considered the matter at an end, and destroyed the note. Davison, in his testimony, admits

that no communication took place between him and Davis in relation to the stock after February, 1878. At that time he states that a conversation occurred between them in which Davis offered to carry his (Davison's) stock in the company until it worked out, but that nothing was said about the particular stock in question. The conversation, as he afterwards explained, related to 579 shares bought by him of one Johnson, and not to the 379½ shares. Another circumstance of weight is the fact that the stock would not sell for more than twenty dollars per share until long after the note became due; and that afterwards, when Davis himself took hold of the road, the stock appreciated so as to sell for nearly or quite double that amount. It was after this appreciation of the stock in value, that Davison transferred his supposed interest to Mundy, who then made the offer to pay Davison's note and take up the stock. Under all these circumstances, the laches of Davison and Mundy is a perfectly good defence against any claim of relief from the condition (if it was a sale upon condition); or for specific performance of the agreement (if it was an agreement for a sale). In *Brashier* v. *Gratz*, 6 Wheat. 528, 541, Chief Justice Marshall said: "This, then, is a demand for a specific performance, after a considerable lapse of time [five years] made by a person who had failed totally to perform his part of the contract; and it is made after a great change, both in the title and in the value of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction." The reason why the party seeking relief in that case could not be compelled to execute his part of the contract, was his pecuniary inability to execute it — a circumstance which also existed in the present case.

But, as before stated, the complainants contend that the nature of the transaction between the parties is to be gathered from the agreement of November 10th, 1873, and not solely from the receipt given in January, 1877; and that by that agreement the parties became joint owners of the stock then held by each, and of all that they or either of them might

afterwards purchase. That agreement was undoubtedly the basis of the settlement made in January, 1877; but it cannot be invoked to control the terms of that settlement. The agreement amounted to this, that the respective interests of the parties in the stock of the company should be joint and equal, Davison paying the amount necessary to equalize the difference of costs between them. It appears, from the evidence, that the stock held by the two would control the management of the company; and the object of the agreement, stated shortly, was that they should stand together and be equally interested; Davison being at that time president of the company, and Davis the largest stockholder. Up to January, 1877, Davison had never paid the difference in the cost of the stock. The parties then came to the settlement referred to. Each still held his own individual shares as at first, and as purchased afterwards, no transfers having been made. They now concluded, instead of holding the stock in common, to make an equal division of their aggregate shares; and to do this, Davis must transfer to Davison 379½ shares, and, according to the terms of the original agreement, the latter must pay therefor the sum of $6521.36. In making this change in their proposed relations, the parties treated the transfer of the 379½ shares as a sale, the terms of which are specified in the receipt of January 29th, 1877. Those terms are clear and unmistakable. It is expressly declared that the note was given for the purchase of 379½ shares of the stock of the Louisville City Railway Company, to be delivered to Davison upon the payment of his note. A mere receipt is subject to explanation; but an agreement, or contract, in a receipt is as conclusive as in any other paper executed between the parties. Therefore, although the object of the original agreement was, or may have been, a joint and equal ownership of stock, with right of purchase by the survivor, in case of death, yet it is apparent that this plan was abandoned, at the time of the settlement, for that of an equal division of the stock of both, to be held in severalty only. In other words, instead of the old contract, which had never been fully carried into effect, the parties entered into a new

contract based upon the principal feature of the old, that Davis should sell to Davison a sufficient amount of stock to make their holdings equal, but to be held in severalty, free from any conditions, and with liberty on the part of each to dispose of his stock as he should see fit; the price being fixed in accordance with the terms prescribed in the original agreement.

That this was the real nature of the transaction which took place in January, 1877, is apparent from the circumstances, and from the subsequent conduct of the parties. Davison, being in embarrassed circumstances, did not retain his stock, but had parted with it all as early as the spring of 1878, thus entirely ignoring the objects and purposes of the agreement of 1873. The answer of the defendant contains the following statement, to wit: "The respondent further says that said agreements were entered into by him in the belief and with the assumption that said Davison was the holder or entitled to hold about eight hundred shares, as represented by him, and respondent does not know how much of said stock said Davison held or was entitled to hold, but he never came into possession or control of about eight hundred shares or near that amount, and as early as the spring of 1878 ceased to be a stockholder; that he then turned over to the company whatever stock he held in part payment of his indebtedness to the company, and the intent and purpose of the agreement between said Davison and respondent wholly ceased and failed." This averment is substantially proved by the testimony of both parties, Davison and Davis. The former continued president of the railway company until February, 1878, but was not reëlected after that time. He had become indebted to the company, which had run down financially, and, as before said, parted with all his stock. It is plain, therefore, that the main purpose of the original agreement had failed and had been abandoned. The only thing we have to guide us, as to what the new contract was, is the receipt of January 29, 1877, the terms of which we have already adverted to. From those terms it is clear that the sale was not to be completed until the payment of Davison's note.

The language is, "said note is given me for the purchase of 379½ shares of stock now held by me and to be delivered, upon payment of his note, to said Davison." That such language amounts to conditional sale, or to an agreement for a sale on performance of the condition, see Benjamin on Sales, Book II, Chap. III, Rule III, (p. 252, second ed.,) and the cases there collected.

If this is a correct view of the case, it is plain that the only equitable remedy applicable to it is a bill for relief from the condition, or for specific performance. Both of these remedies, as we have seen, have been lost by the laches of the complainant.

The decree of the Circuit Court is affirmed.

WEIR *v.* MORDEN.

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

No. 182. Argued February 13, 1888. — Decided March 19, 1888.

The second claim in reissued letters-patent No. 8914, dated September 30, 1879, to Frederick W. Weir, for an improvement in railroad frogs, (the original patent being No. 215,548, dated May 20, 1879,) whether construed by itself, or with reference to the state of the art at the time of the alleged invention, is a claim for a combination of parts, viz.: (1) two centre rails B B′ joined to form the V-shaped point; (2) the outside diverging or wing rails; (3) the channel irons of a U shape uniting the centre rails together, and also to the outside or wing rails, so that the whole shall constitute a frog with the characteristics imparted by the features of this combination: and no invention was required to divide the U iron, shown in patent No. 173,804 issued to William J. Morden, February 22, 1876, into two, so as to connect the centre rails with the outer rail.

This was a bill in equity to restrain the alleged infringement of reissued letters-patent No. 8914, dated September 30, 1879, for an improvement in railroad frogs, the original patent, No. 215,548, dated May 20, 1879, having been issued on an

Statement of the Case.

application filed February 4, 1879, to Frederick C. Weir, the complainant. In his specification the patentee described the invention generally as follows:

"My invention relates to the class of frogs made by the bending of the overlapping ends of the rails themselves, and the junction of the same with the central rail constituting the point by rivets or bolts through separating pieces; and my invention consists, first, in such a formation and connection of the two rails which make up the angular point as that one of the rails extends unbroken and uncut directly across the path of the other, and in itself makes a solid end to the point with a full-width flange, which is overlapped by the flange of the other rail, and thus a flange of double thickness is afforded at a point where strength is particularly needed, and the cutting away of the flanges (as is the usual custom) is avoided entirely; second, in an improved manner of connecting the two rails of the point together and to channel-iron pieces, to which the outer rails are connected.

"One of the objects of this invention is to furnish a firm lateral support upon each side of the V-shaped rails by means of channel irons, which at the same time unite and hold the centre rails forming the V to the wing rails firmly, uniting and holding all the parts in their proper relative position."

The drawings accompanying the specification were as follows:

Fig. 1.

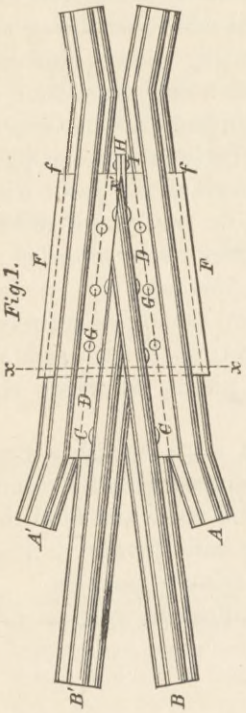


Fig. 3.

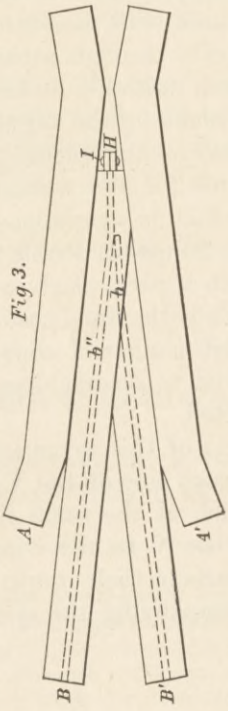


Fig. 4.

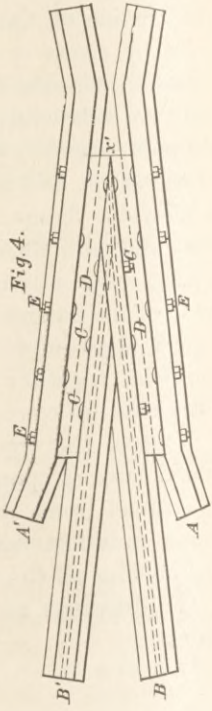


Fig. 2.

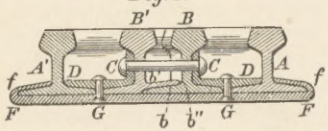
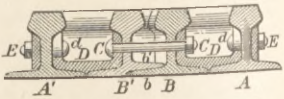


Fig. 5.



Statement of the Case.

The specification explained the drawings as follows:

"In the accompanying drawings Fig. 4 is a plan of a frog embodying my improvements. Fig. 5 is a cross-section of the same on line *x x*. Fig. 3 is a plan of the under side of the frog, showing the continuations of the main point rail with a full-width flange throughout, also showing the riveted extension of the flanges of the channel irons beyond the points.

"It will not be necessary to describe the devices shown in Figs. 1 and 2, as they are fully described in division B of this reissue.

"A A′ are the outer or wing rails of the frog, and B B′ are the two rails which compose the acute angle or point.

"In place of cutting away both the flanges, of the rails B B′, so as to make a joint between the two rails midway between the lines of the angle of the frog, as is common now, and, I may say, usually practised, I continue the flange of the rail B, of full width, intact clear along the junction of the two rails to the point where it strikes the flange of the outer rail, as shown in Fig. 3, which is almost immediately under the point X′ of the frog, and I swage up the flange b^1 of rail B′ on one side, as shown in Figs. 5 and 3, so that it lies over the flange of rail B, this flange of rail B′ being cut away angularly on the edge to properly meet the line of the web b^2 of the rail B.

"I connect the point rails B B′ together by rivets, C, which, while they secure these rails together, also secure pieces of channel iron, D, to said point rails, the channel iron making the separating medium between the point rails B B′ and wing rails A A′ and giving a means for attaching said wing rails.

"The adjacent flanges of the channel irons of the point may be extended beyond the point and riveted, as shown in Fig. 3.

"With channel iron I attach the wing rails in the manner shown in Fig. 5, the outer flanges of the iron being notched at *d* for the passage, before the outer rails are attached, of the long rivets C, the bolts E, which connect the outer rails, being placed between the notches *d*."

The claims were as follows:

"1. A frog having one of its point rails extending with a full-width flange along the junction of the two rails, and the flange of the other point rail overlying the flange of the first-mentioned one, substantially as and for the purpose specified.

"2. A frog composed substantially of the two centre rails B B′ joined to form the V-shaped point, united to outside diverging or wing rails by means of two channel or U irons, D D, one wing of which channel or U iron is shaped to fit the web of the abutting rails, combined to form the point of the frog, and upon the other side fitting the web of the wing or diverging rail, respectively, and secured by bolts or rivets passing through the webs of the rails and the sides of the channel bars, substantially as shown.

"3. In combination with the point rails B B′, fitted to each other as described, the channel pieces D extending and bolted or riveted together beyond the point of the frog and connecting rivets C, which extend entirely through the two point rails and the channel pieces, substantially as and for the purpose specified."

The only claim involved in this suit was the second, no infringement being alleged of either the first or third. Separate answers were filed by the defendants, respectively, which were, however, in substance the same. The defences were that the reissued letters-patent were null and void, as not being for the same invention as set forth and described in the original letters-patent; that the defendants did not infringe; and that the alleged invention of the complainant was not a patentable novelty, in view of the state of the art at the time of the alleged invention, as shown in certain prior letters-patent specifically mentioned. The answer of Morden, adopted by the others, also set out the following:

"And this defendant, further answering, says, on information and belief, that he is the original and first inventor of a U-shaped plate in combination or connection with a railroad frog, and that said invention was secured to him by said letters-patent of the United States No. 173,804 and No. 205,496, and that by virtue of said letters-patent he has the sole

and exclusive right to said U shape in a railroad frog, and that, while the complainant is engaged in the manufacture and sale of railroad frogs, he uses a V-shaped plate so secured to your defendant, as before stated, and in said manufacture and sale has copied from defendant's invention in substantial and material parts secured to defendant by his letters-patent aforesaid and in infringement of the same; and this defendant, in this connection, would state that prior to the filing of complainant's bill he, the defendant, filed a bill in this honorable court against said complainant for infringement of his said letters-patent No. 173,804 and said wrongful acts, and praying relief on account of said wrongful acts by the complainant, which said bill is now pending against him in this court. Some days after this defendant filed his bill as aforesaid, the said complainant filed his bill, seeking thereby, as defendant is advised and states, on information and belief, to harass and annoy defendant in his said suit and to delay accounting to defendant for said wrongful acts of him, the said complainant."

On final hearing a decree was rendered dismissing the bill for want of equity, to reverse which the present appeal was taken.

Mr. E. E. Wood (with whom was *Mr. Edward Boyd* on the brief) for appellant.

Mr. Clarence A. Seward filed a brief for appellant.

Mr. Charles K. Offield for appellees.

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

The question of infringement depends upon the proper construction of the second claim. The proof shows that the defendants did not infringe either the first or the third. They did not form and connect the two rails, making up the angular point as a part of the frog, so that one of the rails would extend unbroken and uncut directly across the path of the

other, and in itself make a solid end to the point with a full-width flange overlapped by the flange of the other rail, thus affording a double thickness and avoiding the cutting away of the flanges, as was customary. If there is an infringement, it consists in the use of the channel irons of a U shape, uniting the two centre rails, forming the V-shaped point of the frog, to each other, and the two thus united to the two diverging rails on each side by means of bolts or rivets passing through the webs of the rails and the sides of the channel bars. The question was disposed of by the Circuit Court in favor of the defendants, as follows:

"The question of fact as to infringement depends upon whether the 'two centre rails B B′ joined together to form the V-shaped point,' mentioned in the second claim, necessarily mean the two centre rails which are described in the specification, or does it mean any centre rails joined together in any manner to form a V-shaped point? The answer to this question seems to me to be found in the complainant's own specification. He says: 'My invention consists, first, in such a formation and connection of the two rails which make up the angular point as that one of the rails extends unbroken and uncut directly across the path of the other, and in itself makes a solid end to the point with a full-width flange, which is overlapped by the flange of the other rail, and thus a flange of double thickness is afforded at a point where strength is particularly needed, and the cutting away of the flanges (as is the usual custom) is avoided entirely.'

"In his description of the drawings he says:

"'A A′ are the outer or wing rails of the frog, and B B′ are the two rails which compose the acute angle or point.'

"And in his description of the mode of constructing his device he says:

"'In place of cutting away both the flanges of the rails B B′, so as to make a joint between the two rails midway between the lines of the angle of the frog, as is common now and, I may say, usually practised, I continue the flange of the rail B, of full width, intact clear along the junction of the two rails to the point where it strikes the flange of the outer rail,

as shown in Fig. 3, which is almost immediately under the point X′ of the frog, and I swage up the flange b^1 of rail B′ on one side, as shown in Figs. 5 and 3, so that it lies over the flange of rail B, this flange of rail B′ being cut away angularly on the edge to properly meet the line of the web b^2 of the rail B.'

"It will thus be seen that minute directions are given as to the construction of the two centre rails B and B′ to form a V-shaped point, and I am of opinion that the two centre rails B and B′, described in the second claim, are the rails constructed and joined according to the description given in the patent. The language of the claim is, 'the two centre rails B B′ joined to form the V-shaped point,' not any two centre rails joined to form a V-shaped point. The V-shaped point made by extending one rail unbroken and uncut directly across the path of the other, and thereby making a solid end to the point, and with the flange of the rail B′ swaged up so as to lie upon or overlap the flange of the rail B, seems to me to be an essential element of what complainant supposed he had invented, and, therefore, the two centre rails B B′ mentioned in the second claim refer to and mean the two centre rails which he has particularly described in his specification. The proof in the case wholly fails to show that the defendant forms the V-shaped point in his frog in the manner that complainant forms his point."

The construction of the second claim contended for by the appellant is, that it embodies separately and distinctly that part of the invention which, in the general description in the preliminary part of the specifications, is stated to be "an improved manner of connecting the two rails of the point together and to channel-iron pieces, to which the outer rails are connected," without reference to the manner in which the two rails of the point are formed, so as to constitute the first part of the invention. If this construction be admitted, the second claim would cover every case of two centre rails joined to form the V-shaped point, which were united to outside diverging or wing rails by means of channel irons of a U shape, bolted or riveted, as therein described, without reference

to the manner in which the two centre rails were combined to make the angular point or V shape. In our opinion, the construction placed upon this claim by the Circuit Court is right, and is required by the language of the specifications and claim. The claim does not on its face profess to cover a mere mode of connecting, by means of U-shaped channel irons, the intermediate with the external rails. It is in form a claim for a combination of parts, which together constitute a frog of peculiar construction. The elements of that combination, as stated in the claim, are, first, the two centre rails B B′ joined to form the V-shaped point; second, the outside diverging or wing rails; third, the channel irons of a U shape uniting the centre rails together, and also to the outside or wing rails, so that the whole shall constitute a frog with the characteristics imparted by the features of this combination. This coincides with the statement contained in the brief of counsel for the appellant, who say, speaking of the invention as described in the second claim:

"The elements constituting the invention in controversy are: First, two outside diverging wing and main rails; two inside V-shaped point rails, the four rails being united and joined together by two channel irons bolted to these rails by three lines of rivets or bolts, to wit: one line of bolts, bolting one channel iron to one wing rail; another line of bolts, bolting another channel iron to the other outside wing rail; and the third line of bolts passing through the two inside wings of the two channel plates, and through the webs of the point rails, thereby making one structure or machine. In this construction the cut-away rail forming the point is reinforced on each side by the vertical wings of the channel irons. The claim is for this frog or machine so constructed, a frog composed substantially of the elements above named."

The claim refers specifically to the "two centre rails B B′ joined to form the V-shaped point." This points explicitly to the drawings, on which the two centre rails are designated by the letters, and also to the mode in which they are shown by the drawings and the description in the specification to be joined, and excludes the idea of constructing a frog, such as is

intended to be covered by the second claim, of any other centre rails than those thus pointed out and described. The patentee by this mode of description and of claim has made the centre rails, formed and connected in the manner described to make up the V-shaped point, an essential part of the invention intended to be secured by the second claim.

An argument against this construction, made by the counsel for the appellant, is based upon the language of the third claim. That claim is for the channel pieces D extending and bolted or riveted together beyond the point of the frog and connecting rivets C, which extend entirely through the two point rails and the channel pieces, "in combination with the point rails B B′, fitted to each other as described." It is admitted that the language of that claim limits it to the point rails formed and connected together so as to make the V-shaped point, according to the specific manner described in the specification and shown in the drawings, and that it does not cover centre rails of any other description. This limitation is based upon the words "fitted to each other as described." It is argued that as this phrase is omitted from the second claim, the contrary inference must prevail, so that that claim may be permitted to extend so as to embrace all centre rails joined to form the V-shaped point, however they may be fitted to each other. But this variation of language does not seem to us so significant. The second claim, by the use of the phrase at its close, "substantially as shown," limits its application quite as effectually to the particular kind of centre rails described in the specification and covered by the first claim; and the reference therein to "the two centre rails B B′ joined to form the V-shaped point," can only mean such point rails as are shown in the drawings marked B B′, and joined to form the V-shaped point referred to in the drawings and described in the specification "substantially as shown."

If this construction of the second claim needed corroboration, that would be found in the state of the art at the time of the alleged invention, as shown by the proof in the present case. The frogs exhibited in evidence as infringements of the complainant's patent were manufactured by the defendants, as

they claimed, under patent No. 148,264, dated March 3, 1874, issued to George Thomas and William Miller, under whom they claim, and also under patent No. 173,804, dated February 22, 1876, issued to Morden, one of the defendants, as inventor. Morden's patent of February 22, 1876, showed a connection of the wing rails for use as frogs by means of a U-iron or "trough plate," the upturned sides of which "are made to conform to the curve of the side rails, as well as to the form of the neck and base of the rails, and are firmly secured to the neck of the rails by bolts or rivets." Instead of holding the V-shaped point in place by the use of channel irons, he provided a V-shaped recess in the channel or trough plate into which the point of the frog was inserted and held; but in applying his device to railroad crossings instead of switches, he used channel or U-shaped irons to connect the points and wing rails. It is true, as suggested by counsel for the appellant, that a crossing of railroad tracks is a very different device from a switch, where the latter is used by means of a frog to shift the engine and train from one line of tracks to another; but the use of channel irons is analogous in the two cases, and it would require no more than ordinary mechanical skill to transfer the channel irons used upon a crossing to firmly hold the parts in place, to a similar use in a frog to unite firmly in their respective positions the centre rails with the exterior rails.

Independently, however, of this use of channel irons on crossings, we think that the patent to Morden of February 22, 1876, for an improvement in railroad frogs, considered in itself, leaves no room for invention in the application of channel irons in uniting the V-shaped point rails with the exterior rails. In that patent the invention consisted in forming a metallic plate into a U-shaped trough for the purpose of connecting the outer rails, leaving the V-shaped ends of the point rails to be secured by means of a V-shaped recess in the bed of the plate at the wide end of the trough. There seems to be no invention in dividing that trough into two, so as to connect the centre rails on each side, by means of a separate channel iron or U-shaped trough, with the outer rail exterior to them.

For these reasons the decree of the Circuit Court is

Affirmed.

TOMPKINS *v.* LITTLE ROCK AND FORT SMITH RAILWAY.

WILLIAMS *v.* LITTLE ROCK, MISSISSIPPI RIVER AND TEXAS RAILWAY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Nos. 70, 71. Argued January 17, 18, 1888. — Decided March 19, 1888.

The statute of the State of Arkansas of July 21, 1868, to aid in the construction of railroads, and the statute of that State of April 10, 1869, to provide for payment of interest upon the bonds of the State issued in aid of such construction, created no lien upon the property of a railroad company for whose benefit such state bonds were issued, in favor of the holder of the bonds, which, after a sale under foreclosure of a mortgage upon the property remained a lien upon it in the hands of the purchaser at the foreclosure sale.

In Equity. The case is stated in the opinion of the court.

Mr. John R. Dos Passos and *Mr. John McClure* for appellant. *Mr. U. M. Rose* and *Mr. Attorney General* were with them on the brief.

Mr. C. W. Huntington and *Mr. John F. Dillon* for appellees.

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

These cases may properly be considered together. The material facts are these:

The Little Rock and Fort Smith Railroad Company was incorporated by the State of Arkansas, January 22, 1855, to build and operate a railroad in that State from Little Rock, by the way of Van Buren, to Fort Smith. The Mississippi, Ouachita and Red River Railroad Company was also incorporated by the State on the same day, to build and operate a railroad from the Mississippi River near Gaines' Landing,

through or near Camden, to some point on the Red River, at or near Fulton, and thence to the boundary line between Arkansas and Texas. The Little Rock, Pine Bluff and New Orleans Railroad Company was organized November 23, 1868, under the general railroad law of Arkansas, passed July 23, 1868, to build and operate another railroad from Little Rock, through or near Pine Bluff and Monticello, to the state line, with a branch from Pine Bluff to Eunice.

On the 21st of July, 1868, the General Assembly passed "an act to aid in the construction of railroads." By this act the State, "for the purpose of securing such lines of railroad in this State as the interests of the people may from time to time require," pledged itself "to issue to each railroad company or corporation, which shall become entitled thereto, the bonds of this State, in the sum of one thousand dollars each, payable in thirty years from the date thereof, with coupons thereto attached, for the payment of interest on the same in the city of New York, semi-annually, at the rate of seven per cent per annum, in the sum of fifteen thousand dollars in bonds for each mile of railroad which has not received a land grant from the United States, and ten thousand dollars in bonds for each mile of railroad which has received a land grant from the United States, on account of which such bonds shall be due and issuable, as provided." To get the aid application was required to be made to the Board of Railroad Commissioners for "the loan of state credit herein provided for," and its approval by that board obtained.

The bonds were to be under the seal of the State, and attested by the Secretary of State, and they, or the avails thereof, were to be used "solely for the purpose of providing for the ironing, equipping, building, and completing said road." They were to be issued only as each ten miles or more of the road was prepared for the iron rails.

Sections 7 and 8, which are principally relied on as the ground of recovery, are as follows:

"SEC. 7. Be it further enacted, That the Legislature shall from time to time impose upon each railroad company, to which bonds shall have been issued, a tax equal to the amount

of the annual interest upon such bonds then outstanding and unpaid, which tax may be paid in money or in the past due coupons of the State at par, and after the expiration of five years from the completion of said road the Legislature shall impose an additional special tax of two and one-half per cent per annum upon the whole amount of state aid granted to such company, payable in money or in the bonds and coupons of the State at par; and, if in money, the same shall be invested by the treasurer of the State in the bonds of the State at their current market value. The taxation in this section provided to continue until the amount of bonds issued to such company, with the interest thereon, shall have been paid by said company as herein specified, in which case the said road shall be entitled to a discharge from all claims or liens on the part of the State: *Provided*, That nothing herein contained shall be so construed as to deprive any company, securing the loan of the bonds of the State herein provided for, from paying the whole amount due from such company to the State at any time in the bonds of the State loaned in aid of railroads or the coupons thereon, or in money.

"SEC. 8. Be it further enacted, That in the case said company shall fail to pay the taxes imposed by the preceding section, at the time the same become due and for sixty days thereafter, it shall be the duty of the treasurer of the State, by writ of sequestration, to seize and take possession of the income and revenues of said company until the amount of said defaults shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its proper officers."

In this statute the tax provided for in § 7 was to be imposed by the legislature from time to time, but on the 10th of April, 1869, another act was passed, "to provide for paying the interest of the bonds to aid in the construction of railroads," by which it was enacted that the interest on all bonds issued under the act of 1868 should be made payable on the first day of April and the first day of October in each year, and it was made the duty of "the auditor of public accounts, on or before the first day of June in each year," to "certify

to the treasurer the amount of bonds issued to each railroad company, the amount of semi-annual interest that will accrue thereon — that is to say, the amount of interest the State will have to pay on the first day of October of that year, on the bonds issued to each of said railroad companies — and the amount of tax required from each of said railroad companies to pay the same, which tax shall be deemed due and payable on the thirtieth day of June of that year." Similar provision was also made for the interest falling due in April. Upon the receipt of a certificate from the auditor, it was made the duty of the treasurer to "cause notice to be served upon each railroad company, on or before the twentieth day of June," or the twentieth day of December, as the case might be, "in each year, specifying the amount of tax to be paid, which amount shall be the interest on said bonds for the said period, and demanding payment of the same into the treasury" at the appointed time. If default occurred in the payment of the tax, and it continued for sixty days, it was made the duty of the treasurer, "through the attorney general, to make and file a petition, under the seal of the treasurer's office, in the Pulaski Chancery Court, setting forth the amount due and the fact of such default, praying the issue of the writ of sequestration contemplated in said act, and the appointment of a receiver, to be named in said petition, to receive in his behalf the revenue and income of said company, for the purpose specified in said act, which writ shall issue upon the filing of the petition for the same." Upon the issue of the writ so ordered, the receiver therein named was required to "take possession of all the income and revenues of the defaulting company, with authority to demand and receive all moneys coming to the same from the operation of such road;" and it was further made "the duty of all officers of said company to return all moneys to him, for receiving which he may require the submission of all necessary books, papers, and accounts to him, and may examine any and all persons under oath, and any person making false returns, or failing to pay over moneys, shall be deemed guilty of a misdemeanor, and any person swearing falsely shall be declared guilty of perjury." Section 5 of this act was as follows:

"SEC. 5. That such receiver shall give such bond as the treasurer may require, shall be removable at the pleasure of the treasurer, and a successor appointed, to be approved by the chancellor. He shall, at the end of each month, make full report and return to the treasurer of all moneys received by him, with his estimate of the necessary cost of operating said road, which, on the approval and order of said treasurer, shall be paid out of the money so returned, the surplus or net proceeds to be applied in the discharge of the tax due and unpaid; and shall so continue until such amount in default shall be paid, with the reasonable cost of sequestration, to be taxed and certified by the chancellor, when the treasurer shall account with said company and withdraw said receiver from the management of its affairs."

The Little Rock and Fort Smith Railroad Company received a land grant from the United States, and on the 28th of April, 1869, its application to the State for "the benefits of" the act of July 21, 1868, was granted as a "loan of state credit." Afterwards, beginning April 2, 1870, state bonds to the amount of one million dollars were issued to the company, as its road was built, in the following form:

"No.—— No.——

"$1000. United States of America. $1000.

"It is hereby certified that the State of Arkansas is indebted unto the Little Rock and Fort Smith Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, redeemable at the city of New York thirty years from the date hereof, with interest at the rate of seven per cent per annum, payable semiannually, in the city of New York, on the first day of April and October in each year, on the presentation of the proper coupons hereto annexed. The faith and credit of the State are hereby solemnly and irrevocably pledged for the payment of the interest and redemption of the principal of this bond. Issued in pursuance of an act of the General Assembly of the State of Arkansas, approved July 21, 1868, entitled 'An act to aid in the construction of railroads,' the said act having been sub-

mitted to and duly ratified by the people of the State, at the general election held November 3, 1868.

"In witness whereof, the governor of the State has signed this bond, the state treasurer has countersigned the same, and the seal of the State has been affixed at the city of Little Rock, Arkansas, this first day of April, 1870.

[SEAL.] "POWELL CLAYTON, Governor.
"R. J. T. WHITE, Secretary of State.
"HENRY PAGE, Treasurer.
"J. R. BERRY, Auditor."

Each of said bonds at the time of their issue had sixty interest coupons thereto attached, numbered from one to sixty inclusive, and which, with the exception of the time of payment and number thereon, were as follows, to wit:

"$35.00. $35.00.

"The treasurer of the State of Arkansas will pay to bearer thirty-five dollars, in the city of New York, on the first day of October, 1870, being semiannual interest due on bond No. ——.

"L. R. & F. S. R. R. J. R. BERRY, Auditor."

On the 22d of December, 1869, the railroad company executed a mortgage on its railroad and the income thereof to Henry W. Paine and Samuel T. Dana, to secure a proposed issue of bonds to the amount of $3,500,000, and on the 20th of June, 1870, another mortgage to the same parties on its land grant to secure another proposed issue of $5,000,000.

Interest was paid on the state bonds up to and including April 1, 1873. Default having been made in the payment of interest upon the bonds issued under the railroad mortgage, a suit was begun by the trustees, May 12, 1874, for the foreclosure. To this suit the State was not a party, but in the bill the fact that state aid had been granted to the company was set forth, and the prayer was for a sale "subject to the lien of the State of Arkansas, if your honor shall find and decree that any lien existed in favor of said State prior to the lien created

by said deed of mortgage." Upon this bill a decree was rendered *pro confesso*, directing a sale of the mortgaged property, but making no decision and giving no directions as to the suggestion of a lien in favor of the State. Under this decree the property was bought by a committee of the bondholders for a nominal sum, and they organized a new corporation under the laws of Arkansas by the name of the Little Rock and Fort Smith Railway, to take the title, the original bondholders, or such of them as elected to come in, being the stockholders. Afterwards the property purchased was conveyed to the new corporation.

On the 15th of March, 1869, state aid was awarded to the Little Rock, Pine Bluff and New Orleans Railroad Company under the act of July 21, 1868, to the amount of $1,200,000, and on the 25th of June, 1870, to the Mississippi, Ouachita and Red River Railroad Company to the amount of $600,000. On the 20th of April, 1870, the Little Rock, Pine Bluff and New Orleans Company mortgaged its railroad and income to Benjamin A. Farnham and David B. Sickels to secure an issue of $1,200,000 of bonds, and on the 3d of May, 1870, the Mississippi, Ouachita and Red River Railroad Company mortgaged its road and income to the same trustees to secure another issue of bonds, amounting to $2,040,000. In October, 1873, these companies were consolidated into one corporation, under the name of the Texas, Mississippi and Northwestern Railroad Company. Default having been made in the payment of interest on these bonds, suits were begun by the trustees, March 15, 1875, to foreclose the mortgages under which the two roads were sold by order of the court, and afterwards conveyances made to the Little Rock, Mississippi and Texas Railway. The proceedings in these suits were substantially the same as in that against the Little Rock and Fort Smith Railroad Company.

No interest was paid on the state bonds after April, 1873, and at its May term, 1877, the Supreme Court of the State decided that the bonds were void, because issued in violation of one of the provisions of the Constitution of the State. *Arkansas* v. *Little Rock, Mississippi & Texas Railway*, 31

Arkansas, 701. On the 29th of May, 1874, the legislature repealed the act of April 10, 1869, being the act above mentioned, "to provide for paying the interest on bonds issued to aid in the construction of railroads."

William H. Tompkins is the owner of 2286 coupons cut from the bonds of the State issued to the Little Rock and Fort Smith Railroad Company which his mother bought in open market in 1870, without notice, and which she gave to him on his coming of age in 1875 or 1876, and he, on the 15th of March, 1882, began the suit against the Little Rock and Fort Smith Railway, in which he appears here as appellant, in the Circuit Court of the United States for the Eastern District of Arkansas, "on behalf of himself and all holders of bonds issued by the State" to the Little Rock and Fort Smith Railroad Company, the object of which is to subject the earnings of the railroad formerly owned by the Little Rock and Fort Smith Railroad Company to the payment of the interest due on the state aid bonds, and to require the new or reorganized company to account for the earnings since the road has been in its possession, and apply the amount due in the same way.

William S. Williams is the owner of bonds issued to the Little Rock, Pine Bluff and New Orleans Railroad Company to the amount of $67,000, and of bonds issued to the Mississippi, Ouachita and Red River Railroad Company to the amount of $24,000, on all of which coupons No. 6 and thereafter remain unpaid. These bonds, with the coupons attached, he bought in open market at the current price, after the decision in *Arkansas* v. *The Little Rock, Mississippi River and Texas Railway*, above referred to, but without notice of any want of power or defect in the issue of the bonds other than is shown on their face. The suit in which he is here as appellant was brought in the same court, in the same way as that of Tompkins, on the 29th of January, 1883, against the Little Rock, Mississippi and Texas Railway to obtain substantially the same relief. Both bills were dismissed after hearing, and from decrees to that effect these appeals were taken. Two opinions were filed in the court below, one by the presiding

Justice in favor of the decree, and reported in 18 Fed. Rep. 344, and the other by the District Judge against it, and reported in 21 Fed. Rep. 370.

The liability of the present companies, or the roads in their hands, for the payment of the state bonds depends entirely on the operation and effect of the acts of July 21, 1868, and April 10, 1869, under which the bonds were issued, and they, being in *pari materia*, are to be construed together. The position taken in argument, as stated in the brief of counsel, is, that the acceptance of the bonds by the several companies created "an equitable or statutory lien or charge in favor of the State, upon the income and revenue of the roads, to the extent necessary to meet the interest and principal upon the bonds as they accrued and became due," and that "the bondholders can avail themselves of the lien." This lien on the income and revenue, it is further claimed, is in law and in fact a charge on the roads themselves, which attached as soon as the awards of aid by the Board of Railroad Commissioners were made to the several original companies, and can be enforced against subsequent incumbrancers or purchasers until the debt of the company to the State is paid in full.

It cannot be denied that the bonds were issued as "a loan of state credit," and that the original companies were bound to hold the State harmless from all liability on the amounts taken by them respectively. This might be done by paying to the State at the times specified the taxes imposed under the law, either in money or in the bonds and coupons of the State at par, or by paying at any time the whole amount of principal and accrued interest then unpaid, in money or in the bonds of the State loaned in aid of railroads or the coupons thereon. Such is the express provision of § 7 of the act of 1868. The bonds were bonds of the State, "pure and simple." They carried on their face no express obligation of the railroad company to the holder. The promise made by the company on the acceptance of the bonds was to pay the State, not the bondholder. The failure of the company to meet its obligations to the State did not operate in any manner to relieve the State from its liability on the bonds. The debt of

the state still remained and was the only debt the bonds expressed on their face. The debt of the company was to the State for the bond, not to the bondholder on the bond. Payment to the State discharged the obligation of the company.

What we have thus far said relates to the bonds considered as a valid and constitutional obligation of the State. If they were invalid, and relief was sought on that account against the company selling them, the liability would be, not on the bonds, but for the money had and received on their sale. That certainly would be the debt of the original company alone, and in no way binding on a purchaser of its property. In *Railroad Companies* v. *Schutte*, 103 U. S. 118, the object was to enforce the statutory mortgage the company actually gave the State as security for the issue of the bonds, not to recover the money received for them. There can be no liability of the new companies in these cases, therefore, unless the acceptance of the bonds by the old companies created the lien which is now contended for on the railroads or their income. In the *Schutte* case there was the lien, and it was enforced. The question now is, whether a lien was created in these cases which, under the rule in that case, will inure to the benefit of the bondholders.

If we understand the argument for the appellants correctly, it is, that because the requisition which is to be made on the company to meet the instalments of interest as they mature, and to provide a fund to pay the principal when it falls due, is called in the statute *a tax*, which may in case of default be collected by a sequestration of the income and revenue of the company, it necessarily implies a lien on the property from which the income and revenue are to be derived, as security for the payment of the debt; and that this view of the case is strengthened by the further provision for "a discharge of all claims and liens on the road" when the payment is made, which would be unnecessary if it was not intended that a lien on the road should be, and was in fact, created in favor of the State.

It is true that the requisition provided for is called a tax in

the statute, but that does not make it a tax in the ordinary sense of that term. By statute in Arkansas, "all property, whether real or personal," except such as shall be "expressly exempted," is "subject to taxation," and must "be entered on the list of taxable property for that purpose." Gantt's Dig., § 5048. Each owner is required to list his own property, (§ 5066,) and, when valued in the way provided by law, the county clerk is "to make out . . . a complete list or schedule of the taxable property in his county, and the value thereof," placing each separate lot or tract of real property opposite the name of its owner. The aggregate value of the personal property of each owner is also to be set opposite his name. § 5133. This being done, the clerk is to enter the amount of taxes imposed upon each parcel of property, and deliver the list to the proper officer for collection. §§ 5137, 5139. It is then provided by § 5153 that "the lien of the State for the taxes levied for all purposes in each year shall attach to all real and personal property on the first Friday after the first Monday in October in each year, and shall continue until such taxes, with any penalty that may accrue thereon, shall be paid." Taxes upon personal property, if not paid by the owner, may be collected by distraint. § 5173. Taxes on land, not voluntarily paid, are to be collected by a sale of the property. §§ 5185 to 5188.

Such taxes are undoubtedly liens on the property taxed, for they are in express terms made charges thereon, and there is something directly pointed out to which a lien may attach. The lien is not on the property of the owner generally, but only on that upon or against which the tax is charged. Taxes are also levied and collected in Arkansas for privileges, (§§ 5050 to 5054,) but these are not liens on the property of him to whom the privilege is granted. He may be prevented from exercising the privilege until the tax is paid, but the tax is certainly no lien on his property until a seizure has actually been made under some appropriate form of proceeding for its collection, or something else done in that behalf.

In the present case the tax provided for is not on the property of the company, and it has none of the qualities of

a tax for revenue. It is in reality nothing but a way of fixing the amount due at a particular time from the company to the State on account of the loan of credit under the statute, and demanding its payment. The object is to collect a debt due, not to require a contribution from the company for the public necessities. The obligation to pay grows out of a private contract between the State and the company, not out of the political relations between a sovereign and his people. The rights of the respective parties depend on the terms of the agreement they have entered into, not on the reciprocal duties between a State in its public capacity and its citizens. An exaction by the State under such circumstances and for such purposes is not made a lien on the property of the person who is to pay the money by simply calling it a tax. To create a charge there must be something more than the mere giving of a name to the requisition that is made. In short, the statute which authorizes the requisition must in express terms or by reasonable implication establish a lien. That has been done in Arkansas so far as taxes for revenue are concerned. The question to be determined is whether the same thing has been done in respect to the liability of railroad companies to the State under the statutes now in question.

Certainly no such lien has been created in express terms. A provision for the "discharge from all claims or liens" does not of itself establish a lien. If the lien does not exist without, such a provision will not create one. The provision may be used in aid of construction if there is doubt, but not as an affirmative grant of a positive right.

Is there anything, then, in the rest of the statute from which the creation of a lien may be reasonably implied? Before the loan could be obtained it was necessary for the company to make a statement to the Board of Railroad Commissioners, setting forth its charter and organization, a map of its line, and the progress made in construction, its financial condition and resources, and for it to furnish such other information as the case might require. The board was also to inspect the road from time to time, and to indicate to the governor how the aid was being used and applied. If

improperly used, the governor was authorized to withhold all or any part of the bonds, and to take such other steps as he might deem proper, to the end that the bonds should not be squandered. Any action of that kind on the part of the governor was to be reported to the General Assembly, which was empowered to take such steps as might be necessary to protect the interests of the State. If the company failed to complete its road within the time limited by the statute, it was to forfeit its charter and franchises to the State. In all this we see no intention of establishing a lien on the road as security for the loan which was actually made. A right to forfeit a charter and its franchises for not completing that which had been begun does not necessarily imply a prohibition against a sale or incumbrance of property acquired before a forfeiture was in fact enforced. The taking away of the franchises may, under some circumstances, affect the value of the property in the hands of a purchaser, but it cannot ordinarily deprive him of his title. A forfeiture of the charter does not necessarily transfer the road built under it to the State, or give the State any rights therein.

The whole matter, therefore, depends, so far as the act of 1868 is concerned, on the operation and effect of § 8, which provides that if the company fails to pay "the taxes imposed" by § 7, "it shall be the duty of the Treasurer of State, by writ of sequestration, to seize and take possession of the income and revenues of said company until the amount of said defaults shall be fully paid up and satisfied, with costs of sequestration, after which said treasurer shall release the further revenues of said company to its officers." The act of 1869 provides the machinery for obtaining this writ of sequestration and carrying it into effect, through a receiver to be appointed by the Pulaski Chancery Court. This receiver is authorized to demand and receive all moneys coming to the company from the operation of the road. To accomplish this it was made the duty of the officers of the company to return all moneys to him, with power on his part to require the submission to his inspection of books, papers, and accounts, and to examine persons under oath. Operating expenses were

to be paid by the receiver, on the approval of the Treasurer of State, out of the moneys turned over to him, and only the surplus or net proceeds applied in discharge of the tax. When the tax was satisfied the treasurer was required to "account with said company, and withdraw said receiver from the management of its affairs."

This, it is contended, "created and designated a fund from which the bonds were to be paid, and in case of default named a person who should seize that fund and apply it to the payment of the interest and the principal of the bonds." Such being the case, it is argued, on the supposed authority of *Ketchum* v. *St. Louis*, 101 U. S. 306, that the statute created a lien on the entire income and revenue of the company for the payment of the debt, and as the company relied exclusively on its road for its income and revenue, this lien extended to the road itself as the thing out of which the earnings must necessarily come, and that, too, notwithstanding the road has passed into other hands.

We do not understand that the case relied on warrants any such conclusion. Its facts were peculiar. The Pacific Railroad was mortgaged to the State of Missouri to secure a loan of state aid bonds amounting to $7,000,000. It was unfinished and more money was needed for its completion. Authority was then given the company by the State to issue more bonds for that purpose, to be secured by a first mortgage on a part of the line, which should be superior in lien to that already existing in favor of the State as security for the original loan. Under this legislation a fund commissioner was appointed, who had acquired, by authority of the statute, for the security of the State, "complete control of the earnings and income arising from the property." In this condition of affairs the State was invaded by armed forces during the late civil war, and while the invasion continued much of the property belonging to the company, including bridges, depots, machine shops and track, was destroyed. To raise the money to repair these damages and put the road again in a condition for use, the company applied to the county of St. Louis for a loan of $700,000 of county bonds. In aid of this application the

legislature of Missouri passed a statute authorizing the county to issue the bonds, "under such conditions as may be agreed upon between the said County Court and the Board of Directors of the Pacific Railroad Company," and directing that "the fund commissioner of the Pacific Railroad, or such person as may at any time hereafter have the custody of the funds of the said railroad company, shall, every month after said bonds are issued, pay into the county treasury of St. Louis County, out of the earnings of said Pacific Railroad, $4000, and $1000 additional in each month of December, to meet the interest on the said seven hundred bonds; said payments to continue until said bonds are paid off by said Pacific Railroad." This act was accepted by the railroad company, and the bonds were loaned by the county to the company, under a special arrangement in accordance with its provisions. The fund commissioner had at the time full control of the earnings and income under the provisions of the previous statute. What was done under these circumstances was held to be "not a simple, naked covenant to pay out of a particular fund; but the act, being accepted by the parties interested, operated as an equitable assignment of a fixed portion of the fund — an assignment which became effectual without any further intervention upon the part of the debtor, and which the party holding the funds of the company, whether the fund commissioner, or some other person, could respect without liability to the debtor for so doing. It was an arrangement based on a valuable consideration, which neither the State nor the company, nor both, nor parties claiming under either, with notice, could disregard without the assent of the county, expressed by those who had authority to bind it. It was an engagement to pay out of a specially designated fund, accompanied by express authority to its custodian to apply a specific part thereof to a definite object, in the accomplishment of which all the parties to the arrangement were directly interested." In other words, it was a specific appropriation by statute of a fixed and definite portion of the future earnings of the railroad to a particular purpose, with an express statutory provision for a custodian of the earnings as they accrued, whose duty it should

be to apply this specified portion in this specified way. No further action of the company was required. The law made it the duty of the custodian of the earnings of the road, whoever he might be, to use this definite amount thereof in this definite way and in no other way whatever, so long as the debt remained. The effect of this was to charge the road as a road, into whosesoever hands it might come, with the payment of this amount of money each month out of its current earnings. If the earnings came into the hands of the person or corporation owning the road for the time being, and the payments were not made as the law required, then some other custodian of the earnings — some other trustee — could be appointed by the proper judicial tribunal, who would obey the law in that behalf.

In the present case, however, there is no specific appropriation of the earnings of the road. The company is required to pay what is called the tax to enable the State to meet the semiannual instalments of interest on the state bonds and provide a fund for the redemption of the principal whenever it falls due. No specific amount of the earnings of the road is specially set apart by law for that purpose. There is no provision for a custodian of the earnings, whose duty it shall be to pay to the State *out of the earnings* as they accrue any definite amount on the days named. The tax is to be paid by the company on certain specified days, but there is no statutory appropriation of earnings for that purpose. If the company fails to meet the tax as it falls due, "the income and revenues of the *said company*" may be sequestered. Under the operation of this sequestration the receiver to be appointed may "take possession of all the income and revenue of said defaulting company, with authority to demand and receive all moneys coming to the same from the operation of such road;" but this falls very far short of a specific appropriation of the earnings of the road as they accrue, so that they can be demanded under the statute as earnings of the road without sequestration. Under the law which was the subject of consideration in *Ketchum's* case, there was no need of sequestration, because the part of the earnings of the road to be reached was

always in equity the property of the county, and the remedy applied was only such as was necessary to enable the county to reduce its own property to its own possession. Here, however, the writ of sequestration is given as a means of enabling the State to collect a debt, not to recover possession of its property. True, in the process of sequestration the State is authorized, through its receiver, to demand and receive the moneys coming to the company from the operation of the road, but this is for the purpose of enabling the State to subject that particular kind of property belonging to the company to the payment of its debt, not to get possession of anything which actually belonged to the State irrespective of its rights under the sequestration proceedings. It is true, also, that in executing its writ of sequestration, the State could, through its receiver, direct the officers of the company as to the disposition of the current earnings of the road, and thus to a certain extent assume the management of the company's affairs. This was not, however, for the purpose of enabling the State to get possession of its own property, but of compelling the company to apply its property to the payment of its debts. Certainly, if A owes B a debt, and agrees that if the debt is not paid at maturity B may apply to a proper judicial tribunal for a receiver to collect the rents of a certain building which he then owned, and apply them on the debt until it is discharged in full, it would not be claimed that B had acquired a lien on the building, or even on the rents, until he had at least commenced proceedings to subject the rents under the agreement. The agreement alone did not make the rents the property of B, or charge the building as security for their payment to him. The rents belonged to A until default in the payment of the debt, and until B took steps to reduce them to possession. If in the meantime the building should be sold by A there would be no rents which B could subject under his agreement, because it was only rents due to A himself that he could give B the right to collect. In *Ketchum's* case the earnings of the road to the extent that they had been specifically appropriated to the county of St. Louis never did belong to the company after the bonds were accepted, and the grant of the earnings was in equity a

grant of such an interest in the road as was necessary to produce the earnings. Hence, a conveyance of the road afterwards to one with notice was necessarily subject to the prior equitable charge on the road which had been created in favor of the county. But here there was never any grant of earnings, and consequently there was never any grant of an equity in the road. The case stands precisely as it would if, instead of a writ of sequestration, it had been agreed that the Pulaski Chancery Court might, on application of the Treasurer of State, issue an ordinary writ of *fieri facias* to subject the property of the company to the payment of the amount which was then due. No one could properly claim that in such a case any lien in favor of the State existed which would prevent an alienation of its property by the company before steps were taken to get the execution. The writ of sequestration actually provided for was to issue as an appropriate form of execution to subject any "income and revenue" which the company then had to the payment of its debt then due, and in the income and revenue of the company that might be thus subjected was included "all moneys coming to the same from the operation of such road," that is to say, the road in aid of the construction of which the loan of credit was made. But if there were then no moneys coming, or which could be rightfully made to come, to the company from the operation of the road, then there was nothing of that kind of property which could be subjected to the writ. And they neither could come, nor be made to come, to the company unless the original company to which the loan was made and by which the obligation was incurred either owned the road itself or had passed it to another, coupled with a condition that its earnings should be subject to the writ, or something equivalent.

We agree with counsel for the appellants, that if, on an examination of the statutes, read in the light of the circumstances which surrounded the legislature at the time of their enactment, it appeared to have been the intention to charge the road of the company as a road with a liability for the repayment of the loan to be made, it would be the duty of a court of equity to do everything in its power which was neces-

sary to enforce that charge. And it may also be true that the courts ought to construe the statutes liberally with a view to the establishment of such a charge as against the company itself or those claiming under it, because, if the charge was actually created by the statutes, those dealing with the company were bound to take notice of it. But after a careful consideration of the statutes, and construing them liberally in favor of the State, we have been unable to find that any such intention did in fact exist. There was a plain and simple way in which such a lien could be created, and that was by providing in express terms for it. That way had been adopted by the State in a statute passed March 18, 1867, and it was the way usually adopted by other States when granting similar aid to their own companies. The wide departure which Arkansas made in this statute from the accustomed form of proceeding, both at home and elsewhere, is strongly indicative of an intention to waive security any further than it was embraced in the reserved power of sequestration. The constitution of the State gave authority to issue bonds in aid of such works of internal improvement if assented to by the people. If the people gave their consent, then the bonds when issued became a debt of the State, and there was power in the General Assembly, under the constitution of 1868, to levy taxes for their payment, if necessary.

This disposes of the cases and renders it unnecessary to consider any of the other questions discussed at the bar or in the briefs. In our opinion the new companies took the roads free of incumbrance in favor of the State, and neither the State nor its bondholders are entitled to a sequestration of the income and revenue arising therefrom in their hands. The decree of the Circuit Court in each of these cases is consequently

Affirmed.

MR. JUSTICE BLATCHFORD did not sit in these cases or take any part in their decision.

HARTRANFT *v.* LANGFELD.

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

No. 750. Argued February 15, 1888. — Decided March 19, 1888.

Velvet ribbons made of silk and cotton, silk being the material of chief value, known as "trimmings," chiefly used for making or ornamenting hats, bonnets, and hoods, but sometimes used for trimming dresses, being imported into the United States, are subject to a duty of twenty per centum *ad valorem* under Schedule M of the act of March 3, 1883, 22 Stat. 512, as "hats and so forth, materials for . . . trimmings;" and not to a duty of fifty per centum *ad valorem* under Schedule L of that act, Ib. 510, as "goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value."

This was an action to recover customs duties alleged to have been illegally exacted. Judgment for plaintiffs. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. Joseph H. Choate for defendants in error. *Mr. Henry Edwin Tremain*, *Mr. Mason W. Tyler* and *Mr. H. T. Kingston* were with him on the brief.

Mr. Justice Matthews delivered the opinion of the court.

This was an action against the collector of the port of Philadelphia by importers to recover an alleged illegal excess of duties exacted by and paid to him. There was a verdict for $856.56 in favor of the plaintiffs, and judgment rendered thereon, to reverse which this writ of error is prosecuted.

The goods which were the subject of the duty were velvet ribbons made of silk and cotton, of which silk was the material of chief value. The custom-house officers assessed upon them a duty of fifty per centum *ad valorem* under the last

paragraph of Schedule L of the act of March 3, 1883, 22 Stat. c. 121, 488, 510, which reads as follows: "All goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum *ad valorem*." The plaintiffs claimed, and the jury found, under the instructions of the court, that the duty should have been assessed under the following paragraph of Schedule M of the same act, 22 Stat. c. 121, 488, 512:

"Hats and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow-sheets, and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone, or any other substance or material not specially enumerated or provided for in this act, twenty per centum *ad valorem*."

A bill of exceptions sets out all the evidence in the cause, together with the charge of the court to the jury, and instructions asked for by counsel on both sides, respectively, with the exceptions to certain parts of the charge as given, and to the refusal of the court to charge as requested by counsel for the defendant.

It appears from the evidence that the goods in question were "trimmings," and that they were "used for making or ornamenting hats, bonnets, and hoods." That they were "trimmings," was not a matter of controversy; all the witnesses on both sides spoke of them as such. Neither was it disputed that they were "used for making or ornamenting hats, bonnets, and hoods," but there was no evidence that they were used exclusively for that purpose. The testimony on the part of the plaintiffs tended to show that they were chiefly used for making or ornamenting hats, bonnets, and hoods, but that they also might be, and sometimes were, used for trimming dresses. The testimony on the part of the defendant tended to show that they were dress trimmings equally with hat trimmings, and were commonly used as much for the one purpose as the other. In this state of the proof the judge charged the jury as follows:

"It is the use to which these articles are chiefly adapted,

and for which they are used, that determines their character within the meaning of this clause of the tariff act. It would in my judgment be a fair construction of the meaning of this act to say that because certain articles are indifferently adapted for use for different purposes either of these purposes may determine the rate of duty. It is the predominant use to which articles are applied that determines their character. It certainly could not have been the intention of Congress in framing this clause of the law to admit the importation, at a low rate of duty, of articles which may be used for certain purposes, but which are used chiefly for another and different purpose.

"You will therefore determine to which use these articles in question are chiefly devoted. If they are hat trimmings, and used for making and ornamenting hats, then the rate of duty imposed was excessive, and the plaintiff is entitled to recover the excess.

"If, however, in the determination of this question of fact, you find the articles to be chiefly used for other purposes, you will find for the defendant. The question is simply and purely one of fact, namely, What is the predominant use to which these articles are devoted? As you determine that question you will return your verdict."

The plaintiffs had requested the judge to charge the jury as follows:

"I. That if the jury find the goods in question are used for making or ornamenting hats, their verdict should be for plaintiff.

"II. That where the articles are named or described in one section of the tariff act and a duty so imposed thereon, general terms in the same act, although sufficient to comprehend such articles, by which a higher rate of duty is fixed, are not applicable to it, and will not prevail to make such higher rate of duty; and, that if the jury find the goods in question are hat trimmings used for making or ornamenting hats, and also find that silk is the component material of chief value, the verdict should be for the plaintiff.

"III. That the clause imposing a duty on hat trimmings

being subsequent in the act to the clause imposing a duty on articles of which silk is the component material of chief value, if the jury find the goods are hat trimmings used for making or ornamenting hats, and also that they are articles of which silk is the component material of chief value, that the subsequent clause imposing the duty at twenty per cent should be taken as showing the latest and final intent of the law-makers, and the verdict should be for the plaintiff.

"IV. That if the jury find the goods in question are known and used as hat trimmings, used for making or ornamenting hats, although they may be used from time to time for other purposes, their verdict should be for the plaintiff."

In reply to these requests the judge said to the jury as follows:

"1. If the evidence shows that the goods upon which the duty was charged are adapted to use and are used for various purposes other than for trimming hats, the jury must be satisfied that the use to which they are chiefly applicable and for which they were employed was in making or ornamenting hats, to bring them within the scope of the clause of the tariff act imposing a duty of twenty per cent.

"2, 3 and 4. Subject to the qualifications stated in the foregoing answer to the first point, the three remaining points are affirmed."

The counsel for the defendant requested the judge to charge the jury as follows:

"I. That if the jury should find that the goods in question are not specially enumerated or provided for, and that the silk is the component material of chief value, then the rate of duty should be fifty per centum *ad valorem*, and your verdict should be for the defendant.

"II. That if the jury should find that silk is the component material of chief value of the goods in question, and that they are suitable for and are occasionally used for hat trimmings, but that they are generally used for other purposes, then, as they are not exclusively or specially used for hat trimmings, they cannot be said to be 'used for making or ornamenting hats' within the meaning of the act of Congress so as to sub-

ject them to a duty of twenty per centum *ad valorem*, and your verdict should be for the defendant.

"III. That if the jury should find that the goods in question can properly be classified under Schedule M, act March 3, 1883, as 'trimmings used for making or ornamenting hats,' not specially enumerated or provided for in said act, and subject to a duty of twenty per centum *ad valorem*, and can also properly be classified as goods not specially enumerated or provided for, of which silk is the component material of chief value, and subject to a duty of fifty per centum *ad valorem*, then, as two rates of duty are applicable to the goods, they should be classified as subject to a duty of fifty per centum, as this is the higher rate, and your verdict should be for the defendant.

"IV. That unless the jury should find that the goods in question are not specially provided for, and that by their style and character they are fitted only for use or making or ornamenting hats, then your verdict should be for the defendant."

The court declined to give these instructions and the counsel for the defendant excepted as follows:

"1. Because the judge declined to charge as requested in defendant's first, second, and fourth points, stating that those points were substantially covered by the answers to the plaintiffs' points.

"2. Because the judge declined to charge as requested in the defendant's third point.

"3. Because the judge charged the jury that 'if the evidence shows that the goods upon which the duty was charged are adapted to use and are used for various purposes other than for trimming hats, the jury must be satisfied that the use to which they are chiefly applicable and for which they are employed was in making or ornamenting hats, to bring them within the scope of the clause of the tariff act imposing a duty of twenty per cent.' And that, 'subject to the qualifications stated in the foregoing answer to the first point, the three remaining points are affirmed.'"

In support of these exceptions, it is argued by the Solicitor General, that the charge of the court and the answers to

the points of instruction requested by the respective counsel, misled the jury from the real point involved in the case to a foreign issue, by substantially instructing it, that the inquiry was whether these materials had a predominant use for making and ornamenting hats, bonnets, and hoods, whereas the true construction of the statute required that the inquiry, which should have been submitted to the jury, was whether the materials imported were "braids, plaits, flats, laces, trimmings, willow-sheets and squares, . . . composed of straw, chip, . . . used for making or ornamenting hats, bonnets, and hoods." The instruction of the court, it is said, was that any material, of which the predominant use was for the making or ornamenting of hats, bonnets, and hoods, not specially provided for, should be classified under this clause. It is contended that "the true construction is that the use of the material must not only be for making and ornamenting hats, bonnets, and hoods, but it must be in some of the forms fixed in the statute; that is, in the form of either 'braids, plaits, flats, laces, trimmings, tissues, willow-sheets, or squares.'"

But this is an entire misconception of the charge of the court. There was no controversy in the evidence as to whether these velvet ribbons were or were not "trimmings." All the witnesses agreed that they were; it was so assumed throughout the case; it was expressly stated in the charge of the court to the jury that they must be "trimmings" within the sense of the section in order to justify a recovery. The court said expressly in its charge: "If they are hat trimmings, and used for making and ornamenting hats, then the rate of duty imposed was excessive, and the plaintiff is entitled to recover the excess." This necessarily implied that if they were not hat trimmings, the plaintiffs could not recover; and also that even if they were hat trimmings, but were not chiefly used for making and ornamenting hats, the plaintiffs would not be entitled to recover, because in the sentence immediately preceding in the charge, the court had said to the jury: "You will, therefore, determine to which use these articles in question are chiefly devoted." What the court charged the jury, therefore, was that in order to entitle the plaintiffs to recover,

they must find that the velvet ribbons in question were "trimmings" used for making and ornamenting hats, and that they were "chiefly" used for that purpose. The jury were told: "If, however, in the determination of this question of fact, you find the articles to be chiefly used for other purposes, you will find for the defendant. The question is simply and purely one of fact, namely, What is the predominant use to which these articles are devoted? As you determine that question, you will return your verdict." The objection, therefore, to the charge of the court, that it would have authorized a recovery if the goods in question were materials used for making or ornamenting hats, although not coming within the enumeration of the section as "braids, plaits, flats, laces, trimmings, tissues, willow-sheets and squares," is not well taken.

The court in fact did instruct the jury that they must find the goods in question to be "trimmings" chiefly used for making and ornamenting hats, bonnets, and hoods, composed of a material not otherwise specially enumerated or provided for. It is not suggested that the velvet ribbons are specially mentioned as subject to a duty by that name or description. It is true that there was no evidence showing that the exclusive commercial designation of such velvet ribbons was "trimmings," but all the witnesses spoke of the velvet ribbons in question as "trimmings," manifestly according to the natural meaning of the word, and because they were used to trim either hats or dresses; the real controversy being for which purpose as "trimmings" they were principally used.

A further criticism, by way of objection, is made to that part of the charge excepted to wherein the judge states that "the jury must be satisfied that the use to which they (the goods) are chiefly applicable, and for which they were employed, was in making or ornamenting hats," &c. The point of this criticism is that the language, "and for which they were employed," "would require the collector to suspend the assessment until he should know how the goods were used or employed. That use or employment of the goods might not take place for years after the importation was made. The law clearly did not intend the classification should be required to

await such an uncertain event." This is hypercritical. The language does not admit of any such construction. It means for which they were habitually employed, or customarily employed, or usually employed, and not "for which they had been employed." It is impossible that any jury could have otherwise understood the instruction.

The remaining exception was on account of the refusal of the court to instruct the jury as requested by the counsel for the defendant in the third point, viz: "That if the jury should find that the goods in question can properly be classified under Schedule M, act March 3, 1883, as 'trimmings used for making or ornamenting hats,' not specially enumerated or provided for in said act, and subject to a duty of twenty per centum *ad valorem*, and can also properly be classified as goods not specially enumerated or provided for, of which silk is the component material of chief value, and subject to a duty of fifty per centum *ad valorem*, then, as two rates of duty are applicable to the goods, they should be classified as subject to a duty of fifty per centum, as this is the higher rate, and your verdict should be for the defendant." The section of the Revised Statutes upon which this instruction was framed is § 2499, which provides: "If any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty." The principle of this section, however, is not applicable to the circumstances of this case. The velvet ribbons were found by the jury to be trimmings chiefly used for making or ornamenting hats; that brought them within the operation of Schedule M of the act of March 3, 1883, fixing the duty at twenty per centum *ad valorem;* and being specially provided for by that section, they were excluded from the operation of all others.

The contention which appears to have been made on behalf of the government on the trial of the cause, that these velvet ribbons could not be classified as trimmings used for making or ornamenting hats, bonnets, and hoods, within the meaning

of the section levying the duty of twenty per centum *ad valorem*, unless they were shown to have been used exclusively for that purpose, is not insisted upon by the Solicitor General in this court. It was very properly abandoned, the charge of the court upon that point being, in our opinion, clearly right.

The judgment of the Circuit Court is accordingly

Affirmed.

TILGHMAN *v.* PROCTOR.

PROCTOR *v.* TILGHMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Nos. 537, 548. Argued November, 3, 4, 5, 1886. — Decided March 19, 1888.

One having an interest in all fees and other sums to be recovered under a patent, but not shown to have any interest, legal or equitable, in the patent itself, need not be made a party to a bill in equity for its infringement.

Upon a bill in equity by the owner against infringers of a patent, the plaintiff, although he has established license fees, is not limited to the amount of such fees, as damages; but may, instead of damages, recover the amount of gains and profits that the defendants have made by the use of his invention, over what they would have had in using other means then open to the public and adequate to enable them to obtain an equally beneficial result.

Upon a bill in equity for infringing a patent, if the defendants have gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which the invention was employed by the defendants did not result in profits; and if the use of a patented process produced a definite saving in the cost of manufacture, they must account to the patentee for the amount so saved.

The liability of infringers of a patent to account to the patentee for all the profits, gains and savings, which they have made by the use of his invention during the whole period of their infringement, is not affected by the fact that in the midst of that period an erroneous decision was made in favor of a distinct infringer, in no way connected with these defendants.

The conclusions of a master in chancery, depending upon the weighing of

conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside unless there clearly appears to have been error or mistake on his part.

In determining the amount of gains and profits derived by infringers of a patent from the use of the invention, over what they would have made in using an old process open to the public, the expense of using the new process is to be ascertained by the manner in which they have conducted their business, and not by the manner in which they might have conducted it; but the cost at which they used the old process is not conclusive against them, if other manufacturers used that process at less cost.

As a general rule, in taking an account of profits against an infringer of a patent, interest is not to be allowed before the date of the submission of the master's report, but only after that date and upon the amount shown to be due by his report and the accompanying evidence.

The other questions decided were questions of fact.

In equity. These were cross appeals from the decree entered (on the report of a master) in the execution of the mandate of this court in the cause reported in 102 U. S. 707. The case is stated in the opinion of the court.

Mr. Francis T. Chambers and *Mr. George Harding* for Tilghman.

Mr. Robert H. Parkinson and *Mr. William M. Ramsey* for Proctor and others.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity, filed June 26, 1874, by Richard A. Tilghman against William Proctor and four others, copartners under the name of Proctor & Gamble, praying for an injunction, for an account of profits, and for damages, for the infringement of letters patent, originally granted to Tilghman for fourteen years from January 9, 1854, and afterwards extended to January 9, 1875, for the process of manufacturing fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure.

The infringement complained of in this suit was from May 1, 1870, to January 8, 1875. Similar suits by this plaintiff against other defendants had been maintained by the Circuit Courts for the Southern Districts of Ohio and of New York

in 1862 and 1864 respectively. *Tilghman* v. *Werk*, 2 Fisher Pat. Cas. 229; *Tilghman* v. *Mitchell*, 2 Fisher Pat. Cas. 518. In the suit in New York, a final decree for an account of profits was entered by the Circuit Court on September 1, 1871. *Tilghman* v. *Mitchell*, 9 Blatchford, 1, 18; *S. C.* 4 Fisher Pat. Cas. 599, 615. On March 2, 1874, that decree was reversed in this court, by the opinion of four justices against three, two judges not sitting, upon the hypothesis that Tilghman's patent was limited to the apparatus therein described, and that the use of an apparatus similar to that used by the present defendants was not an infringement. *Mitchell* v. *Tilghman*, 19 Wall. 287, 419, iii.

In the case at bar, the Circuit Court, on December 2, 1874, following the decision of this court in *Mitchell* v. *Tilghman*, made a decree dismissing the bill. But, on appeal from that decree, this court, at October term, 1880, by a unanimous opinion, overruled its decision in *Mitchell* v. *Tilghman*, and adjudged that Tilghman's patent was a valid one for a process, and not merely for the particular apparatus described in the specification; that that apparatus could be operated to produce a beneficial result; that the defendants had infringed the plaintiff's patent; and, therefore, that the decree of the Circuit Court be reversed, and the case remanded with directions to enter a decree for the plaintiff in conformity with that opinion. *Tilghman* v. *Proctor*, 102 U. S. 707. There is nothing in the record before us to induce any change or modification of the conclusions then announced.

By making a few extracts from that opinion, the questions now before us will be the better understood.

"The patent in question relates to the treatment of fats and oils, and is for a process of separating their component parts so as to render them better adapted to the uses of the arts. It was discovered by Chevreul, an eminent French chemist, as early as 1813, that ordinary fat, tallow and oil are regular chemical compounds, consisting of a base which has been termed glycerine, and of different acids, termed generally fat acids, but specifically stearic, margaric and oleic acids. These acids, in combination severally with glycerine, form stearine,

margarine and oleine. They are found in different proportions in the various neutral fats and oils; stearine predominating in some, margarine in others, and oleine in others. When separated from their base (glycerine) they take up an equivalent of water, and are called free fat acids. In this state they are in a condition for being utilized in the arts. The stearic and margaric acids form a whitish, semi-transparent, hard substance, resembling spermaceti, which is manufactured into candles. They are separated from the oleic acid, which is a thin oily fluid, by hydrostatic or other powerful pressure; the oleine being used for manufacturing soap, and other purposes. The base, glycerine, when purified, has come to be quite a desirable article for many uses." 102 U. S. 708, 709.

The substance of Tilghman's discovery and invention was thus summed up by the court: "That the fat acids can be separated from glycerine, without injury to the latter, by the single and simple process of subjecting the neutral fat, whilst in intimate mixture with water, to a high degree of heat under sufficient pressure to prevent the water from being converted into steam, without the employment of any alkali or sulphuric acid, or other saponifying agent; the operation, even with the most solid fats, being capable of completion in a very few minutes when the heat applied is equal to that of melting lead, or 612° Fahrenheit; but requiring several hours when it is as low as 350° or 400° Fahrenheit. The only conditions are, a constant and intimate commixture of the fat with the water, a high degree of heat, and a pressure sufficiently powerful to resist the conversion of the water into steam. The result is, a decomposition of the fatty body into its elements of glycerine and fat acids, each element taking up the requisite equivalent of water essential to its separate existence, and the glycerine in solution separating itself from the fat acids by settling to the bottom when the mixed products are allowed to stand and cool. In this process a chemical change takes place in the fat in consequence of the presence of the water and the active influence of the heat and pressure upon the mixture." pp. 712, 713.

The court spoke of the different forms of apparatus, men-

tioned in Tilghman's patent, or used by the defendants, as follows:

"The apparatus described" in the patent "consists of a coil of iron pipe, or other metallic tubing, erected in an oven or furnace, where it can be subjected to a high degree of heat; and through this pipe the mixture (of nearly equal parts of fat and water), made into an emulsion in a separate vessel by means of a rapidly vibrating piston or dasher, is impelled by a force-pump in a nearly continuous current, with such regulated velocity as to subject it to the heat of the furnace for a proper length of time to produce the desired result; which time, when the furnace is heated to the temperature of 612° Fahrenheit, is only about ten minutes. The fat and water are kept from separating by the vertical position of the tubes, as well as by the constant movement of the current; and are prevented from being converted into steam by weighting the exit valve by which the product is discharged into the receiving vessel, so that none of it can escape except as it is expelled by the pulsations produced by the working of the force-pump. Before arriving at the exit valve, the pipe is passed, in a second coil, through an exterior vessel filled with water, by which the temperature of the product is reduced. After the product is discharged into the receiving vessel, it is allowed to stand and cool until the glycerine settles to the bottom and separates itself from the fat acids. The latter are then subjected to washing and hydraulic pressure in the usual way." pp. 718, 719.

"It is evident that the passing of the mixture of fat and water through a heated coil of pipe standing in a furnace is only one of several ways in which the process may be applied. The patentee suggests it as what he conceived to be the best way, apparently because the result is produced with great rapidity and completeness. But other forms of apparatus, known and in public use at the time, can as well be employed without changing the process. A common digester, or boiler, can evidently be so used, provided proper means are employed to keep up the constant admixture of the water and fat, which is a *sine qua non* in the operation." pp. 719, 720.

Opinion of the Court.

"The defendants use a boiler in which the charge of fat and other materials is placed and heated; and do not mix the fat and water in the manner pointed out in the specification of the patent, but, on the contrary, have inserted in the boiler a pump which forces the water, as it settles to the bottom, upwards to the top of the mass, and pours it upon the upper surface, whence it again finds its way down through the fat, thus keeping up a constant mixture." p. 730.

It was expressly decided that neither the form of the defendants' apparatus, nor the addition of lime, nor the use of steam, nor the applying of a lower degree of heat, prevented their process from being an infringement of the plaintiff's patent. pp. 730–733.

The court also said: "It is objected that the particular apparatus described in the patent for carrying the process into effect cannot be operated to produce any useful result. We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded. A recapitulation of this evidence is not necessary. The testimony of Tilghman himself, of Professor Booth, and of Mr. Wilson, is directly to the point." p. 730.

In accordance with the judgment and mandate of this court, the Circuit Court, in February, 1877, entered an interlocutory decree for the plaintiff, and referred the case to a master "to ascertain and tax and state and report to the court an account of the gains, profits, savings and advantages which the said defendants have received, or which have arisen or accrued to them, from infringing the said exclusive rights of the said complainant by the use of the process patented in the said letters patent, as well as the damages the said complainant has sustained thereby." The master filed his report in August, 1884.

As to damages, "the master finds from the evidence that the complainant has derived no profit from the invention involved in this suit, otherwise than by granting licenses to others to use the same. These licenses have been granted to all manufacturers desiring to use his process, at a substantially uniform fee of twenty cents for each hundred pounds of fat

treated, payable monthly. For several years, the respondents held such a license from the complainant, but terminated the same, refusing to pay the stipulated license fees, after May 1, 1870, although continuing to use the process until the expiration of the patent on January 8, 1875." The master further says: "The accompanying table A shows the quantity of fat treated by the respondents during each month of infringement, the license fees therefor, and interest thereon to October 7, the first day of October term, 1884, making the whole amount of the complainant's damages herein $79,566.91."

As to the profits, gains, savings and advantages which had accrued to the defendants, the master finds that what was known as "the lime saponification process," which consisted in the manufacture of the fat into soap by the use of lime, and in the decomposition of that soap into fatty acids and glycerine by the aid of sulphuric acid, was more advantageous than any other process open to public use at the time in question; and reports the defendants' savings in lime and sulphuric acid, their gain in glycerine, their loss in fat acids produced, and their net gains and savings, as follows:

2,798,733 lbs. of lime, at $0.3526 per hundred .	$9,868 33
6,880,219 lbs. of sulphuric acid, at $2.527 per hundred	173,863 13
Amount saved in chemicals	$182,731 46
Amount gained on glycerine water	61,701 77
Total	$244,433 23
Deducting loss in fatty acids, being 54 cents per hundred on 21,294,753 lbs. of fat	$114,991 76
Net gains and savings	$129,441 47

In September, 1884, each party filed exceptions to the master's report. The Circuit Court, in February, 1886, overruled all the exceptions, and entered a final decree for the plaintiff for $79,566.91, the amount of damages reported by the master,

with simple interest added upon the license fees from October 7, 1884, to February 4, 1886, making in all $83,275.21, and costs. From this decree both parties appealed to this court.

At the hearing before the master, a brother of the plaintiff, called as a witness in his behalf, testified on cross-examination that before this suit was brought the witness had acquired an interest in all license fees and recoveries under the patent. No further question was asked, or evidence offered, by either party, as to the nature or amount of that interest. The defendants contended before the master, and at the argument here, that the plaintiff could recover in this suit no more than his own share, and, having failed to prove the extent of his interest, was entitled to nominal damages only. It is a sufficient answer to this objection, that it is not shown that any one but the plaintiff has any interest, legal or equitable, by assignment or otherwise, in the patent sued on; and that, as observed by Mr. Justice Strong, sitting in the Circuit Court, "an interest in the net proceeds of collections under a patent does not necessarily amount to legal ownership of the patent itself. It is plain, therefore, as the case appears, that there has been no want of joinder of the necessary parties." *Jordan* v. *Dobson*, 4 Fisher Pat. Cas. 232, 236.

The principal question of law now presented is as to the general rule that should govern the amount to be recovered. The defendants contend that the plaintiff, having established license fees for the use of his patent, is not entitled to any gains and profits accruing to the defendants, in excess of those fees. The plaintiff contends that, as the profits to be accounted for exceed the damages, he has the right, waiving the damages found by the master, to have a decree for profits.

In an action at law for the infringement of a patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalties or license fees as he has been accustomed to receive from third persons for the use of the invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of his damages; but the court may, whenever the circumstances of

the case appear to require it, inflict vindictive or punitive damages, by rendering judgment for not more than thrice the amount of the verdict. Acts of July 4, 1836, c. 357, § 14, 5 Stat. 123; July 8, 1870, c. 230, § 59, 16 Stat. 207; Rev. Stat. § 4919; *Seymour* v. *McCormick*, 16 How. 480, 489; *New York* v. *Ransom*, 23 How. 487; *Suffolk Co.* v. *Hayden*, 3 Wall. 315; *Philp* v. *Nock*, 17 Wall. 460; *Packet Co.* v. *Sickles*, 19 Wall. 611, 617; *Burdell* v. *Denig*, 92 U. S. 716.

But upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention.

This rule was established by a series of decisions under the patent act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions, in cases arising under the patent laws. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; *Livingston* v. *Woodworth*, 15 How. 546; *Dean* v. *Mason*, 20 How. 198; *Rubber Co.* v. *Goodyear*, 9 Wall. 788; *Mowry* v. *Whitney*, 14 Wall. 620; *Littlefield* v. *Perry*, 21 Wall. 205, 229; *Mason* v. *Graham*, 23 Wall. 261; *Tremolo Patent*, 23 Wall. 518; *Cawood Patent*, 94 U. S. 695; *Mevs* v. *Conover*, October Term, 1876, 11 Pat. Off. Gaz. 1111[1]; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126; *Root* v. *Railway Co.*, 105 U. S. 189.

---

[1] In *Mevs* v. *Conover*, which came from the Circuit Court of the United States for the Southern District of New York, and is reported at different stages below in 3 Fisher Pat. Cas. 386, 6 Fisher Pat. Cas. 506, and 11 Blatchford, 197, the opinion of this court, not published in its official reports, but printed in the edition of the Lawyers' Coöperative Publishing Company, (Bk. 23, p. 1008,) appears of record to have been delivered on March 13, 1877, by Mr. Justice Strong, as follows:

"The only errors assigned in this case are to the confirmation of the master's report, and they relate to the ascertainment of the profits which the defendant had made by his unauthorized use of the plaintiff's invention. That the machine employed by the defendant in splitting wood was an infringement of the plaintiff's patent is established by the decree which sent the case to the master, and no complaint is made of that, but it is contended the master erred in reporting 'there was saved to the defendant seventy-five cents per cord in the wood split by him and made into bundles.'

"In the ascertainment of profits made by an infringer of a patented

Opinion of the Court.

The reasons that have led to the adoption of this rule are, that it comes nearer than any other to doing complete justice between the parties; that in equity the profits made by the infringer of a patent belong to the patentee and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong,

---

invention, the rule is a plain one. The profits are not all he made in the business in which he used the invention, but they are the worth of the advantage he obtained by such use, or, in other words, they are the fruits of that advantage. *Mowry* v. *Whitney*, 14 Wall. 651. We are not convinced that the rule declared in that case was not followed in this. The patented invention infringed by the defendant was a new and improved machine for splitting kindling wood, and a distinguishing feature of it, perhaps the principal feature, was a device for the automatic feeding of the wood to the reciprocating splitting knives or cutters, by a movable platform or apron carried forward by an endless chain. That device the defendant used, though it is said he used it in another machine, known as Green's. The evidence is full and uncontradicted that an advantage is gained, in splitting kindling wood by a machine with that device, of at least seventy-five cents a cord over splitting it by hand or without that device. It was in harmony with this evidence the master reported and the court decreed.

"It is urged, however, that the Green machine, in which the defendant used the plaintiff's invention, was old and defective, and that no profits were actually received from such an use. But if such be the fact, if the defendant was a loser by splitting wood with the Green machine, his loss was less to the extent of seventy-five cents on each cord split, than it would have been had he not used the patented invention. Such a result was equivalent to an equal gain, and it was rightly estimated as a part of the profits for which the infringer was responsible.

"These observations are sufficient for the present case. We notice, however, a suggestion made on behalf of the appellant, that since the decree in the Circuit Court the patentee has surrendered the patent upon which the decree was founded, and obtained a reissue. This does not appear in the record, and if it did it would be immaterial. We have held that the surrender of a patent extinguishes it, and that, after its surrender, pending suits founded upon it fall with its extinguishment. The patent must remain unsurrendered, not only when a suit upon it is commenced, but at the time of trial and judgment. But a surrender after final judgment or decree can have no effect upon a right passed previously into judgment. After that, there is nothing open for litigation. The right of the patentee then rests on his judgment or decree, and not on his patent. The suggestion, therefore, cannot avail the appellant, and the decree of the Circuit Court must be affirmed. *Decree affirmed.*"

or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged.

The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages.

But if the defendant gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which that invention was employed by the defendant did not result in profits. If, for example, the unauthorized use by the defendant of a patented process produced a definite saving in the cost of manufacture, he must account to the patentee for the amount so saved. This application or corollary of the general rule is as well established as the rule itself.

For instance, in the case of *The Cawood Patent*, for an improvement in a machine for repairing the crushed and exfoliated ends of railroad iron, Mr. Justice Strong, in delivering judgment, said: "It has been argued that it would have been better for these defendants, if, instead of repairing the crushed and exfoliated ends of the rails, they had cut off the ends and re-laid the sound parts, or caused the rails to be rerolled. Experience, it is said, has proved that repairing worn-out ends of rails is not true economy, and hence it is inferred that the defendants have derived no profits from the use of the plaintiff's invention. This argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair their injured rails. They had the choice of repairing them on the common

anvil or on the complainant's machine. By selecting the latter, they saved a large part of what they must have expended in the use of the former. To that extent they had a positive advantage, growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from loss. In settling an account between a patentee and an infringer of the patent, the question is, not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention." 94 U. S. 710.

In *Mevs* v. *Conover*, where the patent was for an improved machine for splitting kindling wood, the same justice, delivering the opinion of the court, said: "It is urged, however, that the Green machine, in which the defendant used the plaintiff's invention, was old and defective, and that no profits were actually received from such an use. But if such be the fact, if the defendant was a loser by splitting wood with the Green machine, his loss was less to the extent of seventy-five cents on each cord split, than it would have been had he not used the patented invention. Such a result was equivalent to an equal gain, and it was rightly estimated as a part of the profits for which the infringer was responsible." 11 Pat. Off. Gaz. 1112; *ante*, 145, note.

In *Elizabeth* v. *Pavement Co.*, Mr. Justice Bradley stated, as a general proposition that would hardly admit of dispute, "It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention, although, from other causes, the general business of the defendant, in which the invention is employed, may not have resulted in profits, — as where it is shown that the use of his invention produced a definite saving in the process of a manufacture." 97 U. S. 138, 139. In *Root* v. *Railway Co.*, that statement was repeated. 105 U. S. 202, 203. And in *Thomson* v. *Wooster*, 114 U. S. 104, in which the patent was for an improved folding guide for sewing-machines, Mr. Justice Bradley said: "It might have been a better financial operation to

have bought of others, or employed others to make the folded strips which they required, just as, in the case of *The Cawood Patent*, the railroad company would have done better not to have mended the ends of their battered rails, but to have had them cut off; but as they chose to perform the operation they became responsible to the patentee for the advantage derived from using his machine." 114 U. S. 118.

The general rule has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say, that a court of equity, which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage. *Root* v. *Railway Co.*, 105 U. S. 189, 214, 215.

The rule in equity of requiring an infringer to account for the gains and profits which he has made from the use of a patented invention, instead of limiting the recovery to the amount of royalties paid to the patentee by third persons, has been constantly upheld under the provision of the patent act of 1870, embodied in the Revised Statutes, which, beside rëenacting the grant of general equity jurisdiction in patent cases, further enacts that "upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that are given by this act to increase the damages found by verdicts in actions upon the case;" and thus expressly affirms the defendant's

liability to account for profits, as well as authorizes the court sitting in equity to award and to treble any damages that the plaintiff has sustained in excess of the defendant's profits. Act of July 8, 1870, c. 230, § 55, 16 Stat. 206; Rev. Stat. § 4921; *Birdsall* v. *Coolidge*, 93 U. S. 64, 69; *Marsh* v. *Seymour*, 97 U. S. 348; *Root* v. *Railway Co.*, above cited; *Manufacturing Co.* v. *Cowing*, 105 U. S. 253; *Garretson* v. *Clark*, 111 U. S. 120; *Black* v. *Thorne*, 111 U. S. 122; *Birdsell* v. *Shaliol*, 112 U. S. 485, 488; *Thomson* v. *Wooster*, 114 U. S. 104.

It was argued for the defendants, that the limited construction given to Tilghman's patent by the decision of this court in *Mitchell* v. *Tilghman*, 19 Wall. 287, became a restriction upon the scope of the patent, and so remained until revoked, and therefore that the defendants in this suit should not be held liable for infringement for the time between the date of that decision and the expiration of the patent, that is to say, for the last ten months and six days of the period of more than four years and eight months during which the infringement lasted.

But the injustice done to a patentee by an erroneous decision in a suit against one infringer will not justify a repetition of the injustice in another suit against distinct infringers in no way connected with the first one. The decision against Tilghman in his suit against Mitchell was binding as between those parties only, and having been directly overruled by this court on full consideration in 102 U. S. 707, when the present case was first brought before it, affords no ground for not holding these defendants to account to Tilghman for all the profits, gains and savings which they have made from the use of his invention during the whole period of their infringement.

We are then brought to a consideration of the exceptions taken to the master's report in matters of fact, affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions, the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless

there clearly appears to have been error or mistake on his part. *Medsker* v. *Bonebrake*, 108 U. S. 66; *Donnell* v. *Columbian Ins. Co.*, 2 Sumner, 366, 371; *Mason* v. *Crosby*, 3 Woodb. & Min. 258, 269; *Paddock* v. *Commercial Ins. Co.*, 104 Mass. 521, 531; *Richards* v. *Todd*, 127 Mass. 167, 172.

The master, as already stated, reports the amount of chemicals that the defendants have saved by using the plaintiff's invention, as $9868.33 in lime, and $173,863.13 in sulphuric acid. If each of these two items is correct, he has made a mistake of $1000 against the plaintiff in adding them together. But the plaintiff contends that a comparison of the report with the evidence shows that the actual saving in either item was greater.

The facts, upon which the master bases his estimates of the savings in chemicals, are stated in his report as follows:

After stating that, at the time of the infringement by the defendants of the plaintiff's patent, "the lime saponification process was more advantageous than any other then in public use," he says:

"By that process, the neutral fat was converted into lime soap by boiling it in open tubs with lime. The water was then run off containing the glycerine, and the lime soap was treated with sulphuric acid, which combined with the lime, forming sulphate of lime, and released the fatty acids. Theoretically, 9½ lbs. of lime and double that quantity of sulphuric acid for each hundred pounds of fat treated were sufficient to effect these results; but, in practical operation, manufacturers used from 12 to 14 lbs. of lime per hundred, and from 2 to 3 lbs. of acid for each pound of lime, to insure perfect decomposition.

"The respondents, during the period of infringement, treated the fat with water in closed digesters, adding one per cent of lime, and heating with steam at a pressure of 225 lbs. for about nine and a half hours. Then they precipitated the lime by using 3 lbs. of sulphuric acid for each pound of lime. As compared with the average amount of each employed in the old process, they saved 12 lbs. of lime and 29½ lbs. of sulphuric acid for each hundred pounds of fat treated.

"Their books show that they thus treated 23,322,777 lbs. of fat during the period in question, saving 2,798,733 lbs. of lime and 6,880,219 lbs. of sulphuric acid, upon the basis above mentioned. The testimony shows the average cost of lime to have been $.3526 per hundred pounds, and the average cost of the acid $2.527 per hundred."

It appears, by the testimony of the defendants themselves, that, when they manufactured by the old process, they used 14 pounds of lime to each hundred pounds of fat treated, and 3 pounds of sulphuric acid to each pound of lime. It is contended by the plaintiff that that process, as used by the defendants, should be the standard of comparison in this suit; and that, according to the preponderance of evidence, the amount of lime, at least, so used by them, was a necessity in that process. But the plaintiff has the burden of proving the amount of profits that the defendants have made by the use of his invention. *Blake* v. *Robertson*, 94 U. S. 728; *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 139; *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, 444, 445. And the question to be determined is, as stated by Mr. Justice Strong in delivering judgment in *Mowry* v. *Whitney*, "what advantage did the defendant derive from using the complainant's invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result?" 14 Wall. 620, 651. In determining that question, the expense of using the new process is doubtless to be ascertained by the manner in which the defendants have in fact conducted their business, and not by the manner in which they might have conducted it. But as to the comparative expense of the old process, the cost at which they used that process, if they did once use it, although strong evidence against them, because they may be presumed to have used it as economically as they could, is not conclusive evidence that the old process could not have been used at a less cost. To hold otherwise would be to hold infringers of a patent for a new process, who had ever used the old process, to a different measure of accounting from those who had never used the old process at all. In the former opinion, the court assumed, as the result

of the evidence, that the saponifying process required twelve or fourteen per cent of lime. 102 U. S. 731. There being evidence that such was the amount of lime used by some manufacturers under the old process, as well as that the average use of sulphuric acid under that process was $2\frac{1}{2}$ pounds to each pound of lime, we cannot say that the conclusion of the master ought to be set aside or modified as to either of these items.

The master finds that no material economy in operation has been secured by the change of process; and the testimony introduced by the plaintiff is not clear and decisive enough to overthrow his conclusion in this respect.

That part of the master's report, which relates to the amount saved in glycerine water, is as follows:

"It appears from the evidence that the average density of glycerine water obtained in the old lime-saponification process was only $\frac{3}{4}°$ Baumé, while that obtained from the digesters was from 3° to $3\frac{1}{4}°$. It also appears that the concentration of the latter to 15° cost $1.55 per barrel at the respondents' factory.

"Assuming the cost of concentration to be in like proportion for each degree, it is claimed that concentration from $\frac{3}{4}°$ to $3\frac{1}{4}°$ would cost nearly $.94 per barrel, and the cost of such concentration is an item of gain and saving realized by the respondents, by reason of the greater density of the glycerine water obtained from the digesters, for which they should be charged in this accounting. But there is no testimony establishing that the cost of concentration is in proportion to its degree, nor is it reasonable to assume such to be the fact; indeed, it is apparent that the cost of concentrating a single degree would be much greater in proportion than a more extensive operation, while an additional degree of concentration in an extensive operation would affect the cost but little.

"It appears in evidence that glycerine water was sold in the market at so much per barrel for each degree of density, and that the respondents sold it at the market price as it came from the digesters. It, however, required considerable concentration to prepare it for use, and they boiled it down to 15° for

the purchasers, charging the cost thereof to them. Provided as they were with facilities for such work, the additional cost of concentration from a still lower degree could not be great. The only witness whose testimony is directly in point says it would not be material. Besides, if paid by the purchaser, it would not affect the profits of the respondents.

"But the evidence does show a larger yield of glycerine by the new process. While the old lime-saponification process was in use, glycerine had no market value; consequently no effort was made to secure it, and there is no direct testimony as to the best results that could be secured by careful treatment, but the testimony shows that the average density of the glycerine which ran to waste was $\frac{3}{4}°$, and that it was about equal in volume to the fat.

"It is claimed that the same volume of glycerine water was drawn from the digesters, while its density was much greater. But the master finds from the evidence that the respondents used two charges of water, each half the bulk of the fat, the first charge drawn from the digesters being the glycerine water sold by them. There was consequently double the volume of glycerine water in the former process, which accounts, in part, for difference in density; but the comparison still shows considerable loss due to various causes, which is further increased by the additional concentration required, the average result of tests made in various degrees of concentration indicating that it requires about $4\frac{4}{5}$ barrels of $\frac{3}{4}°$ to make one of 3°.

"The accompanying table B shows the quantity and value of glycerine water obtained by the respondents from the digesters, and also the number of barrels, concentrated to 3°, that could be obtained from the fat treated by lime saponification, and the value thereof at market prices, the difference being the amount gained by reason of the greater yield of glycerine from the digesters, viz., $61,701.77."

As, according to the master's report and the whole evidence, the glycerine obtained by either process must, in order to be sold, be concentrated to 15°, and it is not shown how much, if anything, more it would cost to concentrate from $\frac{3}{4}°$ to 15° than from $3\frac{1}{4}°$ to 15°, and the purchaser in either case pays the cost

of concentration to 15°, the plaintiff fails to show that anything should have been allowed for the cost of concentration.

But the finding of the master, that in the new process "the respondents used two charges of water, each half the bulk of the fat, the first charge drawn from the digesters being the glycerine water sold by them," and "there was consequently double the volume of glycerine water in the former process;" as well as the corresponding statement in his table B, that the amount of glycerine water obtained by the new process was 65,312 barrels, while the amount that would have been obtained under the old process would have been 130,624 (misprinted in the record 134,624) barrels; is quite inconsistent with the sworn answer to the bill, and with the testimony of the defendants.

The answer states that in the tank were placed fat and water in equal quantities, and that during the operation the first charge of water was drawn off and a second charge of water introduced.

The defendant James N. Gamble testified that the barrels of glycerine obtained under the new process were 40-gallon barrels, containing, as he estimated, 330 pounds; and to the question, "Can you state what amount of water was used in each charge in the process as carried on from 1870 to 1875?" answered: "I cannot state positively from recollection of what was absolutely used. My recollection was, however, that it was in each charge about fifty per cent of the fat, and this recollection is confirmed by the amount of glycerine water obtained."

The amount of glycerine water obtained, as stated by the master from the defendants' books, was 65,312 barrels, which, at 330 pounds each, is 21,552,960 pounds. This is not half, but 92.4 per cent of 23,322,777, the number of pounds of fat treated by the defendants, as ascertained by the master from their books; and perhaps a somewhat, but not much, less proportion in bulk.

As to the old process, the defendant William A. Proctor, who was a member of the firm while they were using it, testified as follows:

"64. The saponifying tubs were large enough to contain about double the quantity of fat you put in them, I understand? *Ans.* They were.

"65. About how much water was put into these tubs, along with the fat? *Ans.* A little less than the volume of the fat, so that the vats were almost full. It was calculated that the condensed steam would supply water enough to keep them full.

"66. When the cooking of the mass in the saponifying tubs was completed, the tubs were about full of lime soap and water, I understand? *Ans.* They were not full, there being space enough to allow for the boiling of the water without excessive flashing out; that was all. The water in the vat, when the operation was through, was about equal to the bulk of the fat that had been put in."

Upon this testimony, as the whole of the glycerine could hardly have been separated from the mass of lime soap by merely drawing off, it may safely be concluded that the amount of glycerine water, obtained under the old process, which the witness speaks of as "about equal to the bulk of the fat that had been put in," was not more than 90 per cent of the fat treated, and that there was no substantial difference in this particular between the results of the two processes.

It is therefore clear that the old process would produce only one-half the amount of glycerine reported by the master and stated in table B; and that the sum of $61,701.77, at which the master has arrived by deducting from $103,143.03, the value of 65,312 barrels of glycerine water obtained under the new process, $41,441.26, the value of 130,624 barrels, as obtainable under the old process, must be increased by adding half of the amount deducted, or $20,720.63.

The findings of the master, upon which he bases his conclusion of the amount of loss of fatty acids in using the plaintiff's invention as compared with the old process, are shown by the following extracts from his report:

"It does not appear that saponification by water alone in such digesters" as the defendants used "had been regularly employed by any one; but the testimony shows that" those

who tried to do so, under licenses from the plaintiff, "all became satisfied that a satisfactory result could not be secured by that process alone, and found it necessary to employ some additional agency to secure complete saponification at safe pressures within reasonable time."

"During the period of this accounting, the respondents used one per cent of lime and a second charge of water, completing the process in about nine and a half hours, at a pressure of about 225 pounds. With these two modifications, both of which are shown by the evidence to be efficient, a good quality of fatty acids was obtained, though not fully equal to that obtained by lime saponification."

"The fatty acid product obtained by the respondents, operating in their digesters for nine and a half hours, at an average pressure of 225 pounds, by the action of water alone, was inferior in value to the product of lime saponification."

"The experiments made pending the hearing before the master, at 225 pounds pressure, without lime or change of water, yielded products containing an average of 92.5 per cent of fatty acids."

"As compared with the result of lime saponification, the experiments at 225 pounds pressure show a loss of 6 pounds of free fatty acids for each hundred pounds of fat treated, and an admixture of undecomposed fat seriously affecting the value of the product." "The fatty acids were worth at least 9 cents per pound, making the direct loss of fatty acids not less than 54 cents upon each hundred pounds of fat treated."

"There is no testimony from which the master can determine to what extent the value of fatty acids actually obtained was affected by the admixture of undecomposed fat, and no allowance has been made therefor."

"During the period of infringement, the respondents treated 23,322,777 pounds of fat in their digesters with one per cent of lime. The evidence shows that 11½ pounds of lime completely saponify 100 pounds of fat, in close digesters, under pressure;" and "in the process employed by the respondents 2,028,024 pounds of the fat treated by them were converted into lime soap by the action of lime; and 21,294,753 pounds

were converted into a fatty acid mixture, containing 92.5 per cent of free fatty acids, by the action of water, the further decomposition of such mixture being effected by modifications of the complainant's process."

Upon comparing the master's report with the evidence, we are unable to accept his conclusion upon this part of the case.

Much of the testimony on which he chiefly relies was in the record upon which the case had been previously heard before this court, having been introduced to support the objection that the particular apparatus described in the plaintiff's patent for carrying the process into effect could not be operated to produce any useful result, of which the court then said: "We have examined the evidence on this point, and are satisfied that it shows the objection to be unfounded." 102 U. S. 730. Under these circumstances, the master appears to us to have given too much weight to this, as contrasted with the other testimony in the original record, although it is quite true, as argued by the defendants, that the question of the practical economy of the patented process, as compared either with older processes, or with the subsequent modifications used by the defendants, is distinct from the questions of utility and infringement heretofore determined.

The testimony of experts since taken, and the tables of experiments made by them pending the hearing before the master, are quite unsatisfactory, for reasons fully set forth in the brief for the plaintiff, which it would take too much space to recapitulate.

Apart from these considerations, and even assuming that the master is right in reporting that the modifications of using one per cent of lime and two charges of water, made by the defendants in the plaintiff's process, are shown to have been efficient, and that the defendants, in accounting with the plaintiff for the profits made by them from the use of his invention, are entitled to be allowed for the effect of such modifications, the evidence wholly fails to support the master's conclusion that in the use of the plaintiff's process, without addition of lime or change of water, as compared with the lime saponification process, there is a loss of 6 pounds of free fatty acids for each

hundred pounds of fat treated; or to show that there has been any loss of free fatty acids which affects the value of the product.

The master's conclusion is based upon the finding that the product of the patented process, without modification, contains only 92½ per cent of free fatty acids, and upon the hypothesis that the product of the old process contained 98½ per cent.

But there is no proof whatever that there was any such difference in the result of the two processes, or that the product of the old process contained 98½ per cent of fatty acid. No chemical analysis of the product of the old process appears to have been made. The defendants' own experts testify that the highest possible amount of fat acid in pure tallow is only 95 and a fraction per cent. And two of the defendants, as well as Ropes, one of the witnesses on whom the master relies, and Verdin, a partner of Mitchell, testify that in using the old process the whole average product was 95 per cent of the amount of fat treated.

The testimony of one of the defendants, James Gamble, who had been forty years in the business, and was examined as a witness in their behalf, clearly exhibits his general impression as a practical manufacturer, not only that the product of the old process was not more than 95 per cent of fatty acid, but also that there was no comparative loss of fatty acid by Tilghman's process. On cross-examination he testified as follows:

"14. Was there more or less fatty acid obtained by the old process used by you prior to 1858 than by the process used by you since 1870? *Ans.* I think there would be no difference if the fatty acid from the tank in the new process is well settled, but it won't settle as well as in the old. In actual practice, there is more weight in the product of the new process, as it contains more sediment than from the old; but I think the amount of fatty acids in each is the same."

Upon the direct examination being resumed, he further testified:

"16. Do you know how many pounds of fatty acids were practically produced from 100 pounds of fat treated by the old saponification process used by you prior to 1858? *Ans.* We

always made a calculation of 95 pounds, but I cannot say more than that.

"17. Do you know how many pounds of fatty acids were practically produced from 100 pounds of fat treated by the process used by you from 1870 to 1875? *Ans.* We calculated the same.

"18. Was this calculation or estimate founded upon any tests made by your firm or under their direction? *Ans.* No, sir. I do not think a test practicable; it is no more than guesswork.

"19. So far as you have any actual knowledge, there may have been a difference in the weight of fatty acids produced from 100 pounds of fat treated by the old saponification process, and the process as used by you from 1870 to 1875, may there not? *Ans.* I think when we have examined and find the lime all clear of the acids, the product in each case must be the same, except as to the sediment remaining in the tank-stock."

The great preponderance of the evidence is to the effect that the product of the plaintiff's process, using water alone and all at one time, would contain as much as 95 per cent of free fatty acids. Even the defendants' principal expert, in an experiment testified to by him, and stated in his table, obtained that proportion by the use of equal quantities of water and of fat, without lime or change of water, under a treatment for nine hours at 225 pounds of pressure.

Moreover, the real question is not of the exact quantity of fatty acid, as proved by chemical tests, contained in the two products, but whether the one is as good as the other for use in the manufacture of candles. The defendants' testimony shows that manufacturers always test the fitness of the product for that use by pressure with the thumb, and never by chemical analysis; and upon all the evidence there can be no doubt that a difference between 95 and 92½ per cent in the proportion of fatty acids does not affect the commercial or practical value of the product.

From these considerations, it follows that nothing is to be deducted for a loss in fatty acids, and that to the amount of

$182,731.46, saved in chemicals, and $61,701.77, gained in glycerine water, as reported by the master, there is to be added $1000 for his mistake in adding up the items of chemicals, and $20,720.63 for his error in computing the amount of glycerine water, making a total amount of $266,153.86.

This result is arrived at by taking the amount of savings in chemicals, as found by the master, which the defendants produced no evidence to control, and which is less than such savings if computed by the standard of their own use under the two processes; then adding the amount gained in glycerine water, as appearing by the facts stated in the master's report or testified to by the defendants themselves, correcting only a clear error in the master's computation; and rejecting the deduction made by the master on acount of a supposed loss of fatty acids in using the plaintiff's invention as compared with the old process, because the evidence returned with the master's report is quite inconsistent with the theory that there was any loss in this respect.

The only exception of any importance, not disposed of or rendered immaterial by what has been already said, is the exception of the plaintiff to the refusal of the master to allow interest on profits before the date of his report.

If the question thus presented were a new one, it would require grave consideration. But by a uniform current of decisions of this court, beginning thirty years ago, the profits allowed in equity, for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained; and the provision introduced in the patent act of 1870, regulating the subject of profits and damages, made no mention of interest, and has not been understood to affect the rule as previously announced. *Silsby* v. *Foote*, 20 How. 378, 387; *Mowry* v. *Whitney*, 14 Wall. 620, 651; *Littlefield* v. *Perry*, 21 Wall. 205, 229; Act of July 8, 1870, c. 230, § 55, 16 Stat. 206; Rev. Stat, § 4921; *Parks* v. *Booth*, 102 U. S. 96, 106; *Railway Co.* v. *Root*, 105 U. S. 189, 198, 200, 204; *Illinois Central Rail-*

road v. *Turrell*, 110 U. S. 301, 303. Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. Interest should therefore be allowed, as in *Illinois Central Railroad* v. *Turrell*, just cited, only from the day when the master's report was submitted to the court, (which appears, by the terms of his report and of the decree below, to have been October 7, 1884,) upon the amount shown to be due by that report and the accompanying evidence.

Decree reversed, and case remanded to the Circuit Court with directions to enter a decree for the plaintiff for the sum of $266,153.86, *with interest from October* 7, 1884, *and costs.*

Mr. Chief Justice Waite dissented.

Mr. Justice Matthews did not sit in this case or take any part in the decision.

CHICAGO *v.* TAYLOR.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 151. Submitted January 31, 1888. — Decided March 19, 1888.

Under the provision in the constitution of the State of Illinois adopted in 1870 that "private property shall not be taken or *damaged* for public use without just compensation," a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value.

Trespass on the case. Judgment for plaintiffs. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Frederick S. Winston and *Mr. John W. Green* for plaintiff in error.

Mr. George A. Follansbee and *Mr. Thomas M. Hoyne* for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought by Moses Taylor, as owner of an undivided interest in a lot in Chicago, having sixty feet front on Lumber Street, one hundred and fifty feet on Eighteenth Street, and three hundred feet on the South Branch of Chicago River, to recover the damages sustained by reason of the construction, by that city, of a viaduct on Eighteenth Street, in the immediate vicinity of said lot. The city did this work under the power conferred by its charter "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same," and "to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." It appears that the construction of the viaduct was directed by special ordinances of the city council.

For many years prior to, as well as at, the time this viaduct was built, the lot in question was used as a coal yard, having upon it sheds, machinery, engines, boilers, tracks, and other contrivances required in the business of buying, storing, and selling coal. The premises were long so used, and they were peculiarly well adapted for such business. There was evidence before the jury tending to show that, by reason of the construction of the viaduct, the actual market value of the lot, for the purposes for which it was specially adapted, or for any other purpose for which it was likely to be used, was materially diminished, access to it from Eighteenth Street being greatly obstructed, and at some points practically cut off; and that, as a necessary result of this work, the use of Lumber Street, as a way of approach to the coal yard by its occupants and buyers, and as a way of exit for teams carrying coal from the yard to customers, was seriously impaired. There was, also, evidence tending to show that one of the results of the

construction of the viaduct, and the approaches on either side of it to the bridge over Chicago River, was, that the coal yard was often flooded with water running on to it from said approaches, whereby the use of the premises, as a place for handling and storing coal was greatly interfered with, and often became wholly impracticable.

On behalf of the city there was evidence tending to show that the plaintiff did not sustain any real damage, and that the inconveniences to occupants of the premises, resulting from the construction and maintenance of the viaduct, were common to all other persons in the vicinity, and could not be the basis of an individual claim for damages against the city.

There was a verdict and judgment against the city. The court below having refused to set aside the judgment and grant a new trial, the case has been brought here for review in respect to errors of law which, it is contended, were committed in the admission of incompetent evidence, in the refusal of instructions asked by the city, and in the charge of the court to the jury.

Before noticing the assignments of error it will be well to ascertain what principles have been announced by this court or by the Supreme Court of Illinois in respect to the liability of municipal or other corporations in that State, for damages resulting to owners of private property from the alteration or improvement, under legislative authority, of streets and other public highways.

By the constitution of Illinois, adopted in 1848, it was provided that no man's property shall "be taken or applied to public use without just compensation being made to him." Art. XIII, § 11. While this constitution was in force Chicago commenced, and substantially completed, a tunnel under Chicago River, along the line of La Salle Street, in that city. It was sued for damages by the Northern Transportation Company, owning a line of steamers running between Ogdensburg, New York, and Chicago, and also a lot in the latter city, with dock and wharfage privileges, the principal injury of which it complained being that, during the prosecution of the work by the city, it was deprived of access to its premises, both on the

side of the river and on that of the street. This court — in *Transportation Co.* v. *Chicago*, 99 U. S. 635, 641 — held that in making the improvement of which the plaintiff complained the city was the agent of the State, performing a public duty imposed by the legislature; and that "persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country," — citing numerous cases, among others *Smith* v. *Corporation of Washington*, 20 How. 135. "The decisions to which we have referred," the court continued, "were made in view of Magna Charta, and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action." This view, the court further said, was not in conflict with the doctrine announced in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, which was a case of the permanent flooding of private property, a physical invasion of the real estate of the private owner, a practical ouster of his possession.

In *City of Chicago* v. *Rumsey*, 87 Illinois, 348, 363, the Supreme Court of Illinois, upon a full review of previous decisions and especially referring to *Moses* v. *Pittsburg, Fort Wayne & Chicago R. R. Co.*, 21 Illinois, 516; *Roberts* v. *Chicago*, 26 Illinois, 249; *Murphy* v. *Chicago*, 29 Illinois, 279; *Stone* v. *Fairbury, Pontiac and Northwestern Railroad Co.*, 68 Illinois, 394; *Stetson* v. *The Chicago and Evanston Railroad Co.*, 75 Illinois, 74, and *Chicago, Burlington and Quincy Railroad Co.* v. *McGinnis*, 79 Illinois, 269, held it to have been the settled law of that State, up to the time of the adoption of the constitution of 1870, that there could be "no recovery by an adjacent property holder, on streets the fee whereof is in the city,

for the merely consequential damages resulting from the character of the improvements made in the streets, provided such improvement has the sanction of the legislature."

But the present case arose under, and must be determined with reference to, the constitution of Illinois adopted in 1870, in which the prohibition against the appropriation of private property for public use, without compensation, is declared in different words from those employed in the constitution of 1848. The provision in the existing constitution is that "private property shall not be taken *or damaged* for public use without just compensation." An important inquiry in the present case is to the meaning of the word "damaged" in this clause.

The earliest case in Illinois in which this question was first directly made and considered, is *Rigney* v. *City of Chicago*, 102 Illinois, 64, 74, 80. That was an action to recover damages sustained by the plaintiff by reason of the construction by Chicago of a viaduct or bridge along Halstead Street and across Kinzie Street, in that city, some 220 feet west of his premises, fronting on the latter street. There was no claim that the plaintiff's possession was disturbed, or that any direct physical injury was done to his premises by the structure in question. But the complaint was, that his communication with Halstead Street, by way of Kinzie Street, had been cut off, whereby he was deprived of a public right enjoyed by him in connection with his premises, and an injury inflicted upon him in excess of that sustained by the public. For that special injury, in excess of the injury done to others, he brought suit. The trial court peremptorily instructed the jury to find for the city, holding, in effect, that the fee of the streets being in the city, there could be no recovery for the obstruction of which the plaintiff complained.

That judgment was reversed, an elaborate opinion being delivered, reviewing the principal cases under the Constitution of 1848, and referring to the adjudications in the courts of other States upon the general question as to what amounts to a taking of private property for public use within the meaning of such a provision as that contained in the former Constitution of Illinois. After alluding to the decisions of other state

courts to the effect that such a provision extended only to an actual appropriation of property by the State, and did not embrace consequential injuries, although what was done resulted, substantially, in depriving the owner of its use, the Supreme Court of Illinois reviewed numerous cases determined by it under the Constitution of 1848. *Nevins* v. *City of Peoria*, 41 Illinois, 502, decided in 1866; *Gillam* v. *Madison County Railroad*, 49 Illinois, 484; *City of Aurora* v. *Gillett*, 56 Illinois, 132; *Aurora* v. *Reed*, 57 Illinois, 29; *City of Jacksonville* v. *Lambert*, 62 Illinois, 519; *Toledo, Wabash &c. Railroad* v. *Morrison*, 71 Illinois, 616. It says: "Whatever, therefore, may be the rule in other States, it clearly appears from this review of the cases that previous to, and at the time of the adoption of the present Constitution, it was the settled doctrine of this court that any actual physical injury to private property by reason of the erection, construction, or operation of a public improvement in or along a public street or highway, whereby its appropriate use or enjoyment was materially interrupted, or its value substantially impaired, was regarded as a taking of private property, within the meaning of the Constitution, to the extent of the damages thereby occasioned, and actions for such injuries were uniformly sustained."

Touching the provision in the Constitution of 1870, the court said that the framers of that instrument evidently had in view the giving of greater security to private rights by giving relief in cases of hardship not covered by the preceding Constitution, and for that purpose extended the right to compensation to those whose property had been "damaged" for public use; that the introduction of that word, so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and abolished the old test of direct physical injury to the *corpus* or subject of the property affected. The new rule of civil conduct, introduced by the present Constitution, the court adjudged, required compensation in all cases where it appeared "there has been some physical disturbance of a *right*, either public or private, which the plaintiff enjoys *in connection with his property*, and which gives to it an additional value, and

that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." The chief justice concurred in the judgment, and in the general views expressed by the court, holding that while the owner of a lot on a street held it subject to the right of the public to improve it in any ordinary and reasonable mode deemed wise and beneficial by the proper public functionaries, he was entitled, under the constitution of 1870, to compensation in case of a sudden and extraordinary change in the grade of the street or highway, whereby the value of his property is in fact impaired. Three of the justices of the state court dissented.

As we understand the previous cases of *Pekin* v. *Brereton*, 67 Illinois, 477; *Pekin* v. *Winkel*, 77 Illinois, 56; *Shawneetown* v. *Mason*, 82 Illinois, 337; *Elgin* v. *Eaton*, 83 Illinois, 535; and *Stack* v. *St. Louis*, 85 Illinois, 377; — all of which arose under the present Constitution of Illinois — they proceeded upon the same grounds as those expressed in *Rigney* v. *Chicago*, although in no one of them did the court distinctly declare how far the present Constitution differed from the former, in respect to the matter now before us.

At the same term when Rigney's case was decided the state court had occasion to consider this question as presented in a somewhat different aspect. The Union Building Association owned a building and lot three and a half blocks from a certain part of La Salle Street in Chicago, which the city proposed to close up, and permit to be occupied by the Board of Trade with its building. As the streets adjacent to the plaintiff's property were to remain in the same condition as to width, etc., that they were in before, and as the closing up of a portion of La Salle Street would not, in any degree, interfere with access to its lot, or with the use and enjoyment of it, it was held that there was no special or particular injury done for which an action would lie against the city. That case was distinguished from *Rigney* v. *Chicago*, in this, that in the latter case the court held that "property holders bordering upon streets have, as an incident to their ownership of such property, a right of access by way of the streets,

which cannot be taken away or materially impaired by the city, without incurring legal liability to the extent of the damages thereby occasioned." *City of Chicago* v. *Union Building Association*, 102 Illinois, 379, 397.

In *Chicago & Western Indiana Railroad* v. *Ayres*, 106 Illinois, 518, the court — all the justices concurring — observed: "It is needless to say our decisions have not been harmonious on this question, but in the case of *Rigney* v. *City of Chicago*, 102 Illinois, 64, there was a full review of the decision of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was, that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character — that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of *Pittsburg & Fort Wayne Railroad Co.* v. *Reich*, 101 Illinois, 157, is in point on this question of damages, and the case of *City of Chicago* v. *Union Building Association*, 102 Illinois, 379, also reviews the authorities and approves the doctrine in *Rigney* v. *Chicago*, *supra*. These cases, therefore, overrule the doctrines of the earlier cases." Our attention has not been called to, nor are we aware of, any subsequent decision of the State court giving the Constitution of 1870 an interpretation different from that indicated in *Rigney* v. *Chicago* and *Chicago etc. Railroad Co.* v. *Ayres*. We concur in that interpretation. The use of the word "damaged" in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870 gave no additional or greater security to private property,

sought to be appropriated to public use, than was guaranteed by the former constitution.

The charge to the jury by the learned judge who presided at the trial gave effect to the principles announced in the foregoing cases arising under the present constitution of Illinois. It covered every vital question in the case, in language so well guarded that the jury could not well have misunderstood the exact issue to be tried, or the proper bearing of all the evidence. So far as the special requests for instructions in behalf of the city contained sound propositions of law they were fully embodied in the charge to the jury.

In behalf of the city it was contended that, if liable at all, it was only liable for such damage as was done to the market value of the property by rendering access to it difficult or inconvenient. The court said, in substance, to the jury that the flooding of the lot by water running down upon it from the approaches to the viaduct was an element of damage which they might consider; though if such flooding merely caused inconvenience to the occupant in the conduct of his business, such as his coal getting wet or its becoming more difficult to keep his scales properly adjusted, these were not elements of impairment to the value of the property for purposes of sale. The jury were also instructed that although the occupant may have found it difficult to haul coal out of the lot, and although it may have been much more unprofitable to conduct the business of selling coal at this lot, that did not weigh upon the question as to the value of the lot in the market. Other observations were made to the jury, but the court, in different forms of expression, said to them that the question was whether, by reason of the construction of the viaduct, the value, that is, the market price, of the property had been diminished. The scope of the charge is fairly indicated in the following extract: "The real question is, has the value of this property to sell or rent been diminished by the construction of this viaduct? It may be that it can no longer be used for the purposes of a coal yard, or for any purpose for which it has heretofore been used, but that would not be material if it can be rented or sold at as good a price for other purposes, except that if the proof satis-

fies you that any of the permanent improvements put on the lot for the particular business which has been heretofore carried on there and for which it was improved, have been impaired in value, or are not worth as much after this viaduct was built and the bridge was raised as before, and you can from the proof determine how much these improvements are damaged, the plaintiff would be entitled to recover for such damage to the improvements — that is to say, this lot being improved for a specific purpose, if the proof satisfies you that it can no longer be rented or used for that purpose, and that thereby these improvements have been lost or impaired in value, then the impairment of value to these improvements is one of the elements of damage which the plaintiff is entitled to have considered and passed upon and included in his damage."

It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be, as suggested by its counsel, that the present constitution of Illinois, in regard to compensation to owners of private property "damaged" for the public use, has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement of public highways. And it may, also, be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their constitution.

We perceive no error in the record, and the judgment is

Affirmed.

CISSEL *v.* DUTCH.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 153. Argued January 31, February 1, 1888. — Decided March 19, 1888.

In this case this court reversed the decree of the general term of the Supreme Court of the District of Columbia, on a question of fact as to whether a deed of trust and a promissory note secured thereby were forgeries.

Bill in equity. The case is stated in the opinion of the court.

Mr. T. A. Lambert and *Mr. Enoch Totten* for appellant.

Mr. S. S. Henkle for appellees. *Mr. Francis Miller* filed a brief for same.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought to the Supreme Court of the District of Columbia, by persons claiming to own a lot of land in the city of Washington, as the heirs at law of one Jenifer, and as devisees under his last will and testament.

The bill alleges that a deed of trust, purporting to have been executed on the 8th of July, 1875, by Jenifer, to R. P. Dodge and P. A. Darneille, conveying the land to them as security for the payment of a promissory note dated that day, purporting to have been made by Jenifer, payable two years after date, for $1000, with 10 per cent interest until paid, payable semi-annually, to John T. Hall, or order, was a forgery, and that the note was also a forgery. The deed of trust bears the notarial certificate, dated July 8, 1875, with the notarial seal, of James Nicholas Callan, a notary public, certifying that Jenifer, the party to the deed, personally appeared before him, in the county of Washington, being personally well known to him to be the person who executed the deed, and

acknowledged it to be his act and deed. The deed was recorded on the 10th of July, 1875, in a book of the land records for Washington County. The note and the deed of trust were each of them signed by Jenifer by making his mark, and each of them bears the signature of Callan as a witness.

The bill alleges that Jenifer was never indebted to Hall in any sum, and never received any money from Hall; that Jenifer never signed or made his mark to the note or deed of trust, or authorized any one to do so, and never acknowledged the deed to Callan; and that on the 29th of May, 1882, the two trustees, having advertised the premises for sale, sold them at public sale to one Cissel, and executed to him a deed of the premises, which has been recorded in the land records of the district. In an amendment to the bill it is alleged that the note and the deed of trust came into the possession of one Brittania W. Kennon, who held them on the day of the sale, and ordered the sale. The two trustees, and Hall, Cissel, and Kennon are made parties to the bill. The prayer of the bill is, that the deed of trust and the note, and the deed to Cissel, be declared null and void, and be cancelled, and that Cissel reconvey the premises to the plaintiffs. Dodge, Darneille, and Cissel each answered the bill by a separate answer, denying its allegations as to the alleged forgeries, and averring that the note and the deed of trust were genuine and valid instruments. The plaintiffs joined issue, by replication, with the defendants Dodge, Darneille, and Cissel. Proofs were taken on both sides, and the case was heard before the court in special term, which dismissed the bill. On an appeal by the plaintiffs to the court in general term, it reversed the decree of the special term, and adjudged the note, and the deed of trust, and the deed to Cissel to be void, and directed an account, in favor of the plaintiffs, of the mesne profits received by Cissel. From the decree of the general term Cissel has appealed to this court.

The issue is one entirely of fact, in which the burden of proof is upon the plaintiffs. Callan, the notary public, testifies with particularity to the circumstances attending the exe-

cution of the note and of the deed of trust in his presence, and to the acknowledgment of the latter before him, and to his signing his name as a witness to the execution of each. It is also satisfactorily shown that the $1000 secured by the note passed from the lender to the agent of the borrower. It would serve no good purpose to discuss the evidence at length. The integrity of the transaction is not satisfactorily impeached.

The decree of the court below, in general term, is reversed, and the case is remanded to it, with a direction to affirm, with costs, the decree of the court in special term.

POTTS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 698. Argued February 2, 1888. — Decided March 19, 1888.

A naval officer being retired on furlough pay, under Rev. Stat. § 1454, for incapacity not the result of any incident of the service, and being subsequently transferred by the President, by and with the consent of the Senate, from the furlough to the retired pay list under Rev. Stat. § 1594, is entitled thereafter, under the second clause of Rev. Stat. § 1588, when not on active duty, to one-half the sea pay provided for the grade or rank held by him at the time of his retirement.

The case is stated in the opinion of the court.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellant.

Mr. Heber J. May for appellee. *Mr. Attorney General* was with him on the brief.

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

Howard D. Potts, an assistant engineer of the navy, being physically disabled, was examined by a naval retiring board who reported that he was incapacitated from active service, and that in their judgment the incapacity did not originate in

the line of duty. In this report the President concurred, and directed a retirement on furlough pay.

The sections of the Revised Statutes governing such a proceeding are as follows:

"SEC. 1449. Said retiring board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary.

"SEC. 1450. The members of said board shall be sworn in each case to discharge their duties honestly and impartially.

"SEC. 1451. When said retiring board finds an officer incapacitated from active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service.

"SEC. 1452. A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval or orders in the case.

"SEC. 1453. When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service, with retired pay, as allowed by Chapter 8 of this Title.

"SEC. 1454. When said board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from service with one year's pay, as the President may determine.

"SEC. 1593. Officers placed on the retired list on furlough pay shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list."

On the 15th of March, 1877, Potts was nominated by the President and confirmed by the Senate on the 17th of the same month, for transfer from the furlough to the retired pay list under § 1594 of the Revised Statutes. That section is as follows:

"SEC. 1594. The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired pay list."

Since his confirmation he has been paid one-half the sea pay of an officer of his rank at the time of retirement, the accounting officers being of opinion that his case fell within the second clause of § 1588 of the Revised Statutes, which is as follows:

"The pay of all other officers on the retired list (excluding those above specified) shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them at the time of retirement."

He claims, however, that after his transfer from the furlough to the retired list he was entitled to three-quarters of the sea pay under the first clause of that section as follows:

"SEC. 1588. The pay of all officers of the navy, who have been retired after forty-five years' service after reaching the age of sixteen years, or who have been, or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement."

This suit was brought to recover the difference between one-half and three-quarters of sea pay from the date of his transfer. The Court of Claims gave judgment against him, and from that judgment this appeal was taken.

We agree entirely with the Court of Claims in the view it took of the case. The finding of the retiring board, approved by the President, is the judgment of the tribunal created under the law for the government of the navy to determine such questions, that Potts be retired from active service for incapacity, which "did not originate in the line of duty." This made him a retired officer on furlough pay, and gave him one-half the leave of absence pay of an officer on the active

list. When he was afterwards transferred by the action of the President and Senate "from the furlough to the retired pay list," his *status* as a retired officer was not changed. He still remained an officer retired for incapacity which did not originate in the line of duty, but his pay was raised from that of an officer retired "on furlough pay" to that of one retired on half sea pay. In other words, he was taken from the furlough list and put on the list of those retired under circumstances which brought them within the second clause of § 1588, instead of the first. The object of the statute is not to enable the President and Senate to vacate the finding of the retiring board that the incapacity of the officer did not "originate in the line of duty," and to decide that it was "the result of an incident of the service," but to afford a means for his relief from the consequences of such a finding, to the extent of adding to his pay the difference between the half of leave of absence pay and the half of sea pay. It may have been intended as a provision for a remedy for wrongs done by retiring boards, but it limited the power of the President and Senate in that behalf to a transfer of the name of the officer from "the furlough to the retired pay list." The cause of his retirement still remains the same, and determines his position on the "retired pay list."

The judgment of the Court of Claims is

Affirmed.

UNITED STATES *v.* BURCHARD.

BURCHARD *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 158, 1332. Argued February 2, 1888. — Decided March 19, 1888.

An appeal, docketed here January 7, 1888, from a judgment of the Court of Claims which was entered February 4, 1884, is dismissed for want of due prosecution.

Potts v. *United States*, *ante*, 173, affirmed and applied to the case.

Opinion of the Court.

Section 1594, Rev. Stat. authorizing the transfer of a retired officer of the navy from the furlough to the retired pay list being intended to afford relief from the consequences of the findings of retiring boards, should be construed liberally: and being so construed, it is held that the President has power under it, with the advice and consent of the Senate, to make the transfer relate back to a time when, in his judgment, it ought to have been granted.

In an action in the Court of Claims by an officer to recover a balance claimed to be due him on pay account, the United States can set up as a counterclaim an alleged overpayment to him on that account, and can have judgment for it if established.

THE case is stated in the opinion of the court.

Mr. Heber J. May for the United States. *Mr. Attorney General* was with him on the brief.

Mr. John Paul Jones and *Mr. Robert B. Lines* for Burchard.

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

Jabez Burchard, an assistant engineer in the navy, was examined by a retiring board organized under § 1448 of the Revised Statutes, and the board reported that he was incapacitated from active service, and "that his incapacity was not the result of an incident of the service." The statutes regulating such a proceeding are given in full in *Potts* v. *The United States*, *ante*, 173, just decided. The President approved the findings, and Burchard was retired on furlough pay, October 26, 1874. On the 1st of March, 1877, the Secretary of the Navy addressed a letter to the Fourth Auditor of the Treasury, stating that "upon a full review of all the facts in the case . . . the department is of opinion that the causes which incapacitated him [Burchard] for active duty were incident to the service, and that he should have the higher rates of pay allowed to retired officers by § 1588 of the Revised Statutes."

On the 1st of March, 1878, the President made the following nomination:

"To the Senate of the United States:

"In accordance with § 1594 of the Revised Statutes, I nom-

inate Jabez Burchard assistant engineer, to be transferred from the furlough to the retired pay list of the navy from the 26th of October, 1874.

"R. B. HAYES."

On the 25th of March, 1878, the Senate advised and consented to the appointment as follows:

"*Resolved*, That the Senate advise and consent to the appointment of Assistant Engineer Burchard to be transferred from the furlough to the retired pay list from the 26th of October, 1874, agreeably to the nomination."

On the 1st of April, 1878, Burchard was notified of this transfer.

From the 26th of October, 1874, until the 1st of April, 1878, he has been paid seventy-five per cent of the sea pay for the grade or rank which he held at the time of retirement, being $1275 a year. Since April 1, 1878, he has been paid $850 a year, under the second clause of § 1588 — his half sea pay. He brought this suit on the 5th of September, 1883, to recover the difference between one-half and three-quarters of sea pay from April 1, 1878. The United States set up by way of counter-claim that he had been overpaid $1168.75 for his salary from April 1, 1875, to March 31, 1878, and asked judgment for that amount. The Court of Claims, on the 4th of February, 1884, dismissed both the petition and counter-claim. From that judgment both parties appealed. That of the United States was docketed in this court October 24, 1884, which was during the return term; but that of Burchard was not docketed until January 7, 1888, and he did nothing here in the mean time to make himself an actor in that behalf. For that reason his appeal is dismissed for want of due prosecution, on the authority of *The S. S. Osborne*, 105 U. S. 447. See also *Hilton* v. *Dickinson*, 108 U. S. 165, 168; *The Tornado*, 109 U. S. 110, 117.

We have, then, for consideration only the questions which arise on the appeal of the United States. The suit was brought to recover a balance claimed to be due for pay after March 31, 1878. The counter-claim is for moneys alleged to have been

overpaid between October 26, 1874, and March 31, 1878. As the petition of Burchard was dismissed because he had already been paid in full for all he was entitled to after March 31, 1878, the appeal of the United States brings up only the questions presented by the counter-claim. These are, first, as to the amount which Burchard was actually entitled to for his pay between October 26, 1874, and April 1, 1878, after his transfer "from the furlough to the retired pay list," and second, as to the right of the United States to recover back any amount he may have been paid over what he was actually entitled to by law.

As to the first of these questions it was settled in the case of *Potts*, *ante*, 173, that he was in no event entitled to more than half sea pay, and that all he got over that was by a mistake of the accounting officers. Whether he was entitled to more than half of leave of absence pay before April 1, 1878, depends on the effect of the action of the President, with the advice and consent of the Senate, in antedating the transfer so as to make it relate back to October 26, 1874, when the nomination to the Senate was not actually made until March 1, 1878.

What is now § 1594 of the Revised Statutes was originally enacted as part of § 3 of the act of January 16, 1857, (c. 12, 11 Stat. 134,) "to amend an act of February 28, 1855, (c. 127, 10 Stat. 616,) being 'an act to promote the efficiency of the Navy,'" and it was evidently intended to enable the President, with the advice and consent of the Senate, to relieve a deserving officer to a limited extent from the consequences of the findings of retiring boards. Under such circumstances it should in our opinion be liberally construed in favor of justice. This case may fairly be taken for illustration. The law requires a record of the proceedings and decision of the retiring board to be made and transmitted to the Secretary of the Navy, and by him laid before the President for his approval or disapproval, or orders in the case. At first the findings in this case were approved, and orders made thereon, but afterwards the department became satisfied on reëxamination that the findings were wrong, and that the incapacity was actually the result of causes incident to the service. Neither

the department nor the President could then change the findings, as they had already been approved, and were no longer open to review. The action of the President was equivalent to the judgment of an appropriate tribunal upon the facts as found. That judgment as a judgment could not be disturbed, but under this statement it was just within the power of the President, with the advice and consent of the Senate, to relieve the officer to some extent from its consequences by transferring him from furlough to retired pay. There is no prohibition against antedating such a transfer. The statute simply says that the President, by and with the advice and consent of the Senate, may make it, and in our opinion he may with like advice and consent determine whether it shall operate only in the future, or relate back to a time when in his judgment it ought to have been granted. It follows that Burchard, by this action of the President and Senate, became entitled to half sea pay from October 26, 1874. He has thus been overpaid only to the extent of one-fourth of sea pay from October 26, 1874, to March 31, 1878, or at the rate of $425 a year.

It only remains to consider whether the amount which has thus been paid, or as much thereof as is embraced in the counter-claim, can be recovered back in this action, and we are of the opinion that it can. The action was brought by Burchard to recover a balance claimed to be due on pay account from the date of his retirement. He had been paid according to his present claim until April 1, 1878, and consequently there was nothing to complain of back of that date. But in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law, and he has no right to keep what he thus obtained. Whether the government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law, is a question which it is not now necessary to decide any more than it was in

Syllabus.

M'Elrath v. *United States*, 102 U. S. 426, 441, when it was suggested. This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected. It follows that the judgment against the United States upon the counter-claim must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is consequently so ordered.

Reversed.

PEMBINA CONSOLIDATED SILVER MINING AND MILLING COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 189. Argued February 16, 1888. — Decided March 19, 1888.

The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employés of the corporation, does not impinge upon the commercial clause of the Federal Constitution (Article I, section VIII, clause 3), provided the corporation is neither engaged in carrying on foreign or interstate commerce, nor employed by the government of the United States.

Corporations are not citizens within the meaning of the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, Article IV, section II, clause 1.

A private corporation is included under the designation of "person" in the Fourteenth Amendment to the Constitution, section I.

The provisions in the Fourteenth Amendment to the Constitution, section I, that "no State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring for the admission within its limits of a corporation of another State such conditions as it chooses.

The only limitation upon the power of a State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign.

Statement of the Case.

THE court stated the case as follows:

In May, 1881, the Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of Colorado, with an authorized capital of one million dollars, for the purpose of carrying on a general mining and milling business in that State. Its principal office is in Alpine, Colorado, and since July 1, 1881, it has had, and still has, an office in the city of Philadelphia, "for the use of its officers, stockholders, agents, and employés." On the 31st of October, 1881, the Auditor General and Treasurer of Pennsylvania assessed a tax against the corporation for "office license" from July 1, 1881, to July 1, 1882, at the rate of one-fourth of a mill on each dollar of its capital stock, which amounted to $250, and added to it a penalty of $125 for failure to take out a license. This tax was assessed and penalty imposed under section sixteen of the act of the legislature of the Commonwealth, approved June 7, 1879, entitled "An act to provide revenue by taxation." The section provides as follows:

"That from and after the first day of July, A.D. 1879, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth, for the use of its officers, stockholders, agents, or employés, unless it shall first have obtained from the Auditor General an annual license so to do; and for said license every such corporation shall pay into the State treasury, for the use of the Commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock, or a majority thereof, is owned or con-

trolled by a corporation of this State which does pay a tax under any previous section of this act."

It is conceded that the corporation is not within the exception of the *proviso* of the act, as it pays no tax under any previous section.

From this assessment, or settlement of the account against the corporation, as it is termed in the record, the corporation appealed to the Court of Common Pleas of Dauphin County, on the ground, among others, that the said 16th section of the revenue act is in conflict with the clause of the Constitution of the United States declaring that "Congress shall have power to regulate commerce with foreign nations and among the several States," (Art. 1, sec. 8, clause 3,) and also with the clause declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," (Art. 4, sec. 2, clause 1.) In that court the Commonwealth filed a declaration in debt against the corporation for the amount claimed. It does not appear from the record that any answer or plea was filed to this declaration, but it is assumed that issue was joined, as counsel of the parties agreed that a trial by jury should be waived, and that the case should be submitted to the decision of the court, subject to a writ of error as in other cases, at the option of either party.

The Court of Common Pleas affirmed the validity of the assessment, and the corporation took the case on writ of error to the Supreme Court of the Commonwealth, which affirmed the judgment of the Common Pleas. To review this judgment the case is brought here.

Mr. James W. M. Newlin for plaintiff in error.

Mr. W. S. Kirkpatrick, Attorney General of Pennsylvania, for defendant in error. *Mr. John F. Sanderson*, Deputy Attorney General, was with him on the brief.

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

The only questions passed upon by the Supreme Court of Pennsylvania, which can be considered by us, are those which

arise upon its ruling against the contention of the plaintiff in error that the statute of the Commonwealth is in conflict with clauses of the Federal Constitution. Its ruling upon the conformity of the statute with the constitution of the Commonwealth does not come under our jurisdiction.

The clauses of the Federal Constitution, with which it was urged in the state Supreme Court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States, and the one embodied in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

1. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employés. The tax is not for their office, but for the office of the corporation, and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the corporation.

The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In *Paul* v. *Virginia*, 8 Wall. 168, this court, speaking of a foreign corporation, (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded,) said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, — a comity which is never extended where the existence of the corporation,

or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion." A qualification of this doctrine was expressed in *Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1, 12, so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress. The act of July 24, 1866, "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," which was considered in that case, declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any State, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which had been or might thereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States," upon certain conditions specified therein; and this court held that the telegraph, as an agency of commerce and intercommunication, came under the controlling power of Congress, as against any hostile state legislation; and that the Western Union Telegraph Company, having accepted the conditions of the act, could not be excluded by another State from prosecuting its business within her jurisdiction. The legislature of Florida had granted to another company, for twenty years, the exclusive right to establish and maintain telegraph lines in certain counties of the State, but this exclusive grant was adjudged to be invalid as against the company acting under

the law of Congress. And undoubtedly a corporation of one State, employed in the business of the general government, may do such business in other States without obtaining a license from them. Thus, to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, "if Congress should employ a corporation of ship builders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union," and, we may add, without the permission and against the prohibition of the State. *Stockton* v. *Baltimore and New York Railroad Co.*, 32 Fed. Rep. 9, 14.

These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate commerce, or not employed by the government. As to these corporations, the doctrine of *Paul* v. *Virginia* applies. The Colorado corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employés, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State. *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Lafayette Insurance Co.* v. *French*, 18 How. 404; *Ducat* v. *Chicago*, 10 Wall. 410; *St. Clair* v. *Cox*, 106 U. S. 350.

We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employés; nothing more and nothing less; and

in what way this can be considered as a regulation of interstate commerce is not apparent.

2. Nor does the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul* v. *Virginia*. In that case it appeared that a statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited with the treasurer of the State bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits. A subsequent statute of Virginia made it a penal offence for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an agent for a New York insurance company without a license, was indicted and convicted in a Circuit Court of Virginia, and sentenced to pay a fine of $50. On error to the Court of Appeals of the State the judgment was affirmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only

such attributes as the legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the clause in question are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporators, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat* v. *Chicago*, 10 Wall. 410, the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Augusta* v. *Earle*, 13 Pet. 519, and added that "as to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 120.

3. The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating

and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Providence Bank* v. *Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amend-

ment see *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Missouri Pacific Railway Co.* v. *Humes*, 115 U. S. 512; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hayes* v. *Missouri*, 120 U. S. 68.

The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority.

Judgment affirmed.

Mr. Justice Bradley was not present at the argument of this cause and took no part in its decision.

MAYNARD *v.* HILL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 194. Argued February 16, 17, 1888. — Decided March 19, 1888.

A territorial statute of Oregon, passed in 1852, dissolving the bonds of matrimony between husband and wife, the husband being at the time a resident of the Territory, was an exercise of "the legislative power of the Territory upon a rightful subject of legislation," according to the prevailing judicial opinion of the country and the understanding of the legal profession at the time when the act of Congress establishing the territorial government was passed, August 14, 1848, 9 Stat. 323.

The general practice in this country of legislative bodies to grant divorces stated.

The granting of divorces being within the competency of the legislature of the Territory, its motives in passing the act in question cannot be inquired into. Having jurisdiction to legislate upon the status of the hus-

Statement of the Case.

band, he being a resident of the Territory at the time, the validity of the act is not affected by the fact that it was passed upon his application, without notice to or knowledge by his wife; who, with their children, had been left by him two years before in Ohio, under promise that he would return or send for them within two years.

Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution and annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts by state legislation.

Nor is such legislation prohibited by the last clause of Article 2 of the Ordinance of the Northwest Territory, declaring that "no law ought ever to be made or have force in said Territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed;" which clause was, by the organic act of Oregon, enacted and made applicable to the inhabitants of that Territory.

Under the Oregon Donation Act, 9 Stat. 496, c. 76, the statutory grant took effect as a complete grant only on the termination of the four years' term of residence and cultivation; and the wife of a resident settling under the act as a married man, who was divorced from him after the commencement of his settlement, but before its completion, took no interest under the act in the title subsequently acquired by him. He had, previous to that time, no vested interest in the land, only a possessory right, — a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him.

The case, as stated by the court, was as follows:

This is a suit in equity to charge the defendants, as trustees of certain lands in King County, Washington Territory, and compel a conveyance thereof to the plaintiffs. The lands are described as lots 9, 10, 13, and 14, of section 4; and lots 6, 7, 8, and 9, of section 5, in township 24 north, range 4 east, Willamette meridian. The case comes here on appeal from a judgment of the Supreme Court of the Territory, sustaining the defendants' demurrer, and dismissing the complaint. The material facts, as disclosed by the complaint, are briefly these: In 1828 David S. Maynard and Lydia A. Maynard intermarried in the State of Vermont, and lived there to-

gether as husband and wife until 1850, when they removed to Ohio. The plaintiffs, Henry C. Maynard and Frances J. Patterson, are their children, and the only issue of the marriage. David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879. In 1850 the husband left his family in Ohio and started overland for California, under a promise to his wife that he would either return or send for her and the children within two years, and that in the meantime he would send her the means of support. He left her without such means, and never afterwards contributed anything for her support or that of the children. On the 16th of September following he took up his residence in the Territory of Oregon, in that part which is now Washington Territory, and continued ever afterwards to reside there. On the 3d of April, 1852, he settled upon and claimed, as a married man, a tract of land of 640 acres, described in the bill, under the act of Congress of September 27, 1850, "creating the office of surveyor general of public lands in Oregon, and to provide for the survey, and to make donations to settlers of the said public lands," and resided thereon until his death.

On the 22d day of December, 1852, an act was passed by the Legislative Assembly of the Territory, purporting to dissolve the bonds of matrimony between him and his wife. The act is in these words:

"An act to provide for the dissolution of the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard, his wife.

"SEC. 1. Be it enacted by the Legislative Assembly of the Territory of Oregon, That the bonds of matrimony heretofore existing between D. S. Maynard and Lydia A. Maynard be, and the same are, hereby dissolved.

"Passed the House of Representatives Dec. 22d, 1852.

"B. F. HARDING,

"*Speaker of the House of Representatives.*

"Passed the Council Dec. 22d, 1852.

"M. P. DEADY,

"*President Council.*"

Statement of the Case.

The complaint alleges that no cause existed at any time for this divorce; that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that act in the Legislative Assembly; that she had no knowledge of the passage of the act until July, 1853; that at the time she was not within the limits or an inhabitant of Oregon; that she never became a resident of either the Territory or State of Oregon; and that she never in any manner acquiesced in or consented to the act; and the plaintiffs insist that the Legislative Assembly had no authority to pass the act; that the same is absolutely void; and that the parties were never lawfully divorced.

On or about the 15th of January, 1853, the husband thus divorced intermarried with one Catherine T. Brashears, and thereafter they lived together as husband and wife until his death. On the 7th of November, 1853, he filed with the Surveyor General of Oregon the certificate required under the donation act of September 27, 1850, as amended by the act of the 14th of February, 1853, accompanied with an affidavit of his residence in Oregon from the 16th of September, 1850, and on the land claimed from April 3, 1852, and that he was married to Lydia A. Maynard until the 24th of December, 1852, having been married to her in Vermont in August, 1828. The notification was also accompanied with corroborative affidavits of two other parties that he had within their knowledge resided upon and cultivated the land from the 3d of April, 1852.

On the 30th of April, 1856, he made proof before the register and receiver of the land office of the Territory of his residence upon and cultivation of his claim for four years from April 3, 1852, to and including April 3, 1856. Those officers accordingly, in May following, issued to him, and to Catherine T. Maynard, his second wife, a certificate for the donation claim, apportioning the west half to him and the east half to her. This certificate was afterwards annulled by the Commissioner of the General Land Office, on the ground that, as it then appeared, and was supposed to be the fact,

Lydia A. Maynard, the first wife, was dead, and that her heirs were therefore entitled to half of the claim.

On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband. From this decision an appeal was taken to the Commissioner of the General Land Office, and from the decision of that officer to the Secretary of the Interior. The Commissioner affirmed the decision of the register and receiver so far as it awarded the west half to the husband, but reversed the decision so far as it awarded the east half to the first wife; holding that neither wife was entitled to that half. He accordingly directed the certificate as to the east half to be cancelled. The Secretary affirmed the decision of the Commissioner, holding that the husband had fully complied with all the requirements of the law relating to settlement and cultivation, and was therefore entitled to the west half awarded to him, for which a patent was accordingly issued. But the Secretary also held that, at the time of the alleged divorce, the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute; and the plaintiffs insist that the decision of the Commissioner and Secretary in this particular is erroneous, and founded upon a misapprehension of the law.

Subsequently the east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the Commissioner of the General Land Office. The defendants Hill and Lewis, with full knowledge, as the bill alleges, of the rights of the first wife, located certain land scrip, known as Porterfield land scrip, upon certain portions of the land, and patents of the United States were issued to

them accordingly, and they are applicants for the remaining portion. The complaint alleges that the other defendant, Flagg, claims some interest in the property, but the nature and extent thereof are not stated.

Upon these facts the plaintiffs claim that they are the equitable owners of the lands patented to the defendants Hill and Lewis, and that the defendants are equitably trustees of the legal title for them. They therefore pray that the defendants may be adjudged to be such trustees, and directed to convey the lands to them by a good and sufficient deed; and for such other and further relief in the premises as to the court shall seem meet and equitable.

To this complaint the defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and gave judgment thereon in favor of the defendants. On appeal the Supreme Court of the Territory came to the same conclusion: that the complaint did not state a sufficient cause of action; that no grounds for relief in equity appeared upon it; and that the defendants' demurrer should be sustained. Judgment was accordingly entered that the complaint be dismissed. To review this judgment the case is brought to this court.

Mr. C. H. Hanford for appellants. *Mr. Henry Beard* was with him on the brief.

I. Maynard fulfilled the law so as to acquire a donation of 640 acres, one-half of which enured to his wife Lydia, as her donation, by the effect of the grant. *Stark* v. *Starrs*, 6 Wall. 402; *Barney* v. *Dolph*, 97 U. S. 652, 656; *Wirth* v. *Branson*, 98 U. S. 118; *Kansas Pacific Railway* v. *Atchison, Topeka, and Santa Fé Railroad*, 112 U. S. 414, 422; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Walden* v. *Knevals*, 114 U. S. 373; *Missouri, Kansas, and Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491.

The residence and cultivation are required of the settler only. His wife's title is completed when his is. *Van Dolf* v. *Otis*, 1 Oregon, 153; *Vance* v. *Burbank*, 101 U. S. 520;

Davenport v. *Lamb*, 13 Wall. 418; *Hall* v. *Russell*, 101 U. S. 503.

Where a *bona fide* settlement under the preëmption laws is made and those laws are fulfilled, the right of the claimant relates back to the date of the settlement, and cuts off intervening claims. In case of two conflicting donations arising after the grant, it seems quite clear that the *first settler*, all other things being equal, would have the better right. The title would relate back to the date of settlement. This proposition is and has been accepted by the local courts of Oregon, both the state and United States courts. *Lee* v. *Summers*, 2 Oregon, 260, 266; *Dolph* v. *Barney*, 5 Oregon, 190, 201; *Chapman* v. *School District*, Deady, 108, 113; *Lamb* v. *Davenport*, 1 Sawyer, 609, 632; *Adams* v. *Burke*, 3 Sawyer, 415.

II. As to the effect of the divorce law, if valid, upon the rights of Lydia, it is pertinent to remark that it did not attempt to deal with her donation, and it appears to be settled on principle that it could not have defeated the donation if the attempt had been made. We should not give it, therefore, an effect not only not intended, but impossible.

She had no notice of the proceedings of the legislature, no day in court to reply or reject, and if her property rights could be affected by those proceedings, she was entitled to notice under the fifth amendment of the Constitution of the United States, which provides that: "No person shall . . . be deprived of life, liberty, or property without due process of law." As to what is "due process of law," see *Stuart* v. *Palmer*, 74 N. Y. 183, 191; Cooley on Const. Lim. 355.

But that statute was invalid, and the court below erred in deciding that it was valid, as will be seen on examining the current of the decisions in the courts of the United States.

Starr v. *Pease*, 8 Conn. 541, decided in 1831, is usually cited as the leading case on the side of the validity of legislative divorces. But the divorce in question in that case was not legislative, but judicial, although it was granted by the legislature. The record shows that the legislature in that case acted in a judicial capacity and proceeded strictly according to judicial forms, just as Parliament always has in grant-

ing divorces. (See the divorce act recited in the report of the case.) That decision does not maintain that the granting of a divorce is a legislative function, or that the marriage tie of a particular couple is a *rightful* subject of legislation, but it does hold that prior to the adoption of the state constitution of 1818 the legislature of Connecticut possessed all power, legislative and judicial, with only a few limitations; that the constitution of 1818 is not a grant of power, but a limitation of the powers previously belonging to the several branches of the government; that the legislature was not by that constitution divested of the power, which previously belonged to it, of granting divorces.

Wright v. *Wright*, 2 Maryland, 429; *S. C.* 56 Am. Dec. 723, decided in December, 1852, and *Cronise* v. *Cronise*, 54 Penn. St. 255, decided in 1867, are very similar to the case of *Starr* v. *Pease*. They hold that in those two States the legislatures, having prior to the adoption of their constitutions possessed power to grant divorces, still have the same power, except as curtailed or limited by those instruments. In the latter case it was held that the legislature could not grant a divorce in any case in which the courts would have jurisdiction.

In *Bingham* v. *Miller*, 17 Ohio, 445; *S. C.* 49 Am. Dec. 471, decided in 1848, the court emphatically decided the granting of divorces to be a judicial and not a legislative function, and that the legislature had no power to grant a divorce in any case, but out of regard for supposed unpleasant consequences to people not parties to the suit if effect should be given to the law, the court gave judgment as if the law were the reverse of what the court found.

Crane v. *Meginnis*, 1 G. & J. 463; *S. C.* 19 Am. Dec. 237, decided in 1829, was a suit to recover alimony awarded by an act of the legislature granting a divorce to the wife. Judgment was given for the defendant.

Townsend v. *Griffin*, 4 Harrington (Del.) 440, decided in 1846, was a suit to enforce a judgment lien by creditors of the husband against the wife's land after a divorce by the legislature of Delaware. The court refused to give plaintiffs the relief sought, but having doubts as to the validity of the divorce act refrained from deciding that question.

In *Gaines* v. *Gaines*, 9 B. Mon. 295; *S. C.* 48 Am. Dec. 425, decided in 1848, pending a suit for a divorce and alimony, the legislature granted a divorce at the husband's instance. After the husband's death the wife claimed dower and the wife's share of slaves and personal property, and thus brought in question the validity of the divorce act. The court declined to decide the question as to its effect upon the persons, but held it to be inoperative to divest property rights, even the inchoate right of dower.

In *Adams* v. *Palmer*, 51 Maine, 480, decided in 1863, the court held a divorce granted by the legislature of Maine in 1846, with the consent of both parties, each of whom soon afterwards contracted new marriage relations, to be valid.

In *Cabell* v. *Cabell*, 1 Met. (Ky.) 319, decided in 1858, the divorce drawn in question was granted by the legislature with the consent of both parties. Held valid.

Maguire v. *Maguire*, 7 Dana, 181, decided in 1838, has been often cited as a case upholding the validity of a legislative divorce, but the only point actually decided in that case was that, under the then existing laws of Kentucky, the courts had no jurisdiction of a suit by a wife for a divorce against her husband, he being at the time not a resident of the State and absent therefrom.

Although these cases are sometimes cited as upholding the doctrine that divorces in this country by special legislative acts are constitutional and valid, they do not support that doctrine, but rather bear in the opposite direction. In connection with some of these cases Judge Story has said "that marriage, though it be a civil institution, is understood to constitute a solemn obligatory contract between the parties; and it has been *arguendo* denied that a state legislature constitutionally possesses authority to dissolve that contract against the will and without the default of either party." And in a note on this passage Judge Cooley adds: "Such has been the view of state courts in general." 2 Story Const. 4th ed. § 1397.

State v. *Fry*, 4 Missouri, 120, decided in 1835, was a suit in the name of the State to the use of Gentry and wife against a guardian of the wife's estate. The defendant pleaded in de-

fence a special act of the legislature divorcing the plaintiffs. A demurrer to this plea was sustained by the court on the ground that the act was void. The report of the case contains the exhaustive and able arguments of counsel on both sides, showing the case to have been well presented. Able opinions were rendered by two of the justices, thoroughly discussing all the points bearing upon the validity of such acts and holding them to be void.

The case has since been followed and reaffirmed in that State by *Bryson* v. *Campbell*, 12 Missouri, 498, decided in 1849; *Bryson* v. *Bryson*, 17 Missouri, 590, decided in 1853; and by *Bryson* v. *Bryson*, 44 Missouri, 232, decided in 1869.

Clark v. *Clark*, 10 N. H. 380; *S. C.* 34 Am. Dec. 165, decided in 1839, is a strong decision holding that marriage is a contract indissoluble except for misconduct sufficient to work a forfeiture of rights, and that a divorce can be granted only in a regular judicial proceeding.

It is to be noted that the alleged divorce now under consideration was by an act of a territorial legislature, and there is a broad distinction, therefore, between this case and all the cases arising under legislation by States. The following is a list of the cases we have found in which the validity of a divorce granted by special act of a territorial legislature has come in question in other jurisdictions: *Ponder* v. *Graham*, 4 Florida, 23, decided in 1851; *Levins* v. *Sleator*, 2 Green (Iowa), 604, decided in 1850; *Chouteau v. Magennis*, 28 Missouri, 187, decided in 1859; *Estate of Higbee, deceased*, 5 West Coast Rep. 505, decided in 1885.

A majority of these cases — that is, all of them except the Iowa case — deny that a territorial legislature has the power to grant a divorce, and we invite a comparison of the opinions in these different cases. It will be found that the Iowa decision is based upon premises and assumptions which must have been avoided if more than a most careless or superficial examination of the subject had been given by the court, and the sentiments expressed are un-American throughout, while the opinions in the Florida, Missouri, and Utah cases are based upon sound and incontrovertible arguments, and express only the

most wholesome American ideas of government. It is to be noted that prior to the passage of the organic act of Oregon Territory, in 1848, no divorce granted by a territorial legislature had been upheld in any reported case.

There are many other cases containing a vast amount of *obiter dicta* for and against the validity of legislative divorces, but as the point was not necessary to be considered in the decisions rendered, they cannot be regarded in the light of authority. The American authors and commentators who have discussed the question, except Mr. Bishop, condemn the practice and deny that divorce is a rightful subject of legislation. Judge Cooley says that "the general sentiment in the legal profession is against the rightfulness of special legislative divorces." Cooley Const. Lim. 4th ed. 113. (Marginal.) That the American people generally concur with the legal profession on this subject is evidenced by the fact that most of the state constitutions expressly prohibit special legislative divorces.

In 1826 Congress annulled several special acts of divorce passed by the legislature of the Territory of Florida (4 Stat. 167, § 14), whereupon Chancellor Kent remarks: "This is an instance of a strong national condemnation of the practice of granting legislative divorces." 2 Kent Com. 405, note *a*, 4th ed. And his opinion of the action of Congress was concurred in by the Supreme Court of Florida in the case of *Ponder* v. *Graham*, 4 Florida, 44.

But even if the authorities were otherwise and practically unanimous, as the court below supposed, we maintain that the practice of granting divorces by special legislative acts without the consent or fault of or notice to either party, is wrong; that all decisions to the contrary are erroneous, and that error oft repeated does not thereby become right, especially when all the time met by counter-decisions. Moreover, the question is to be determined by the law of Oregon, and not by the law of any of the States.

Although the power to grant divorces in England belongs to and has been exercised by Parliament, it does not follow that similar power belongs to the legislatures of the States;

and although the latter may have the power, it does not follow that similar power is possessed by the legislatures of any of the Territories, for, as we shall show presently, the latter have only the powers expressly delegated to them by Congress. This point is made clear in *Ponder* v. *Graham*, 4 Florida, 33. See also *Kilbourn* v. *Thompson*, 103 U. S. 183.

A divorce cannot be *rightfully* granted in any case without cause. To ascertain and declare the existence of sufficient cause in a particular case is not a legislative but a judicial function, and judicial power is not given to the legislature, but is vested in the courts by the section of the organic act above cited.

By the fourteenth section of the organic law of Oregon Territory the inhabitants thereof were granted all the rights, privileges, and advantages secured to the people of the Northwest Territory by, and subjected to all the conditions and restrictions and prohibitions of, the articles of compact contained in the ordinance of 1787. That ordinance provides that, "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have any force in the said territory that shall in any manner interfere with or affect private contracts or engagements, *bona fide* and without fraud, previously formed." Gen. Laws, Oregon, 59.

Lydia A. Maynard, at the time of the passage of the act, was not within the Territory of Oregon, and being separated from her husband, in fact without her fault, she was not affected by his change of domicile, but remained as he left her, domiciled in Ohio. Such being the case, an act, passed without notice to her and without her consent, is void as to her. *Cheely* v. *Clayton*, 110 U. S. 701, 705; *People* v. *Baker*, 76 N. Y. 78. The supposed act of divorce, being void for want of power in the legislature, could acquire no vitality or become valid by the mere failure of Congress to disapprove and annul it. Congress had doubtless adjourned on March 3, 1853, before a copy of the laws reached Washington. Lydia did not hear of the transaction for over six months after its date, and Catharine was married to Maynard on the 15th of January, 1853.

Congress has exercised its power of annulling territorial

statutes but sparingly, and there are many reasons for this other than a deliberate intention to acquiesce. Members of Congress have neither the time nor inclination to study the different enactments of the territories or perform the amount of labor necessary to the passage of bills to annul the bad ones; and it is preferable to leave the people to legislate for themselves so long as the courts are open and free to pronounce void all such acts as are in violation of the Constitution or laws of the United States and such as the legislatures have no power to pass.

The courts have pronounced many territorial statutes void long after they have taken effect, although Congress had failed to annul them. We will cite an instance of recent occurrence: In 1883 the legislature of Washington Territory passed an act extending the elective franchise to women. Under this act women voted, were elected to and filled public offices, and served as grand and petit jurors, and judgments were rendered upon their presentments and verdicts; and afterwards, in 1887, the supreme court of Washington Territory, in the case of *Harland* v. *The Territory*, 13 Pac. Rep. 453, held this statute void for want of a good title to express its object, as required by the organic act of the Territory, although Congress had failed to annul the act. This decision was rendered by a divided court, but it has since been reaffirmed by a unanimous decision of the court as now constituted.

In *Dunphy* v. *Kleinsmith and Duer*, 11 Wall. 610, this court, in effect though not in words, held the civil practice act of Montana void, although it had been in operation in that Territory several years, and had not been disapproved by Congress.

See also *Ponder* v. *Graham* (above cited), in which case it is shown that even by an affirmative approval Congress could not make such an act valid, because Congress has no judicial power except as specified in the Constitution, and could not itself grant a divorce. This argument is conclusive on the point, and it is supported by the decision of this court in *Kilbourn* v. *Thompson*, 103 U. S. 192. This latter case also contains a perfect answer to the suggestion of the court below,

that the proceedings of the legislature in a matter affecting individual rights cannot be reëxamined in the courts at the suit of the injured party.

In conclusion, we submit that this was an act of gross injustice to a blameless woman and her children, and the judgment of the court below sustaining it ought to be reversed.

Mr. Walter H. Smith for appellee.

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

As seen by the statement of the case, two questions are presented for our consideration: first, was the act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties; and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim.

The act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, consisting of two boards, a Council and a House of Representatives. 9 Stat. 323, c. 177, § 4. It declared, § 6, that the legislative power of the Territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the Assembly should be submitted to Congress, and if disapproved should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the Territory to any loan. These exceptions from the grant of legislative power have no bearing upon the

questions presented. The grant is made in terms similar to those used in the act of 1836, under which the Territory of Wisconsin was organized. It is stated in *Clinton* v. *Englebrecht*, 13 Wall. 434, 444, that that act seemed to have received full consideration; and from it all subsequent acts for the organization of territories have been copied, with few and inconsiderable variations. There were in the Kansas and Nebraska acts, as there mentioned, provisions relating to slavery, and in some other acts provisions growing out of local circumstances. With these, and perhaps other exceptions not material to the questions before us, the grant of legislative power in all the acts organizing territories, since that of Wisconsin, was expressed in similar language. The power was extended "to all rightful subjects of legislation," to which was added in some of the acts, as in the act organizing the Territory of Oregon, "not inconsistent with the Constitution and laws of the United States," a condition necessarily existing in the absence of express declaration to that effect.

What were "rightful subjects of legislation" when these acts organizing the Territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. A long acquiescence in repeated acts of legislation on particular matters, is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them. Rights acquired, or obligations incurred under such legislation, are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply, when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depend-

ing upon its being sustained. It will be found from the history of legislation that, whilst a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. *Loan Association* v. *Topeka*, 20 Wall. 655, 663. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future.

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.

It is conceded that to determine the propriety of dissolving the marriage relation may involve investigations of a judicial nature which can properly be conducted by the judicial tribunals. Yet such investigations are no more than those usually made when a change of the law is designed. They do not render the enactment, which follows the information obtained, void as a judicial act because it may recite the cause of its passage. Many causes may arise, physical, moral, and intellectual — such as the contracting by one of the parties of an incurable disease like leprosy, or confirmed insanity or hopeless idiocy, or a conviction of a felony — which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society. When the object of the relation has been thus defeated, and no jurisdiction is vested in the judicial tribunals to grant a divorce,

it is not perceived that any principle should prevent the legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society. If the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented.

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the States. Says Bishop, in his Treatise on Marriage and Divorce: "The fact that at the time of the settlement of this country legislative divorces were common, competent, and valid in England, whence our jurisprudence was derived, makes them conclusively so here, except where an invalidity is directly or indirectly created by a written constitution binding the legislative power." § 664. Says Cooley, in his Treatise on Constitutional Limitations: "The granting of divorces from the bonds of matrimony was not confided to the courts in England, and from the earliest days the colonial and state legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases." p. 110. Says Kent, in his Commentaries: "During the period of our colonial government, for more than one hundred years preceding the Revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the lifetime of the parties but by a special act of the legislature." 2 Kent Com. 97. The same fact is stated in numerous decisions of the highest courts of the States. Thus, in *Cronise* v. *Cronise*, 54 Penn. St. 255, 261, the Supreme Court of Pennsylvania said: "Special divorce laws

are legislative acts. This power has been exercised from the earliest period by the legislature of the province, and by that of the State, under the constitutions of 1776 and 1790. . . . The continued exercise of the power, after the adoption of the constitution of 1790, cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it. *Communis error facit jus* would be sufficient to support it, but it stands upon the higher ground of contemporaneous and continued construction of the people of their own instrument."

In *Crane* v. *Meginnis*, 1 G. and J. 463, 474, the Supreme Court of Maryland said: "Divorces in this State from the earliest times have emanated from the General Assembly, and can now be viewed in no other light than as regular exertions of the legislative power."

In *Stone* v. *Pease*, 8 Conn. 541, decided in 1831, the question arose before the Supreme Court of Connecticut as to the validity of a legislative divorce under the constitution of 1818, which provided for an entire separation of the legislative and judicial departments. The court, after stating that there had been a law in force in that State on the subject of divorces, passed 130 years before, which provided for divorces on four grounds, said, speaking by Mr. Justice Daggett: "The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the Parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii;* and at almost every session since the Constitution of the United States went into operation, now forty-two years, and for thirteen years of the existence of the constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Con-

stitution of the United States or by that of the State. In view of the appalling consequences of declaring the general law of the State or the repeated acts of our legislature unconstitutional and void — consequences easily conceived but not easily expressed, such as bastardizing the issue and subjecting the parties to punishment for adultery — the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." It is to be observed that the divorce in this case was granted on the petition of the wife, who alleged certain criminal intimacies of her husband with others, and the act of the legislature recited that her allegation, after hearing her and her husband, with their witnesses and counsel, was found to be true. The inquiry appears to have been conducted with the formality of a judicial proceeding, and might undoubtedly have been properly referred to the judicial tribunals; yet the Supreme Court of the State did not regard the divorce as beyond the competency of the legislature.

The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the Legislative Assembly of the Territory, that it was beyond the competency of a legislature to dissolve the bonds of matrimony, have been held untenable. These decisions justify the conclusion that the division of government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions was neither intended nor understood to exclude legislative control over the marriage relation. In most of the States the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years in many constitutions of provisions prohibiting legislative divorces would also indicate a general conviction that without this prohibition such divorces might be granted, notwithstanding the separation of the powers of government into departments by which judicial

functions are excluded from the legislative department. There are, it is true, decisions of State courts of high character, like the Supreme Court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. *Sparhawk* v. *Sparhawk*, 116 Mass. 315; *State* v. *Fry*, 4 Missouri, 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are, therefore, justified in holding — more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature. If within the competency of the Legislative Assembly of the Territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the Territory, and as he acted soon afterwards upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the Assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the Territory, is undoubted, unless the marriage was a contract within the prohibition of the federal Constitution against its impairment by legislation, or within the terms of the ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act, questions which we will presently consider.

The facts alleged in the bill of complaint, that no cause existed for the divorce, and that it was obtained without the knowledge of the wife, cannot affect the validity of the act. Knowledge or ignorance of parties of intended legislation does not affect its validity, if within the competency of the legislature. The facts mentioned as to the neglect of the husband to send to his wife, whom he left in Ohio, any means for her support or that of her children, in disregard of his prom-

ise, shows conduct meriting the strongest reprobation, and if the facts stated had been brought to the attention of Congress, that body might and probably would have annulled the act. Be that as it may, the loose morals and shameless conduct of the husband can have no bearing upon the question of the existence or absence of power in the Assembly to pass the act.

The organic act extends the legislative power of the Territory to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The only inconsistency suggested is, that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal Constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the Supreme Court of the Territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. As was said by Chief Justice Marshall in the *Dartmouth College Case*, not by way of judgment, but in answer to objections urged to positions taken: "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces." 4 Wheat. 629. And in *Butler* v. *Pennsylvania*, 10 How. 402, where the question arose whether a reduction of the *per diem* compensation to certain canal commissioners below that originally provided when they took office, was an impairment of a contract with them within the constitutional prohibition, the court, holding that it was not such an impairment, said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which *perfect rights, certain, definite, fixed private rights* of property are vested." p. 416.

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract — generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization — it is something more

than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams* v. *Palmer*, 51 Maine, 481, 483. Said that court, speaking by Chief Justice Appleton:

"When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. They can neither be modified nor changed by any agreement of parties. It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they may make. The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other." And again: "It is not, then, a contract within the meaning of the clause of the Constitution which prohibits the impairing the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself; a relation the most important, as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life and the true

basis of human progress." pp. 484, 485. And the Chief Justice cites in support of this view the case of *Maguire* v. *Maguire*, 7 Dana, 181, 183, and *Ditson* v. *Ditson*, 4 R. I. 87, 101. In the first of these the Supreme Court of Kentucky said that marriage was more than a contract; that it was the most elementary and useful of all the social relations, was regulated and controlled by the sovereign power of the state, and could not, like mere contracts, be dissolved by the mutual consent of the contracting parties, but might be abrogated by the sovereign will whenever the public good, or justice to both parties, or either of the parties, would thereby be subserved; that being more than a contract, and depending especially upon the sovereign will, it was not embraced by the constitutional inhibition of legislative acts impairing the obligation of contracts. In the second case the Supreme Court of Rhode Island said that "*marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic *relations*. In strictness, though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make. When formed, this relation is no more a contract than 'fatherhood' or 'sonship' is a contract."

In *Wade* v. *Kalbfleisch*, 58 N. Y. 282, 284, the question came before the Court of Appeals of New York whether an action for breach of promise of marriage was an action upon a contract within the meaning of certain provisions of the Revised Statutes of that State, and in disposing of the question the court said: "The general statute, 'that marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent of parties, capable in law of contracting, shall be essential is not decisive of the question.' 2 R. S. 138. This statute declares it a civil contract, as distinguished from a religious sacrament, and makes the element of consent necessary to its legal validity, but its nature, attributes, and distinguishing features it does not interfere with or attempt to define. It is declared a civil contract for certain

purposes, but it is not thereby made synonymous with the word contract employed in the common law or statutes. In this State, and at common law, it may be entered into by persons respectively of fourteen and twelve. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It is more than a contract. It requires certain acts of the parties to constitute marriage independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy, for the benefit of the community."

In *Noel* v. *Ewing*, 9 Indiana, 37, the question was before the Supreme Court of Indiana as to the competency of the legislature of the State to change the relative rights of husband and wife after marriage, which led to a consideration of the nature of marriage; and the court said: "Some confusion has arisen from confounding the contract to marry with the marriage relation itself. And still more is engendered by regarding husband and wife as strictly parties to a subsisting contract. At common law, marriage as a *status* had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one. Other distinctive elements will readily suggest themselves, which rob it of most of its characteristics as a contract, and leave it simply as a *status* or institution. As such, it is not so much the result of private agreement, as of public ordination. In every enlightened government, it is preëminently the basis of civil institutions, and thus an object of the deepest public concern. In this light, marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." pp. 49–50. In accordance with these views was the judgment of Mr. Justice Story. In a note to the chapter on marriage, in his work on the Conflict of Laws, after stating that he had treated marriage as a contract in the common sense of the word, because this was the light in which it was ordinarily viewed by jurists, domestic as well as foreign, he adds: "But it appears to me to be something more than a mere contract. It is rather to be

deemed an institution of society, founded upon consent and contract of the parties, and in this view it has some peculiarities in its nature, character, operation and extent of obligation, different from what belong to ordinary contracts." § 108 *n.*

The 14th section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article two of that ordinance declares "that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the federal Constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. 9 Stat. 496, c. 76. But that act conferred the title of the land only upon the settler who at the time was a resident of the Territory, or should be a resident of the Territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. The words of the act, that "there shall be, and hereby is, granted to every white settler or occupant," is qualified by the condition of four years' residence on the land and its cultivation by him. The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title, what is sometimes vaguely called

an inchoate interest. In some of the cases decided at the circuit, the fourth section of the act was treated as constituting a grant *in præsenti*, subject to the conditions of continued residence and cultivation, that is, a grant of a defeasible estate. *Adams* v. *Burke*, 3 Sawyer, 415, 418. But this view was not accepted by this court. In *Hall* v. *Russell*, 101 U. S. 503, the nature of the grant was elaborately considered, and it was held that the title did not vest in the settler until the conditions were fully performed. After citing the language of a previous decision, that "it is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress," the court said: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer it will be found that the law has designated a grantee qualified to take according to the terms of the law, and actually in existence at the time. . . . Coming then to the present case, we find that the grantee designated was any qualified 'settler or occupant of the public lands . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act.' The grant was not to a settler only, but to a settler who had completed the four years of residence, &c., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee he took the grant, and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil. The act of Congress made the transfer only when the settler brought himself within the description of those designated as grantees. A present right to occupy and maintain possession, so as to acquire a complete title to the soil, was granted to every white person in the Territory, having the other requisite qualifica-

tions, but beyond this nothing passed until all was done that was necessary to entitle the occupant to a grant of the land." In *Vance* v. *Burbank*, 101 U. S. 514, 521, the doctrine of the previous case was reaffirmed, and the court added: "The statutory grant was to the settler, but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband."

When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation which gave him anything more than a mere possessory right; a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land. The judgment of the Supreme Court of the Territory must therefore be affirmed; and it is so ordered.

Mr. Justice Matthews and Mr. Justice Gray dissented.

Mr. Justice Bradley was not present at the argument and took no part in the decision.

HOSKIN *v.* FISHER.

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

No. 169. Argued February 7, 1888. — Decided March 19, 1888.

Claims 2 and 3 of reissued letters patent No. 8876, granted to Frank H. Fisher September 2, 1879, on an application filed March 29, 1879, for an "improvement in hydraulic mining apparatus," the original patent No. 110,222, having been granted to Fisher December 20, 1870, namely, "2. A ball-and-socket joint for connecting the discharge pipe of a hydraulic mining apparatus with the end of a swivel section, B, substantially as above described. 3. The discharge pipe, E, having a semi-cylindrical or ball-shaped enlargement at its base, in combination with a corresponding cup-shaped socket, D, on the end of the horizontally swivelling section, B, substantially as, and for the purpose described," are invalid.

A copy of the original patent being found in the record under a proper certificate from the clerk of the court below, and there being a stipulation under which it might have been introduced in evidence from the proceedings in another case, it is to be considered, although there is no separate memorandum of its introduction in evidence.

There was a first reissue of the patent, granted as No. 5193, December 17, 1872, but no copy of it being found in the record, it cannot be presumed that claims 2 and 3 of the second reissue were found in the first reissue.

The plaintiffs having stated in their bill that the first reissue or a copy of it was ready in court to be produced, it was for them to put it in evidence, if they desired to excuse the delay of more than eight years and three months in applying for the second reissue by showing that the first reissue, granted a little less than two years after the date of the original patent, contained claims 2 and 3 of the second reissue.

The question of such delay is to be considered as if there never had been any first reissue.

Claims 2 and 3 of the second reissue being claims to sub-combinations less than the whole combination covered by the single claim of the original patent, and the descriptive parts and drawings of the two specifications being alike, and it not being indicated in the original that the invention consisted in anything less than a combination of all the elements embraced in such single claim, and the delay not being explained, such claims were unlawful expansions of the original patent.

BILL IN EQUITY. Decree for complainants. Respondents appealed. The case is stated in the opinion of the court.

Mr. M. A. Wheaton for appellants.

Mr. John H. Miller for appellees. *Mr. J. P. Langhorne* was with him on the brief.

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 District of California, by Frank H. Fisher and Joshua Hendy against Richard Hoskin and others, for the infringement of reissued letters patent No. 8876, granted to Frank H. Fisher, September 2, 1879, on an application filed March 29, 1879, for an "improvement in hydraulic mining apparatus," the original patent, No. 110,222, having been granted to Fisher, December 20, 1870. This reissue was a second reissue, and it appears that there was a first reissue, No. 5193, dated December 17, 1872, granted on the surrender of the original patent, and that the second reissue was granted on the surrender of the first reissue.

The bill of complaint sets forth the fact of the surrender of the original patent and the granting of the first reissue, and that the first reissued patent is "ready in court to be produced" by the plaintiffs, "or a duly authenticated copy thereof." The bill also sets forth that the second reissue "was issued for the same invention as that described in the original letters patent."

There was only one claim in the original patent, as follows: "The swivel-jointed nozzle and pipes A B D E, combined, as described, with the lever F, working through slotted post *f*, strap *i*, lever *c*, and pawl and racket *j k*, for the purpose specified."

The second reissue contains three claims, as follows: 1. The swivel-jointed sections A B and ball-and-socket-jointed section D E, combined, as described, with the lever F, working through slotted posts *f*, strap *i*, lever C, and pawl and ratchet *j* K, for the purpose set forth. 2. A ball-and-socket joint for connecting the discharge-pipe of a hydraulic mining apparatus with the end of a swivel section, B, substantially

as above described. 3. The discharge-pipe E, having a semi-cylindrical or ball-shaped enlargement at its base, in combination with a corresponding cup-shaped socket, D, on the end of the horizontally-swivelling section B, substantially as and for the purpose described."

The claim of the original patent and the first claim of the second reissue are substantially alike. It is not alleged that the defendants have infringed the first claim of the second reissue, or that their apparatus would have infringed the claim of the original patent. The contention is that they have infringed claims 2 and 3 of the second reissue.

The answer sets up that the second reissue contains new matter, which was not contained in the original patent, and which describes and claims that of which Fisher "was not the inventor;" that Fisher did not discover or invent or make any hydraulic machine which machine or combination included either a ball-and-socket joint, or ball-and-socket-jointed sections, or a discharge-pipe having a ball-shaped enlargement at its base; that his original patent did not contain any description of either of those devices, and did not claim them in any combination or otherwise; that all that is said in the second reissue about a ball-and-socket-jointed section, and ball-and-socket joints, and a discharge-pipe with a ball-shaped enlargement at its base, is new matter, which was not contained in the original patent, and was inserted in the second reissue by Fisher fraudulently and for the sake of deceiving and misleading the public, he well knowing that no part of it was his invention, and also knowing that it was not contained in the original patent; and that, by reason of such fraudulent insertion of such new matter, the second reissue is void.

Issue was joined and proofs were taken on both sides, and, on the 17th of March, 1882, the case having been heard by the Circuit Judge, an interlocutory decree was entered in favor of the plaintiffs, adjudging the second reissue to be valid, and that the defendants had infringed upon the 2d and 3d claims of it, and awarding a decree to the plaintiffs for profits and damages, and ordering a reference to a master to ascertain them, and a perpetual injunction in regard to the

second and third claims. Afterward, a rehearing was ordered by the Circuit Judge, to be had upon the same testimony. The rehearing was had before the Circuit Justice and the Circuit Judge, and, on the 4th of September, 1882, an interlocutory decree was entered in the same terms as the first interlocutory decree. On the report of the master, a final decree was entered, March 7, 1884, awarding to the plaintiffs a sum of money as profits derived by the defendants from the infringement.

It is to be gathered from the record that Fisher had at some time brought a suit against one or both of the present defendants named Craig, for the infringement of the first reissue, and at the commencement of the taking of evidence on the part of the plaintiffs in the present suit, the following stipulation is found entered on the record: "It is stipulated and agreed by and between the counsel for the respective parties herein, that the evidence taken and on file in this court in the case of *Fisher* v. *Craig*, number 1144, shall be considered in evidence in this case, reserving, however, to each party the right to introduce such additional evidence as they may desire. It is further agreed, that, in case any exhibits introduced in evidence in said case of *Fisher* v. *Craig* shall be missing from the files, the same may be supplied, each party supplying his own exhibits." It does not appear by the record, to what extent the evidence taken and on file in the same court in the case of *Fisher* v. *Craig*, thus referred to, was used on the hearing of the present case. There is found in the record a paper marked "Exhibit No. 5," being a certified copy from the Patent Office, certified March 8, 1873, of the original patent granted to Fisher, with its specification and drawings. There is no separate memorandum in the record of the introduction of this original patent in evidence; but, as it is found in the record, under a certificate of the clerk of the Circuit Court that it is a part of the record and of the proceedings in the cause, we must accept it as such, and, if necessary, assume it to have been a part of the evidence taken and on file in the case of *Fisher* v. *Craig*, and covered by the stipulation above referred to. That stipulation was to the effect that the evi-

dence in *Fisher* v. *Craig* should "be considered in evidence in this case."

The first reissue is not found in the record. The plaintiffs do not appear to have put it in evidence, although the bill avers that it is ready in court to be produced by them, or a duly authenticated copy of it. Nor does it appear that the defendants put it in evidence, although, as the suit of *Fisher* v. *Craig* was founded upon it, it is to be inferred that it must have been part of the evidence taken and on file in that case, and which, by the stipulation, was to be considered in evidence in this case. Nevertheless, neither party has brought it before us.

The plaintiffs contend, that, in order to determine the validity of the second reissue, that must be compared with the first reissue, on the surrender of which it was granted; that, in the absence of the first reissue no such comparison can be made; that, therefore, it must be presumed that the first reissue and the second reissue were both for the same invention; and that it must also be presumed that the second and third claims of the second reissue were contained in the first reissue. But we are of opinion that, the original patent and the second reissue being properly before us, we have a right to compare them with each other, and that, upon such comparison, the question of the validity of the second reissue must be determined.

Under the proffer in the bill of complaint, it was for the plaintiffs to introduce the first reissue in evidence; and, if they desired to show an excuse for the delay of more than eight years and three months after the granting of the original patent in applying for the second reissue, by showing that the first reissue, granted a little less than two years after the date of the original patent, contained substantially claims 2 and 3 of the second reissue, they should have affirmatively made good that excuse, by themselves introducing the first reissue in evidence, or bringing it before us in the record as a part of the evidence taken and on file in the case of *Fisher* v. *Craig*.

Under the allegations contained in the answer that the original patent did not claim the devices covered by the 2d and 3d claims of the second reissue, and that said 2d and 3d claims

are new matter, not contained in the original patent, and that the second reissue is void by reason of such new matter, the question is fairly raised, on the face of the original patent and the second reissue, as to the effect of the delay of more than eight years and three months after the date of the original patent in applying for the second reissue, the case standing, for the purpose of such comparison, as if there never had been any first reissue.

In the case of *Wollensak* v. *Reiher*, 115 U. S. 96, the following propositions were laid down by this court: (1) The question whether delay in applying for a reissue of a patent has been reasonable or unreasonable is a question of law for the determination of the court. (2) The action of the Patent Office in granting a reissue, and deciding that, from special circumstances shown, it appeared that the applicant had not been guilty of laches in applying for it, is not sufficient to explain a delay in the application which otherwise appears unreasonable and to constitute laches. (3) Where a reissue expands the claims of the original patent, and it appears that there was a delay of two years, or more, in applying for it, the delay invalidates the reissue, unless accounted for and shown to be reasonable. These principles are applicable to the present case, and require that the decree of the Circuit Court should be reversed. The delay is not accounted for by the plaintiffs, nor shown to be reasonable.

The descriptive parts of the specifications of the original patent and the second reissue are substantially alike, and the drawings of the two are the same; but claims 2 and 3 of the second reissue are not found in the original patent. The claim in that patent to the swivel-jointed nozzle and pipes A B D E, combined with the other parts of the machine, and to nothing else, was, under the decisions of this court, an abandonment and dedication to the public of sub-combinations less than the whole combination, after an unexplained delay such as that in the present case. The 2d and 3d claims of the second reissue are claims to such sub-combinations. It was not indicated in the specification of the original patent that Fisher considered his invention as consisting in anything less

than a combination of all the elements embraced in the combination claimed in that patent.

In the recent case of *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, it was held that what was suggested or indicated in the original specification, drawings, or Patent Office model, is not to be considered as a part of the invention intended to have been covered by the original patent, unless it can be seen from a comparison of the original and the reissued patents, that the invention which the original patent was intended to cover embraced the things thus suggested or indicated in the original specification, drawings, or Patent Office model, and unless the original specification indicated that those things were embraced in the invention intended to have been secured by the original patent; and that, where it did not appear that any attempt had been made to secure by the original patent the inventions covered by the new claims in the reissue, those inventions must be regarded as having been abandoned or waived, so far as the reissue was concerned.

The plaintiffs contend that it appears from the testimony of Fisher that it was the result of the suit of *Fisher* v. *Craig*, brought on the first reissue, which convinced him that that reissue was inoperative, and that he took out the second reissue to remedy the defect in the first; and that the delay in taking out the second reissue is explained by the fact that the suit on the first reissue was pending. But we have not before us the proceedings in the suit of *Fisher* v. *Craig*, to such an extent as to be able to form any intelligent judgment upon the question as to how far the proceedings in that suit bear upon the question of the delay in taking out the second reissue. If the plaintiffs desired to avail themselves of those proceedings to show such excuse, it was their duty to have brought them before us, if they were a part of the evidence in this case under the stipulation above referred to. Although the defendants did not incorporate them in the record, and although the clerk of the court below, in making his return to this court, certifies that what is contained in the transcript is a "full, true, and correct copy of the record (excepting models), and of all proceedings in the above and therein entitled cause, and

that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause," such certificate being entitled in the present cause, it was perfectly competent for the plaintiffs to have brought before this court, and it was their duty to have done so, by *certiorari*, any necessary parts of the record which the defendants had omitted to bring before us.

The decree of the Circuit Court is

Reversed, and the case is remanded to the Circuit Court for the Northern District of California, with a direction to dismiss the bill, with costs.

FRIEDENSTEIN *v.* UNITED STATES.

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

No. 178. Argued February 10, 1888. — Decided March 19, 1888.

In a suit *in rem* against certain diamonds seized as forfeited for a violation of the customs revenue laws, it was competent for the United States to give in evidence the declarations of S., not the claimant, who was intrusted by the latter with the custody of the diamonds for sale, such declarations having been made to a customs officer who took the diamonds from a person with whom S. had deposited them, and in the course of an investigation by the officer to determine whether he should seize them, and having been part of the *res gestæ*.

It was also competent for the officer to testify that he did not seize the diamonds till after the declarations were made.

The jury having found, in compliance with § 16 of the act of June 22, 1874, c. 391, 18 Stat. 189, that the acts complained of in the information were done with intent to defraud the United States, and no motion to dismiss the cause for any defect in the information, and no motion in arrest of judgment, having been made, any such defect which could have been availed of by demurrer, or exception, or motion to dismiss at the trial, made on the ground of such defect, or motion in arrest of judgment, must be regarded as having been waived or as having been cured by the verdict.

An information under the revenue laws for the forfeiture of goods, which seeks no judgment of fine or imprisonment against any person, is a civil action.

Yet it is so far in the nature of a criminal proceeding that a general verdict on several counts in the information is upheld if one count is good.

Where the sections of the Revised Statutes on which the counts of the information are founded do not prescribe any intent to defraud as an element of the forfeitures they denounce, said § 16 does not make it necessary, in an information filed since its enactment, to aver that the alleged acts were done with an actual intention to defraud the United States.

It is not necessary that the judgment should recite the finding by the jury that the acts complained of in the information were done with intent to defraud the United States.

In rem, for the forfeiture of diamonds seized for a violation of customs revenue laws. Decree of condemnation in the District Court, which was affirmed by the Circuit Court. Claimant sued out this writ of error.

Mr. Edwin B. Smith for plaintiff in error. *Mr. Leopold Wallach* was with him on the brief.

Mr. Solicitor General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit brought by the United States, in the District Court of the United States for the Southern District of New York, to condemn 43 diamonds, seized as forfeited under the customs revenue laws. The information contains five counts.

The first count is based on §§ 2872 and 2874 of the Revised Statutes, and alleges that the goods were brought in a vessel, name unknown, from ——, a foreign port or place, and were, on the —— day of ——, 1882, unladen and delivered from such vessel within the port and collection district of the city of New York, without a permit from the collector and naval officer for such unlading or delivery, contrary to those two sections, and that the value of the goods, according to the highest market price of the same at the said port and district, amounts to $400.

The second count is based on § 3066, and avers that the collector, having cause to suspect a concealment of goods in

the building No. 66 Nassau Street, in the city of New York, did, on the 27th of February, 1883, with due warrant therefor, enter the said building, in the daytime, and there search for such goods, and did then and there find the same concealed, and did seize and secure the same for trial, and that the duties had not been paid or secured to be paid thereon, contrary to said section.

The third count is based on § 2802, and avers that the said goods, being articles subject to duty, were, on the 27th of February, 1883, found in the baggage of a person arriving in the United States, and were not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made by the person making the same, contrary to said section.

The fourth count is based on § 2809, and avers that the said goods were, on the —— day of ———, one thousand eight hundred and ——, imported into the United States in the vessel, name unknown, belonging in whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from a foreign port or place, and were not included in the manifest, and belonged or were consigned to the master, mate, officers, and crew of such vessel, contrary to said section.

The fifth count is based on § 3082, and avers that on or about the —— day of ———, one thousand eight hundred and ——, an unknown person did fraudulently and knowingly import and bring into the United States, and assist in so doing, the said goods, contrary to law, and did receive, conceal, buy, sell, and in some manner facilitate the transportation, concealment, and sale of such goods after their importation, knowing the same to have been imported contrary to law, contrary to said section.

One Augusta Friedenstein put in a claim to the goods as owner, and answered the information, denying the forfeiture. The case was tried by a jury in the District Court, which rendered "a verdict for the informants and against the claimant for the condemnation of the goods mentioned in the information, and that the acts complained of therein were done with intent to defraud the United States." A decree of

condemnation was entered thereon, and the claimant took the case by writ of error to the Circuit Court, which affirmed the decree of the District Court and remanded the case thereto for execution of the decree. The claimant has brought the case to this court by a writ of error.

The bill of exceptions shows the following state of facts in regard to the seizure of the goods: On the 27th of February, 1883, one Brackett, a special agent of the Treasury Department, went with two subordinates to the store of Goldsmith & Kuhn, No. 66 Nassau Street, where they found a man and a woman and the package of diamonds. The woman was a Mrs. Sussman. When Brackett reached the store, the diamonds were in the possession of Goldsmith & Kuhn. They told Brackett that Mrs. Sussman had handed the diamonds to them. Mr. Kuhn, who was behind the counter, had the package and handed it to Brackett upon his demand for it. Brackett took it, and requested Mrs. Sussman to accompany him to the custom-house, as he wished to make some inquiries about the diamonds. He took them to the custom-house, Mrs. Sussman accompanying him. In answer to a question put to Brackett by the counsel for the claimant, on his examination as a witness, as to when he took the diamonds, he said: "I took them at the store and took her down to the custom-house with them. If her explanation was satisfactory I did not intend to seize them." The package was opened at the custom-house, and the diamonds were examined and appraised, and were then placed in the hands of the officer in charge of the seizure room at the custom-house. Brackett was then asked by the district attorney: "When and where did you make the seizure of these diamonds?" To this question the claimant objected, as calling for a conclusion of law; but the court overruled the objection, and the claimant excepted. The witness replied: "The seizure of the diamonds was made at the custom-house in this city after I was through with my investigation."

It appeared that after Brackett and Mrs. Sussman arrived at the custom-house, and before the package was there opened, a conversation took place there between him and her. The bill of exceptions says:

"The witness Brackett was recalled, and asked this question by the district attorney: 'Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamonds in the custom-house, and on the same day when she went in company with you to the custom-house with the diamonds.'

"The claimant objected to this question, because Mrs. Sussman's statement, under the circumstances and at that time, could not affect the claimant; also, because the question involved a conclusion of law as to the time when 'actual seizure' took place. The court overruled the objection, admitting the question, and the claimant excepted.

"The witness Brackett, in reply to this inquiry, testified as follows: 'Well, I asked Mrs. Sussman from whom she got the diamonds. She said they belonged to another party, but she could not give the name of the party, neither would she give her own proper name. I told her, 'If you can give a satisfactory explanation, and if these goods have been brought into the port properly, and duties paid, the United States government don't want them; why do you object?' 'Well,' she says, 'I can't mention the name of the lady to whom these stones belong.' Well, she finally said to me, after some twenty minutes, perhaps, of conversation — there were two other parties in the room, Mr. Cohen sitting outside, and the door open — she said, 'I would like to see you in private.' 'Well,' said I 'these are my offices here; this is all private — these offices.' 'No,' said she, 'I want to speak to you alone.' Well, I went into the adjoining room with her, and she then said to me, 'These diamonds belong to a lady, as I said before, whose name I won't give. The duty has not been paid on these diamonds. I am ready to go now before the collector and make arrangements to have the duties paid.' 'Well,' said I, 'I cannot do that, madam.' 'Well,' she says, 'I am ready; it can't be over $400.' I then went back to the room and told her that I could not make any such arrangement with her as that; the diamonds were then [not?] under seizure; then I made up my mind to seize them after this conversation. She said the duty would not be over $400; she was ready to go

before the collector and make arrangements to pay that duty.' The witness also testified that he sent for Gen. Palmer, and that Mrs. Sussman reiterated to Gen. Palmer what she had said to him, the witness.

"To further sustain the issues the government then called George W. Palmer, who, after testifying that he was the deputy collector in charge of the seventh division or law department of the custom-house, proceeded, under the objection of claimant's counsel, which objection was overruled and an exception to such ruling duly taken, to give in detail a conversation which he had with Mrs. Sussman at that time, of a similar nature to that testified to by Captain Brackett.

"It was also proved for the government, and acknowledged by Mrs. Sussman, when on the stand on behalf of the claimant, that she, Mrs. Sussman, had been to Europe and had returned from thence and landed at the port of New York in the latter part of August, 1882."

The ground urged against the admissibility of the conversation with Mrs. Sussman is that, she not being the owner of the diamonds, evidence as to her declarations was not admissible in derogation of the title to them, especially because such declarations were made after she had ceased to have the custody of them; and that it was error to permit Brackett to swear that, although he took physical possession of the property at 66 Nassau Street, before the conversation with Mrs. Sussman, he did not make the actual seizure until he made it at the custom-house, after the conversation with Mrs. Sussman.

But we see no objection to the evidence. It is plain, on the testimony, that the goods were not seized for forfeiture until after the conversation, and that the seizure took place at the custom-house, after the investigation and examination there, and did not take place at 66 Nassau Street. See *Four Packages* v. *United States*, 97 U. S. 404, 411. The second count of the information does not allege that the seizure took place at 66 Nassau Street. Its fair import is that the collector, with a warrant, entered those premises and searched for the goods and there found them, and that he afterwards seized and secured them for trial.

Mrs. Sussman, as appears from other evidence in the bill of exceptions, had carried the diamonds to the store of Goldsmith & Kuhn for the purpose of selling them to that firm. If they really belonged to the claimant, they had been put by her into the custody of Mrs. Sussman, for the purpose of selling them. Under these circumstances, Mrs. Sussman's declarations to Brackett, in regard to the goods, while he was making an official investigation and examination as to whether they should be seized for forfeiture, were part of the *res gestæ*, and admissible in evidence as against the person claiming to be the owner of the goods, in a suit *in rem* for their forfeiture. It was competent for the claimant to contradict the facts stated to Brackett by Mrs. Sussman, in regard to the diamonds; but the minutes of the trial show that, although Mrs. Sussman was examined as a witness for the claimant, the claimant herself did not testify as a witness.

We see no objection to the evidence shown by the bill of exceptions to have been admitted under the exceptions of the claimant.

The claimant raises a point as to the sufficiency of the information. The record shows a full compliance with the statute in regard to the finding by the jury that the acts complained of in the information were done with intent to defraud the United States. It does not show that any motion in arrest of judgment was made; nor that any motion was made on the part of the claimant to dismiss the cause for any defect in the information. It is stated in the minutes of trial, which are contained in a paper aside from the bill of exceptions and forming no part of it, that, after the evidence for the United States had been put in, the counsel for the claimant moved to dismiss the case, and the motion was denied; but it is not stated on what ground the motion was made. Under these circumstances, any defect in the information which could have been availed of by demurrer, or by exception, or by a motion to dismiss at the trial, made on the ground of such defect, or by a motion in arrest of judgment, must be regarded as having been waived, or as having been cured by the verdict. *Coffey* v. *United States*, 116 U. S. 436.

Among the objections covered by the above observations are those to the first count, that it does not name any vessel, that it does not name the foreign port or place or state that its name was unknown, that it does not state any day or month of the unlading, and that it does not state that there was then a naval officer at the port of unlading; that to the second count, that it does not allege that the goods were dutiable or imported; those to the third count, that it does not name the person arriving in the United States, nor allege that his name was unknown, nor when he arrived, nor at what port he arrived, nor who was the collector, nor that these things were unknown, nor, affirmatively, that any entry was made of the baggage in which the goods were found; those to the fourth count, that it avers no day, month, or year, no port, domestic or foreign, no vessel, no owner, no consignee, and does not affirmatively state the existence of any manifest in which the goods should have been included; those to the fifth count, that it does not name time, place, person, or circumstance in regard to the importation, that it is bad for duplicity, because the importation is distinct from the subsequent dealing with the imported goods, and that it does not state what the illegality was in the importation.

This is a civil cause. In *Snyder* v. *United States*, 112 U. S. 216, it is said that informations under the revenue laws for the forfeiture of goods, seeking no judgment of fine or imprisonment against any person, are civil actions, although so far in the nature of criminal proceedings that a general verdict on several counts in an information is upheld if one count is good. This latter rule was also applied in *Locke* v. *United States*, 7 Cranch, 339; in *Clifton* v. *United States*, 4 How. 242, 250; and in *Coffey* v. *United States*, 116 U. S. 427, 433, 434, 436, 442. In *The Palmyra*, 12 Wheat. 1, 12, it is said that informations of seizure for forfeitures "are deemed to be civil proceedings *in rem*;" and the existence of Rule 22 of the Rules of Practice adopted by this court for the courts of the United States, in admiralty and maritime jurisdiction, on the instance side of the court, prescribing the contents of informations on seizures for a breach of the laws of the United States, shows

that such seizure cases are regarded as civil suits. The authority to make the Rule was conferred by § 6 of the act of August 23, 1842, c. 188, 5 Stat. 518, which relates wholly to the making of rules in suits at common law and in admiralty and equity. The case of *United States* v. *Three Parcels of Embroidery*, 3 Ware, 75, relied on by the plaintiff in error, is distinguishable from the present case. There the statute required, in order to forfeit goods, that they should not have been invoiced according to their actual cost, and that that should have occurred with a design to evade the duties thereon; and it was held, on a motion in arrest of judgment, that an information was bad which only alleged the making of an entry with a design to evade the duties, and did not allege the making of a false invoice with such design.

Section 954 of the Revised Statutes, which was always in force as § 32 of the act of September 24, 1789, c. 20, 1 Stat. 91, provides, that no judgment or other proceedings in civil causes, in any court of the United States, shall be arrested or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof. This statutory provision applies to many of the objections urged to the information in the present case. These and the other objections mentioned were not taken in the court below by demurrer or exception or motion in arrest of judgment, and there has been a verdict of condemnation. As was said in *Lincoln* v. *Iron Co.*, 103 U. S. 412, 415, if the issue joined be such as necessarily required on the trial proof of the facts defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. See, also, *Stockton* v. *Bishop*, 4 How. 155, 167.

There is, however, one objection made to the information which it is proper to notice, as the question is an important one, and arises now for the first time in this court. It is pro-

vided as follows by § 16 of the act of June 22, 1874, c. 391, (18 Stat. 189): "That in all actions, suits, and proceedings in any court of the United States, now pending, or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which action, suit, or proceeding, an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require, upon such proposition, a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

It is contended by the claimant, that it is necessary to aver, in an information filed since that statute, that the alleged acts were done with an actual intention to defraud the United States; and that, as no such averment is found in the information in this case, the judgment cannot be supported. But we are of opinion that such averment is not necessary. The section relates only to the duty of the court, on a trial by a jury or a trial without a jury, to require or make a special and separate finding as to the actual intention to defraud the United States. This is to be done in every suit of the character specified in the section, in which "an issue or issues of fact shall have been joined;" and the provision applies to suits then pending as well as to those thereafter to be commenced. The fair meaning of the section is that the issue or issues of fact shall have been framed, or shall be framed, in the usual manner theretofore in use. No one of the sections on which the counts of this information are founded prescribes any intent to defraud as an element of the forfeiture denounced in it; and, if § 16 of the act of 1874 is complied with, as it was in this case, at the trial of the cause before the jury, that is all that

is required. We do not concur in the view taken in *United States* v. *Ninety Demijohns of Rum*, 4 Woods, 637, so far as such view conflicts with our opinion herein.

Besides, with the knowledge on the part of the claimant and her counsel of the necessity that the United States should prove on the trial that the alleged acts were done with an actual intention to defraud the United States, and that the jury should so find, or no forfeiture could be imposed, it is impossible for the claimant to allege that she did not come to the trial with the understanding that such actual intention was matter to which proof, on the trial, was to be addressed, although there was no allegation to that effect in the information.

It is also objected, that the judgment of the District Court recites, as its basis, only the verdict of the jury, that it found for the United States, condemning the goods, and that it does not recite the finding by the jury that the acts complained of in the information were done with intent to defraud the United States. But we think that this was not necessary. As it appears by the minutes of the trial, that the jury made the finding of the intent to defraud required by the 16th section of the act of 1874, as a necessary condition precedent to the imposition of the forfeiture, the judgment of forfeiture is justified.

The verdict was a general one, for the informants and against the claimant, for the condemnation of the goods mentioned in the information, and is supported, if any count of the information is good, against the objections now made. *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216; *Coffey* v. *United States*, 116 U. S. 427, 433, 436, 442. The bill of exceptions does not state that it sets forth all the testimony given on the trial, and the names of witnesses on both sides are given in the minutes of the trial as having been sworn whose testimony does not appear in the bill of exceptions. There is nothing to show that any motion was made by the claimant that the government should elect on which of the five counts it claimed a verdict. The third count alleges that the diamonds were articles subject to duty, and is a good count.

On the whole case, we see no error in the record, and

The decree of the Circuit Court is affirmed.

Dissenting Opinion: Field, Harlan, JJ.

MR. JUSTICE FIELD, with whom concurred MR. JUSTICE HARLAN, dissenting.

I am not able to concur in the judgment of the court in this case. The proceeding is a libel of information for the forfeiture of forty-three diamonds by reason of alleged violations of provisions of the customs revenue statute. The several acts for which a forfeiture is sought are not alleged to have been committed with any actual intent to defraud the United States, and yet the statute of June 22, 1874, declares that in all actions, suits, and proceedings then pending or thereafter commenced to enforce the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited, by reason of any violation of the provisions of the customs revenue laws, in which issues have been joined, "it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed." 18 Stat. 189, c. 391, § 16.

The statute thus makes the actual intent to defraud the gist of the offence, and an essential element of it, without proof of which no forfeiture can be adjudged. What must be found ought, according to well settled rules of pleading, to be averred. In every suit for penalties or forfeitures what must be proved to entitle the complaining party to judgment against either person or property must be averred in the libel; and its omission will not be cured by any verdict in the case. Defects in matters of substance are not thus cured. *United States* v. *Hess*, 124 U. S. 483. It may be that libels of information for the forfeiture of goods do not require such fulness and particularity of averment as an information for the punishment of a criminal offence, but there is no decision, or even dictum, I have

been able to find, that an entire omission of all averment, as to the essential fact to be established, to justify a forfeiture or conviction, is not fatal. If any different rule has prevailed in any portions of the country, I do not think it should be sustained. This singular result would follow: that a defendant or claimant, admitting all the allegations of the libel, would escape forfeiture or punishment, for without proof of something not alleged, neither could be imposed.

In the case of *The Hoppet*, decided as far back as 1813, 7 Cranch, 388, 394, a libel of information was held insufficient which contained a general reference to the provisions of the statute alleged to have been violated. And the court, speaking by Chief Justice Marshall, said that "a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offence upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute." It was accordingly held in that case that, the information being defective in that respect, the defect was not cured by evidence of the facts omitted to be averred, the court stating that "the accusation on which the prosecution is founded should state the crime which is to be proved and state such a crime as will justify the judgment to be pronounced. The reasons for this rule are: 1st. That the party accused may know against what charge to direct his defence. 2d. That the court may see with judicial eyes that the fact alleged to have been committed is an offence against the laws, and may also discern the punishment annexed by law to the specific offence. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is therefore a maxim of the civil law that a decree must be *secundum allegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts."

In the *United States* v. *Three Parcels of Embroidery*, 3 Ware, 75, it was held that the omission in a libel of information for the forfeiture of those articles for violation of the 66th section of the Collection Act of 1799, 1 Stat. c. 22, p. 627, to

allege that the goods were falsely invoiced with a design to evade the duties was a fatal defect in the proceeding, and was not cured by the verdict of the jury. In considering the omission in that case in arrest of the judgment on the ground that the offence was not set out in the information with that clearness and distinctness which is required by the rules of pleading and practice, the court said: "It was long ago held by the Supreme Court that an information to recover a penalty under the Collection Act of 1799 is in the nature of a criminal proceeding. *Locke* v. *United States*, 7 Cranch, 339; *Clifton* v. *United States*, 4 How. 242. The description of the offence for which the penalty is demanded must have the same kind and degree of certainty that is ordinarily required in other criminal proceedings; and although it may be true, as is argued by the District Attorney, that in the practice of our courts all that technical accuracy of description may not be required, which is held to be essential in indictments, and even in the exchequer practice in England, and that niceties need not be observed which rest on dry precedent, the reason of which has either ceased to exist or cannot now be discovered, it is still indispensable that every circumstance constituting the offence be clearly and distinctly set out in plain and direct averments."

The language of the 66th section of the act of 1799, under which the libel in that case was filed, declared "that if any goods, wares, or merchandise, of which entry shall have been made in the office of a collector, shall not be invoiced according to the actual cost thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof, to be recovered of the person making entry, shall be forfeited." 1 Stat. 677. And the court held that from this language three facts must concur to complete the offence. First, an entry must be made of the goods. Second, they must be invoiced not according to their actual cost. Third, they must be invoiced with a design to evade the duties thereupon, or upon some part thereof. And that each of these facts must be found in order to entitle the plaintiffs to a verdict, and, all

of them being necessary to constitute the offence, each should be plainly and distinctly charged in the information. It was charged that the entry of the goods was made with a design to evade the duties, but it was nowhere distinctly and plainly charged that a false invoice was made with that design; and the court said: "Under this section of the statute it appears to me that this design in making the invoice is an essential part of the offence. If it is so, the rules of pleading require that it be distinctly alleged. If it be said that the jury, under the direction of the court, found the fact, it is still true that, by the strict rules of pleading in penal causes, the plaintiff can recover only according to his allegation, as well as his proofs," and the judgment was arrested. This case, it is true, comes from a District Court, and is therefore not a controlling authority here, but the great learning of the District Judge, and the ability which marked all his opinions, have deservedly entitled them to great weight and consideration in all the federal courts; and the doctrine declared is sustained by a multitude of decisions.

Much stress is laid upon the fact that an information or other proceeding for the forfeiture of goods for a violation of provisions of the customs revenue acts is in form a civil action; but I do not perceive that this fact changes the necessity of alleging, as well as proving, the material facts upon which alone a forfeiture can be adjudged. Though the same strictness in pleading is not required in civil as in criminal actions, in neither can that which is essential to be proved be omitted to be averred. As Chief Justice Marshall indicates in the quotation above, adherence to this rule would seem to be essential to the due administration of justice in all courts; and it may be added, in all proceedings before them, civil or criminal, upon which their judgment is asked.

In the recent case of *Boyd* v. *United States*, 116 U. S. 616, 634, this court held "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."

Nor do I perceive that the question of pleading is affected

by the fact, that the statute, requiring the fraudulent intent to be proved, applied as well to pending actions and proceedings as to such as might be subsequently commenced. That fact, it is true, might in some cases have compelled an amendment of the pleadings in pending actions and proceedings to make their allegations embrace the essential element of the offence for which the forfeiture was sought; and such an amendment, where a fraudulent intent was not already alleged, was, as I think, contemplated. I cannot believe that Congress intended, by making the law applicable to pending cases, to change a long and well-established rule of pleading, one founded upon manifest principles of justice, so as to allow a conviction of an offence upon which a forfeiture could be adjudged, without averring the fraudulent intent upon proof of which alone such forfeiture could be claimed.

A jury should not be allowed to find as to any material fact not alleged. Evidence upon such a fact would be evidence upon something out of the case presented. Even in ordinary civil cases such evidence is not admissible. Much more strictly should the rule be enforced in penal cases like this one. In *United States* v. *Ninety Demijohns of Rum*, 4 Woods, 637, 639, the libel of information was for the forfeiture of those goods for a violation of provisions of the customs revenue law. It made no allegation of actual intent to defraud the United States, and it was held that the libel was fatally defective. Referring to § 16 of the act of June 22, 1874, 18 Stat. c. 391, 186, 189, the court said: "I think it perfectly clear that this section makes intent to defraud the United States a necessary condition to the forfeiture of any goods, etc., for the violation of the customs revenue laws. A libel of information, therefore, which undertakes to state a case for the forfeiture of goods should aver an intent to defraud the United States. Without such averment no case for forfeiture is made. The claimant might well decline to answer a libel in which such averment was wanting, trusting to the court to dismiss the libel for want of necessary averments, when it came to hear the case *ex parte*, and to adjudge thereon as to law and justice should appertain. . . . The libel must set up all the facts

necessary to a forfeiture. If it fails to do this it is the duty of the court to dismiss it, whether issue is joined or not."

Concurring fully in these views, I dissent from the judgment of the court.

MR. JUSTICE BRADLEY was not present at the argument of this case, and took no part in its decision.

ORIGET *v.* UNITED STATES.

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

No. 186. Argued February 16, 1888. — Decided March 19, 1888.

A paper headed "Bill of Exceptions" not bearing the signature of the judge, but containing at its foot these words, "Allowed and ordered on file November 22, '83, A. B.," the trial having taken place in June, 1883, cannot be regarded as a bill of exceptions, because not signed by the judge, as required by § 953 of the Revised Statutes.

An information in a suit *in rem* against certain imported goods seized as forfeited for a violation of the customs revenue laws, alleged an entry of the goods, which were subject to duties, with intent to defraud the revenue by false and fraudulent invoices, by means whereof the United States were deprived of the lawful duties accruing upon the goods embraced in the invoices. The answer of the claimant denied that the goods became "forfeited in manner and form as in said information is alleged." At the trial the jury rendered "a verdict for the informants, and against the claimant for the condemnation of the goods mentioned in the information, and that the goods were brought in with intent to defraud the United States." The decree set forth that the jury having "by their verdict found for the United States, condemning the said goods," they were "accordingly condemned as forfeited to the United States:" *Held*,

(1) The verdict was a sufficient compliance with the requirement of § 16 of the act of June 22 1874, c. 391, (18 Stat. 189,) that, in order to a forfeiture the jury should find that "the alleged acts were done with an actual intention to defraud the United States;"

(2) The judgment was sufficient without reciting any special finding by the jury as to an intent to defraud.

Opinion of the Court

Under § 12 of the act of June 22, 1874, c. 391, (18 Stat. 188,) merchandise can be forfeited independently of the imposition of the fine mentioned in that section.

IN REM, for the condemnation of four cases of goods seized for forfeiture for violation of the customs revenue laws. Judgment in the District Court condemning the goods, which was affirmed in the Circuit Court. The claimant sued out this writ of error.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit *in rem*, brought by the United States, in the District Court of the United States for the Southern District of New York, against four cases of merchandise, seized for forfeiture for violations of the customs revenue laws. One of them was imported into the port of New York on the 6th of March, 1882, and the other three were imported on the 10th of March, 1882. The information proceeds against them for violations of §§ 2839 and 2864 of the Revised Statutes, and of the 12th section of the act of June 22, 1874, c. 391, (18 Stat. 188). The latter section is in these words: "Sec. 12. That any owner, importer, consignee, agent, or other person 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 five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to

such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed." As the material questions in the case arise in respect to section 12 of the act of 1874, it will not be necessary to refer particularly to the counts founded on the sections of the Revised Statutes.

One count, in regard to three of the cases, alleges that, on or about the 10th of March, 1882, the owner, importer, consignee, or agents of the merchandise, or some other person or persons now unknown to the collector and to the attorney for the United States, with intent to defraud the revenue, made or attempted to make an entry of the merchandise, which was then and there subject to duties, and had been imported into the United States, within the district of the city of New York, from Paris, a foreign place, by way of Havre, in the vessel Amérique, by means of false and fraudulent invoices, affidavits, letters, and papers, and by means of false statements, written and verbal, by means whereof the United States were deprived of the lawful duties, or a portion thereof, accruing upon the merchandise, or a portion thereof, embraced and referred to in such invoices, affidavits, letters, and papers, and such false statements, the cases whose contents are proceeded against for forfeiture containing particular articles of merchandise to which said alleged frauds related, contrary to said 12th section.

Another count, in regard to the three cases, alleges, that, on or about the 10th of March, 1882, the owner, importer, consignee, or agents of the merchandise, or some other person or persons now unknown to the collector and to the said attorney, with intent to defraud the revenue, made or attempted to make an entry of the merchandise, which was then and there subject to duties, and had been imported into the United States within said district, from Paris, a foreign place, by way of Havre, in the ship Amérique, and that the said owner, im-

porter, or agents, and other person or persons unknown, was and were guilty of certain acts and omissions, whereby the United States were deprived of the lawful duties, or a portion thereof, accruing upon the merchandise, or a portion thereof, affected by said acts and omissions, the cases whose contents are proceeded against for forfeiture containing particular articles of merchandise to which said alleged frauds and said acts and omissions related, contrary to said 12th section.

There were two similar counts in regard to the fourth case.

The counts founded on § 2829 of the Revised Statutes allege a failure to invoice the goods according to their actual cost at the place of exportation, with design to avoid the duties thereon; and those founded on § 2864 allege an entry of, or attempt to enter, the goods by means of false invoices and papers.

A claim was interposed by one Origet, as owner of the goods, and an answer denying that the goods became "forfeited in manner and form as in said information is alleged."

The case was tried by a jury, and the minutes of the trial show that the jury rendered "a verdict for the informants and against the claimant for the condemnation of the goods mentioned in the information, and that the goods were brought in with intent to defraud the United States." Thereupon a decree was entered, which set forth, that, the jury having "by their verdict found for the United States, condemning the said goods," they were "accordingly condemned as forfeited to the United States." On a writ of error sued out by the claimant from the Circuit Court, that court affirmed the decree of the District Court, and remanded the case to the latter court for the execution of its decree. The claimant has brought the case to this court by a writ of error.

The counsel for the claimant seeks to raise objections to the admission of certain evidence at the trial, and to the exclusion of certain other evidence, upon what appears in a paper found in the record and headed "Bill of Exceptions." But the paper does not bear the signature of the District Judge. The trial took place on the 8th of June, 1883. At the foot of the paper referred to appears the following: "Allowed and ordered on

file November 22, '83. A. B." This cannot be regarded as a proper signature by the judge to a bill of exceptions, nor can the paper be regarded for the purposes of review as a bill of exceptions. To make it clear that a seal to a bill of exceptions was not necessary to its validity, Congress, by § 4 of the act of June 1, 1872, c. 255, (17 Stat. 197,) now § 953 of the Revised Statutes, enacted as follows: "A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto." This provision merely dispensed with the seal. The necessity for the signature still remains. We cannot regard the initials "A. B." as the signature of the judge, or as a sufficient authentication of the bill of exceptions, or as sufficient evidence of its allowance by the judge or the court. Therefore, the questions purporting to be raised by the paper cannot be considered.

An objection is made to the verdict, founded upon § 16 of the act of June 22, 1874, c. 391, (18 Stat. 189,) which is in these words: "Sec. 16. That in all actions, suits, and proceedings in any court of the United States, now pending or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition, a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed."

The objection made is, that the verdict states "that the goods were brought in with intent to defraud the United States," and does not state, in the language of § 16, that the acts alleged in the information were done with such intent. But we are of opinion that this objection has no force. It is evident that, under the information and the answer, the question of intent to defraud, submitted to the jury and passed upon by them, must have been as to the intent to defraud in the respects set forth in the information and denied by the answer; and the finding "that the goods were brought in with intent to defraud the United States" must, in respect to the counts founded on § 12 of the act of 1874, be regarded as a finding that the acts alleged in those counts were done with such intent to defraud. The words "brought in" may fairly be construed as having reference to the entering or attempting to enter the goods by the means specified in those counts, as the entry of the goods is the necessary means, provided by law, for bringing the goods within the control of the importer, so that they may be employed by him for the purposes for which they were imported. There is no count in the information founded upon an unlawful importation or bringing in of the merchandise, in any other sense than that it was entered or attempted to be entered by means of the false papers mentioned in the information.

It is also objected, that the judgment of the District Court only recites that the jury "found for the United States condemning the said goods," and does not recite any special finding as to an intent to defraud. This objection is overruled for the reasons set forth in the opinion in the case of *Friedenstein* v. *United States*, just decided, (*ante*, p. 224).

It is also made a point in the brief of the counsel for the claimant, that the District Court had no jurisdiction of the cause of action set forth in the information, because the only method of obtaining a condemnation of goods for the causes mentioned in § 12 of the act of 1874, is in the course of a proceeding by indictment against an offender; that a proceeding against the goods is only authorized by that section as an incident of the prosecution of an offender by an indict-

ment; that the forfeiture of the goods, like the fine and the imprisonment prescribed, is a part of the punishment, upon a conviction on a criminal prosecution; that the forfeiture is imposed only as an addition to a fine, where that is imposed; and that the merchandise cannot be forfeited independently of the imposition of the fine. But we are of opinion that this is not the proper construction of the section. The fine, or the imprisonment, or both, are to follow conviction on a criminal prosecution of the owner, importer, consignee, agent, or other person who does the act forbidden by the section, with the intent therein mentioned. The section then goes on to say that, "in addition to such fine, such merchandise shall be forfeited." The sole meaning of this is, that the person owning the merchandise shall lose it by forfeiture, in addition to such possible loss as may come to him by the imposition, if he is the offender, of the pecuniary fine, on the criminal prosecution against him. But the merchandise is to be forfeited irrespective of any criminal prosecution. The forfeiture accrues to the United States on the commission or omission of the acts specified. No condition is attached to the imposition of the forfeiture. The section does not say that the merchandise shall be forfeited only on the conviction of some offender, whether the owner of the merchandise or one of the other persons named in the section. The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent.

The construction contended for by the claimant would require the imposition of the forfeiture only when a fine was imposed; and not only could the forfeiture not be imposed where imprisonment was awarded, but the language would require that, on a criminal conviction of the agent, the merchandise of the principal should be forfeited, in order to allow of the imposition of any fine on the convicted agent. Again, two persons, a consignee and an agent, aside from the owner, might each of them be guilty and each of them be separately prosecuted criminally, and, if the first one convicted were

fined and the goods were forfeited, the second one tried could not, on conviction, be punished by a fine, because, the merchandise having been already forfeited, it could not be a second time forfeited, and so the requirement of the statute that the merchandise should be forfeited in addition to the imposition of the fine could not be carried out. We conclude, therefore, that the forfeiture imposed by the section is no part of the punishment for the offence.

In the case of *Coffey* v. *United States*, 116 U. S. 436, 443, where § 3257 of the Revised Statutes imposed on a distiller for forbidden acts the forfeiture of his distillery, and also a fine and imprisonment, this court held, on the authority of *The Palmyra*, 12 Wheat. 1, 14, 15, that the forfeiture was to be enforced by a civil suit *in rem*, and the fine and imprisonment in a criminal proceeding.

The decree of the Circuit Court is affirmed.

SOUTHERN DEVELOPMENT COMPANY *v.* SILVA.

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

No. 1210. Submitted January 9, 1888. — Decided March 19, 1888.

The general rule that when the answer of the defendant in a cause in equity is direct, positive, and unequivocal in its denial of the allegations in the bill, and an answer on oath is not waived, the complainant will not be entitled to a decree unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, applies when the equity of the complainant's bill is the allegation of fraud.

In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other party to his damage, and in ignorance of its falsity and with a reasonable belief that it was true.

Statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale.

The fact that a representation made by a seller was false raises no presumption that he knew that it was false.

When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser cannot afterwards allege that the vendor made representations respecting the subject investigated which were false.

In equity. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. William A. Stewart, *Mr. A. T. Britton*, and *Mr. A. B. Browne* for appellant.

Mr. John H. Miller, and *Mr. J. P. Langhorne* for appellee.

Mr. Justice Lamar delivered the opinion of the court.

This is a bill in equity to rescind a contract of purchase of a silver mine on the ground of fraudulent representations and to recover the consideration paid.

The suit was commenced originally in the Superior Court of Inyo County, California, on the 8th of May, 1884, but on account of the diverse citizenship of the parties, the plaintiff being a corporation organized under the laws of Nevada, and the defendant a citizen of California, it was removed into the United States Circuit Court. Demurrers to the original bill and to an amended bill having been sustained, the present "second amended" bill of complaint was filed. Answer was filed by defendant, replication by complainant, and issue was joined. Testimony was taken, and the case was heard, resulting in a decree dismissing the bill on the 14th of March, 1887.

It appears from the record that on the 15th of March, 1884, the appellant (who was the complainant below) purchased from

the defendant a mining claim, known as the "Sterling Mine," together with other mining property, all situated in Inyo County, California, paying him therefor the sum of ten thousand dollars.

On the 8th of May, 1884, the original bill of complaint was filed, charging in substance that complainant was induced to purchase said mine and mining property solely upon the representations made by Silva as to its condition, extent, and value; that such representations were made to H. M. Yerington, the president of said complainant company, and to one Forman, a mining expert in his employ, in January, 1884, when an examination of said mine was made by them; that said representations were false and fraudulent, and were well known to the defendant at the time to be such; and that said representations were, in substance and in a somewhat different order, as follows:

(1) That there were 2000 tons of ore in the mine;

(2) That the bottom of what is called the "ore chamber" was solid ore, as good as the ore exposed on the sides of the chamber;

(3) That there were not less than 500 tons of ore in and about the said "ore chamber";

(4) That the mine was worth fifteen thousand dollars; and,

(5) That, after going through the mine, the defendant represented to said Yerington and Forman, that he had shown them all the work which had been done in or about the mine that would throw any light upon the quantity of ore therein.

The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill, and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. *Vigel* v. *Hopp*, 104 U. S. 441; Story Eq. Jur. § 1528; Daniell Ch. Pr. 844.

The burden of proof is on the complainant; and unless he

brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show by clear and decisive proof —

First. That the defendant has made a representation in regard to a material *fact;*

Secondly. That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage; and,

Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and, again, (excepting in peculiar cases,) it excludes statements by the owner and vendor of property in respect to its value.

The evidence in the case shows that in the development of this mine a tunnel, called the "Sterling Tunnel" had first been dug. At a distance of about 140 feet along the line of this tunnel, from its mouth, there are branches running easterly and westerly. About 60 feet from the main tunnel, in the eastern branch, winze No. 1 starts down. About 38 feet below the level of the tunnel, a level known as the "38-feet level" starts off from this winze, and at the bottom of the winze, a distance of about 82 feet vertical below the main tunnel, there is another level known as "82-feet level." In the easterly branch of the tunnel, about 30 feet from winze No. 1, there is another winze starting downward, inclining to the southeast as it goes down. This winze is numbered 2, and is connected with the 38-feet and the 82-feet levels. Intermediate between these levels is another level, known as the "55-feet level," which opens out to the eastward of winze No. 2, into a chamber about 15 feet long and about 8 feet wide. In the southeast corner of this

chamber was a little hole or shaft, extending downward a few feet only. In sinking winze No. 2, Silva struck an ore body at a point opposite the 38-feet level. It was irregular in shape, dipping at an angle of about 45 degrees. Commencing at a point, comparatively speaking, it increased gradually as it descended, and was in form somewhat like a pyramid. At its base it measured 4 or 5 feet across, and it was about 9 feet long. The surface of this inclined pyramid formed the floor or bottom of the chamber. There was, however, a small space between the base and the opposite foot wall, which is called the "bottom" of the chamber by complainant's witnesses, and is the "bottom" spoken of in the bill. The ore comprising this pyramid was carbonate, and being friable, had slacked down over the face of the pyramid to the bottom partially covering it, and partially filling up the little hole or shaft in the southeast corner.

As to the first alleged representation, as classified above — viz., that there were 2000 tons of ore in sight in the mine, and that Yerington relied upon such statement when he made the purchase — the proof utterly fails to establish either that Silva made the statement, as a statement of fact, or that Yerington relied upon such statement even had it been made. Silva, both in his answer and in his testimony, denies ever having made the statement, and the testimony of Yerington himself is to the effect that Silva's statement was qualified by the phrase "in his judgment." This then is shown to have been nothing more than an expression of opinion on the part of Silva as to the quantity of ore in sight in the mine. But even if Silva had made the statement imputed to him in the bill, there is abundant evidence to show that Yerington did not rely upon it in the purchase of the mine. Yerington's own evidence, on this point, is against him. He testifies that he did not believe that there were more than 1000 tons of ore in the mine, and that Forman agreed with him on that point. And he further testifies that, valuing this ore at 32 ounces of ore and 45 per cent of lead per ton, (which it appears was its approximate value as determined by several assays,) and calculating that there would be 1000 tons of ore there, the mine would be worth

ten thousand dollars — the sum he actually gave for it. This lacks much of coming up to the rule that the complainant must have been deceived, and deceived by the person of whom he complains. *Attwood* v. *Small*, 6 Cl. and Finn. 232; *Pasley* v. *Freeman*, 3 T. R. 51. Besides, the quantity of ore "in sight" in a mine, as that term is understood among miners, is at best a mere matter of opinion. It cannot be calculated with mathematical or even with approximate certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially.

In the case of *Tuck* v. *Downing*, 76 Illinois, 71, 94, the court say: "No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!"

We approve the position of the court below, that "Yerington and his expert, Forman, were as competent to judge how much ore there was 'in sight' as Silva was. They were no novices in matters of that kind. This misrepresentation, if such it be, does not contain either the 1st, 4th, or 5th element stated by Pomeroy as essential elements in a fraudulent misrepresentation."

As stated above, the substance of the allegation of the bill is, that Silva represented that the bottom of this ore chamber which was covered with loose ore slacked down from the pyramid, was composed of ore as good as that exposed on the sides of the chamber. Silva in his answer expressly denies ever having made such statement. Forman testifies that with a little prospecting pick he had with him he raked through the dirt and loose ore that had slacked down, to see if it

would reach the bottom of the ore chamber, but that it would not. He further says: "I asked Silva how the bottom was; if he had sunk below there. He said, 'No.' I said, 'How is the bottom? You as a miner know it is a suspicious thing to see a bottom covered up or anything of that kind.' He said the bottom was as good or better than any ore which we saw in the chamber." Yerington at first testifies that Silva, in reply to a question by Forman, stated that this floor was solid ore; but he says that he does not think any comparison was made between that ore and the ore in the sides of the chamber, as narrated by Forman. On the next day, however, Yerington, having, as he says, refreshed his memory, "and I [he] had the means of doing it," was positive that the conversation between Silva and Forman at that time was as Forman afterwards stated it. Silva, in addition to his positive denial in his answer, testifies that "there never was a word said about that. They asked me this, 'What I thought of the ore body?' and I said 'I thought it would be extensive.' I thought so at the time, and I think so yet." The witness, Eddy, who was present all the time in the ore chamber, except when he went to the 38-feet level to get a pick, does not know anything about a conversation such as Yerington and Forman narrate.

On this point, then, the testimony of Silva is directly to the contrary of that of Yerington and Forman. Certain other material facts in the case seem to indicate that there is just as strong probability that Silva's statements in this matter are true, as that those of Yerington and Forman are true. In the bill Yerington alleged, under oath, that Silva had discovered the fact that the *bottom* of the ore chamber was not composed of ore, and had afterwards covered that *bottom* with ore, vein-rock, and matter — in other words, had "*salted*" the mine. There is no evidence in the record to prove this, or tending to prove it. On the contrary, the evidence of Yerington himself, and of the other witnesses who were examined on that point, is all to the effect that the ore covering the floor of the chamber had slacked down from natural causes in fine particles like wheat. Nor is there such evidence to show that Silva knew

the character of this floor, or of the extent of the ore-vein, or *deposit*, (as it afterwards turned out to be,) as would justify the interposition of a court of equity to set aside the contract on the ground of fraudulent representations. He had come on to the ore in excavating from the top. The sides of the ore chamber contained some ore of a good quality, and he had never demonstrated the extent and amount of ore in the pyramidal wedge in the side of the chamber. It is shown by the evidence of Yerington himself, that, in the side of a drift running westerly from the ore chamber, there was ore which appeared to be continuous with the body of ore in the chamber. So that the statement Silva said he made — viz., that he thought the ore body would be extensive — at least, appears reasonable. Upon all the facts and circumstances apparent of record, he might have made the statement he says he made, and believed he was telling the truth. For there is also *some* evidence to the effect that Silva had commenced to run a drift from the bottom of winze No. 1, for the purpose of striking and cutting the supposed downward extension of the ore body in the chamber, and this before the examination of the mine by Yerington and Forman. After the sale of the mine, Coffin, the superintendent for the complainant company, when he commenced work in the mine, started in where Silva had left off in this drift, and carried it immediately beneath the ore chamber, entering the chamber by an up-raise. Then it was that the discovery was made that the ore body, instead of being a continuous ledge or lead, was merely a deposit.

Furthermore, the testimony of Yerington and Forman, as regards the little hole or shaft in the southeast corner of the chamber, is directly opposed by the testimony of Silva and Eddy. Both Yerington and Forman testify that this little shaft was completely filled up with dirt and loose ore; while Silva and Eddy both testify that it was not so filled up, but that both Yerington and Forman stood in that shaft and took samples of ore from it.

It is thus seen that the evidence on this material point does not clearly establish the fraudulent representations of Silva as claimed by the complainant; but that, on the contrary, the

material facts and circumstances as disclosed by the record are entirely compatible with the theory that Silva did not make the representations charged against him, or at most, that he merely gave expression to an opinion as to the extent of the ore body, erroneous though it proved to be. This would not constitute fraud. In the language of the court below: "This testimony was taken in June, 1886, about two and a half years after the conversations took place. They were present at the time examining the mine and engaged in conversation for an hour or more. These discrepancies in matters of detail during a long conversation, related by different parties, viewing the subject from different standpoints after the lapse of so long a period of time, are no more than might reasonably be expected, even in honest witnesses. There is no occasion to impute any intention to testify falsely to either. . . . Parties are extremely liable to misunderstand each other, and, in looking back upon the transaction in the light of subsequent developments, are prone to take the view most advantageous to themselves."

As to the third alleged representation — to wit, that there were not less than 500 tons of ore in and about that ore chamber — Silva, both in his answer and in his testimony, denies that he ever told Yerington and Forman, or anybody else, that there were 500 tons of ore there, or that there was any amount fixed or agreed upon by them as to the quantity of ore there; while the testimony of both Yerington and Forman is to the effect that Silva said *in his opinion*, or *in his judgment*, there were 500 tons of ore in the chamber. So that taking the strongest testimony produced on the part of complainant upon this point, it simply amounts to an expression of opinion on the part of Silva as to the amount of the ore in the chamber, and not a statement of fact. It therefore does not constitute fraud.

It is equally true that any statements that may have been made by Silva with reference to the value of the mine, cannot, under the circumstances of this case, be considered an act of fraud on his part sufficient to warrant a court of equity in setting aside the contract herein. Yerington testifies that Silva

said he had been asking $15,000 for the mine, but that he would take $12,500; while Forman says he does not recollect that Silva made any statement as to the value of the mine, but that he heard Silva say he *thought* it was worth $15,000. Such statements are not fraudulent in law, but are considered merely as *trade talk*, and mere matters of opinion, which is allowable. *Gordon* v. *Butler*, 105 U. S. 553; *Mooney* v. *Miller*, 102 Mass. 217. Moreover, it is clear, beyond question, that Yerington did not purchase the mine upon Silva's representations as to its value, as we shall hereafter see.

This disposes of all the alleged fraudulent representations, as arranged above, except the last, adversely to the complainant, and it is to this one that attention will now be directed. This charge is, substantially, that Silva represented to Yerington and Forman, when they visited the mine in January, 1884, and had gone through it, that he had shown them all the work which had been done in and about the mine that would throw any light on the quantity of ore therein. This representation is alleged to have been false and fraudulent, and well known by Silva to be such, because at a cut a short distance from the mouth of the main tunnel, at a point known as the "point of location," a little hole or shaft had been sunk which had been filled up, and was not observable at the time of the examination of the mine in January, 1884, and also because there had been a number of drill holes made in the sides of the ore chamber, and afterwards filled up before the examination in January, 1884, so that they were not observable at that time, which holes clearly developed the fact that the ore about the chamber was nothing more than a shell instead of a continuous body as it appeared to the observer.

The existence of the plugged-up drill holes in the sides of the ore chamber is the worst feature of the case against Silva. They could not have been made by a former proprietor of the mine, as is slightly claimed in his behalf, for, as has been already shown in this opinion, Silva himself, or at least persons in his employ, had excavated that chamber after he had purchased it from one Edwards in 1876. And certain it is that the drill holes were found plugged up within a short time

after he had sold the mine to the complainant company, March 15, 1884. The question is, did Silva know of their existence at the time he sold the mine, and, having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon such representations? Upon this question the evidence is somewhat conflicting. Yerington testifies that after going through the mine, he asked Silva if he had shown him the whole of the mine, and he replied that he had. And Forman testifies that Silva, in reply to a question from him, said that he had shown him all the work that had been done in and about the mine that would throw any light upon the quantity of ore in the mine, or the extent of the ledge or deposit. Silva admits that, in reply to a question by Yerington, he told him that he had shown him all the work that had been done in and about the mine, either by himself or under his direction. So that the question is narrowed down to simply this: Were said drill holes in existence at the time Silva made such statement; if so, had they been made by him or under his direction, or did he know of their existence? In his sworn answer Silva expressly "denies that he drilled any such hole or holes through the ore into the country rock or otherwise, or thereby or at all discovered the extent of said ore, or that he filled up said drill holes, or concealed them from view or kept them secret from complainant," &c., and in his testimony he also denies having any knowledge of their existence. He says that he drilled no holes in the mine, except what he had to do as a miner, and that he concealed nothing from Yerington when he showed him the mine. And again he says: "I showed Mr. Yerington all the work that was done in the mine that I knew anything of." There is no direct evidence going to show who drilled the holes. And there is nothing in the entire record to connect Silva with them, except the fact that he was the owner of the mine, and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer, and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The

law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish the defendant's knowledge. *Barnett* v. *Stanton*, 2 Alabama, 181; *McDonald* v. *Trafton*, 15 Maine, 225. This rule is fortified by the consideration that had he known of the limited quantity of ore in and about the "ore chamber," Silva would hardly have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then in the face of that knowledge actually constructing a drift on the 82-feet level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by any one, especially by such an experienced and practical miner as Silva is admitted to have been.

The testimony, therefore, and all the other facts and circumstances of record, do not substantiate complainant's theory of the case on this point; in other words, there is not a satisfactory case of fraudulent representations on this point made out — not such a case as would justify the interposition of a court of equity to set aside the contract under consideration on the ground of fraudulent representations.

As regards the little hole or shaft that had been sunk at the "point of location" and afterwards filled up, so that it was not observable at the time of Yerington's visit in January, 1884, there is absolutely no testimony at all to show that Silva knew anything about its existence. He had done no work at that place, or very little at most, and was using the cut there as a sort of kitchen. The sides of the cut indicated that there was a ledge of ore there. It is admitted that Forman asked Silva why he did not "go down" on that ore, and that he replied that he considered the tunnel the best place to mine.

Silva denies, both in his answer and in his testimony, that he ever knew that a shaft had been sunk at the point of location, and no one is found who can testify that he did know

anything about it. On the contrary, the former owner of the mine, one Edwards, testifies that he himself dug that shaft and filled it up prior to the time Silva purchased it, and that to his knowledge Silva did not know anything about that shaft.

It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations. *Attwood* v. *Small*, *supra*; *Jennings* v. *Broughton*, 5 De Gex, Macnaghten and Gordon, 126; *Tuck* v. *Downing*, *supra*.

The evidence abundantly shows that Yerington had been willing to give $10,000 for the mine prior to the time he visited it and made his examination in January, 1884. He had made inquiries of various persons for months previous to that visit. Several experts in his employ had visited the mine, had taken samples of ore from it, and it must have been from reports thus received that Yerington had made up his mind as to what the mine was worth. From the letters of an agent (Woods) to Eddy, the testimony of the witness Boland, the testimony of the witness Anthony, Eddy's testimony, and from the testimony of Silva himself, there can be no doubt that Yerington had offered $10,000 for the mine several months before he had ever seen it. Thus showing that his examination of the mine in January, 1884, merely went to corroborate the reports that he had received of it from his experts, Forman, Bliss; and that it was upon such reports, and his own judgment after an examination of the mine, that he made the purchase of it.

From all which it is clear to this court that the complainant has not proven his case, and the decree below is

Affirmed.

Counsel for Parties.

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY *v.* MISSOURI RIVER PACKET COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 163. Argued and Submitted February 6, 1888. — Decided March 19, 1888.

The act of Congress of July 25, 1866, 14 Stat. 244, § 10 of which authorized a bridge to be constructed across the Missouri River at the city of Kansas, required that the distance of one hundred and sixty feet between the piers of the bridge, which was called for by the act, should be obtained by measuring along a line between said piers drawn perpendicularly to the faces of the piers and the current of the river; and as such a line drawn between the piers of the bridge of the plaintiff in error measures only one hundred and fifty-three feet and a fraction of a foot, instead of the required one hundred and sixty feet, it is not a lawful structure within the meaning of that act.

When there is any doubt as to the proper construction of a statute granting a privilege, that construction should be adopted which is most advantageous to the interests of the government, the grantor.

A decision by the highest court of a State upon the question whether the mere fact that a bridge, constructed under authority derived from the act of Congress of July 25, 1866, 14 Stat. 244, had not been constructed as required by the statute rendered the owner liable for injuries happening by reason of its existence to a steamboat navigating the river, irrespective of the question whether the accident was the result of the improper construction, presents no federal question for the decision of this court.

This was an action brought in a state court of Missouri to recover damages for injuries to steamboats of the plaintiff below, caused by striking upon the piers of a bridge across the Missouri River, constructed by the defendant. Verdict and judgment for plaintiff, which was affirmed by the Supreme Court of the State. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Wirt Dexter and *Mr. John J. Herrick* for plaintiff in error, submitted on their brief.

Mr. Sanford B. Ladd for defendant in error. *Mr. John C. Gage* was with him on the brief.

Opinion of the Court.

MR. JUSTICE LAMAR delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Missouri to review a judgment of that court affirming a judgment of the Circuit Court of Jackson County in said State against the plaintiff in error. The action was brought in February, 1875, in the Circuit Court of Jackson County, by the Missouri River Packet Company, plaintiff below, against the Hannibal and St. Joseph Railroad Company, defendant below, to recover damages for injuries done to two of the plaintiff's steamboats by a railroad bridge, which had been erected and maintained by defendant over the Missouri River at Kansas City, Missouri, the piers of which and two certain structures connected therewith, it is alleged, unlawfully obstructed the navigation of said river.

The petition contained two counts, the first of which was as follows:

"Plaintiff states that it is, and for the five years last past has been, a corporation organized and created under, and by virtue of the laws of the State of Missouri, and during said period has been and still is the owner and proprietor of numerous steamboats, including the steamboat named Alice, hereinafter mentioned, with which it has, as such corporation, during said period been engaged in navigating the waters of the Missouri River, and conveying and transporting, by means thereof, passengers and freight between the various towns and cities situated on the banks of said river in the States of Missouri and Kansas.

"That the defendant is and for the last twenty years has been a railroad corporation, organized under and by virtue of the laws of the State of Missouri.

"That the Missouri River, for a long distance above the city of Kansas, in the county of Jackson and State of Missouri, and below said city to the mouth of said river, is a navigable stream; that prior to the 4th day of March, 1874, the defendant had erected, and prior thereto and on said day did keep and maintain, in the said river and the channel thereof, near the southern bank thereof and near the foot of the street

known as Broadway, in said city of Kansas, a certain structure composed of heavy timbers and lumber fastened together; and long prior to said day the defendant had erected, kept, and maintained, and did on said day keep and maintain, in the channel of said river, in a point in said Jackson County and opposite said city of Kansas, nearer the centre of said river than the structure first above named, a certain other structure, to wit: a crib or box built of heavy timbers filled with stone, which said crib or box extended from the bed of said river upward to a height of 30 feet or more above the surface thereof; that both of said structures were and always have been obstacles in the way of vessels passing by the same up and down said river, and have prevented and rendered the navigation of said river dangerous and unsafe; that said structures were so erected, kept, and maintained by the defendant wrongfully, wilfully, and in flagrant disregard and violation of the rights of plaintiff and others, to the free and unobstructed use of said river as a highway of commerce; that before the erection of said structures the current of said river, at and above and below the point where the same were located and erected, had been in a line nearly parallel to the faces of said structure, and the navigation of the same easy and safe.

"But plaintiff states that the structure first above mentioned had, on said 4th day of March, 1874, caused the current of the river at that point to change, so that it rushed with great velocity from the point of the location of said structure in a direction nearly at right angles to its former course towards and against said crib or box.

"And plaintiff states that on said 4th day of March, 1874, it was, in the course of its business, navigating said river with its said steamboat Alice, and while attempting, in the exercise of due care and caution, to run said boat by and between said structures, said boat was, without any fault of this plaintiff, by the current of the river, so changed as aforesaid, hurled violently against said crib or box, and the water-wheel, wheel-house, and other parts of said boat broken, injured, and damaged.

"That plaintiff was compelled to, and did, expend large sums of money in repairing said injuries to said boat, and was, on account of the injuries thereto, wholly deprived of the use of the same and of the earnings thereof for the period of thirteen days, to plaintiff's damage in the sum of twenty-five hundred dollars, for which, with interest from the 1st day of April, 1874, plaintiff prays judgment against the defendant."

The second count was in substantially the same form, and alleged an injury to the St. Luke, another of plaintiff's vessels, occurring on the 15th day of September, 1874, and prayed judgment on account thereof in the sum of $3000.

To this petition the defendant below first interposed a plea to the jurisdiction of the court, alleging that the structures complained of, and each of them, were at the time of the injuries alleged in plaintiff's petition, and still are, a part of a bridge across the Missouri River at Kansas City, authorized by the act of Congress approved July 25, 1866, and constructed under and in accordance with the terms and provisions of said act by the Kansas City and Cameron Railroad Company, of which the defendant company below is the successor; that said bridge was wholly situated at the time of the injuries alleged in plaintiff's petition, and still is wholly situated, within the jurisdiction of the District Court of the United States for the Western District of Missouri, and that, by reason of the premises stated, said District Court has exclusive jurisdiction over the subject matter of this action.

This plea having been overruled by the court, and exceptions duly saved, the defendant answered. The answer consisted of (1) a general denial, and (2) a special defence, which latter was pleaded as a full and complete bar to the cause of action alleged in the petition, and is in substance as follows: That at the time of the injury complained of in plaintiff's petition, the defendant was, for a long time prior thereto had been, and still is, a corporation duly organized under the laws of the State of Missouri, and, as such corporation, acting as it was authorized to do by the terms of its charter, it had constructed a railroad from the town of Hannibal, in the State of Missouri, to the town of St. Joseph, in said State, and has been

ever since maintaining and operating said railroad; that the Kansas City and Cameron Railroad Company, a corporation duly organized under the laws of the State of Missouri, as it was authorized to do by the terms of its charter, had constructed a railroad from the north bank of the Missouri River, opposite said city of Kansas, to Cameron, on the Hannibal and St. Joseph Railroad; that Congress, by an act approved July 25, 1866, authorized the construction of a bridge across the Missouri River at or near Kansas City, and the Kansas City and Cameron Railroad Company, availing itself of this privilege, between the passage of said act of Congress and the 4th day of July, 1869, did construct such bridge at Kansas City; that the Kansas City and Cameron Railroad Company afterwards, to wit, on the 4th day of February, 1870, consolidated with the defendant company, whereby the defendant became the owner and proprietor of said bridge; that said bridge was and is a pivot draw-bridge, with a draw over the main channel of said Missouri River at an accessible and navigable point, and with spans of 160 feet in the clear on each side of the pivot pier of the draw, and the next adjoining spans to the draw were and are 30 feet above low-water mark and 10 feet above high-water mark, measuring to the bottom chord of said bridge, and the piers of said bridge were, at the times of location and construction thereof, parallel with the current of the said river; that the obstacles and obstructions (the structures) described in plaintiff's petition, and each of them, were at that time, and still are, parts and parcels of said bridge, and were and are necessary to the safe and secure maintenance of said bridge; that said bridge, ever since its completion, has been a post route; and that, by reason of the premises aforesaid, said bridge, ever since its completion, has been and still is a lawful structure, and, if plaintiff has sustained any damage in consequence thereof, it has been without any fault on the part of defendant, and the defendant is not legally liable therefor.

Plaintiff in its reply specifically denied every material allegation set up in the special defence of the defendant, and upon this state of the pleadings the case was tried by a jury, result-

ing in a verdict for plaintiff below on the first count in its petition, for $2400, and on the second, for $2900 — in all $5300 — upon which judgment was rendered.

Plaintiff thereupon excepted and appealed to the Supreme Court of the State of Missouri, relying mainly upon the question of jurisdiction in the court below, and upon certain alleged improper and illegal instructions given to the jury. The Supreme Court of the State, upon the questions material to a review of the case by this court, held, (1) That the Circuit Court of Jackson County, in which this action was commenced, had concurrent jurisdiction with the District Court of the United States for the Western District of Missouri in the case, and that therefore the plea to the jurisdiction was properly overruled by the Circuit Court; (2) That, while the piers of the bridge were constructed parallel with the current of the river as required by the act of Congress, in determining whether the spans of the bridge on each side of the pivot pier were 160 feet in length in the clear, as required by the act, the measurement should be made at right angles with the current, and not along the structure itself or on the line of the structure, and, inasmuch as the spans so measured were but 153 feet and a fraction in length, that therefore the structure causing the accident was not a lawful one.

The act of Congress, approved July 25, 1866, giving permission for the construction of the bridge under consideration, is found in volume 14 of the Statutes at Large, page 244, and the sections thereof material to a correct determination of the issue here are quoted in full below.

Section 1 provides for the erection of a bridge across the Mississippi River at Quincy, Illinois, and for the laying of railroad tracks on and over the same, etc. "And in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the District Court of the United States of any State in which any portion of said obstruction or bridge touches."

"Sec. 2. *And be it further enacted*, That any bridge built under the provisions of this act may, at the option of the company building the same, be built as a draw-bridge, with a pivot

or other form of draw, or with unbroken or continuous spans: *Provided*, That if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation in any case than fifty feet above extreme high-water mark, as understood at the point of location, to the bottom chord of the bridge, nor shall the spans of said bridge be less than two hundred and fifty feet in length, and the piers of said bridge shall be parallel with the current of the river, and the main span shall be over the main channel of the river, and not less than three hundred feet in length: *And provided also*, That if any bridge built under this act shall be constructed as a draw-bridge, the same shall be constructed as a pivot draw-bridge with a draw over the main channel of the river at an accessible and navigable point, and with spans of not less than one hundred and sixty feet in length in the clear on each side of the central or pivot pier of the draw, and the next adjoining spans to the draw shall not be less than two hundred and fifty feet; and said spans shall not be less than thirty feet above low-water mark, and not less than ten above extreme high-water mark, measuring to the bottom chord of the bridge, and the piers of said bridge shall be parallel with the current of the river: *And provided also*, That said draw shall be opened promptly upon reasonable signal for the passage of boats whose construction shall not be such as to admit of their passage under the permanent spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw during or after the passage of trains.

"SEC. 3. *And be it further enacted*, That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post route; upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States, than the rate per mile paid for their transportation over the railroads or public highways leading to the said bridge."

"SEC. 10. *And be it further enacted*, That any company authorized by the legislature of Missouri may construct a

bridge across the Missouri River, at the city of Kansas, upon the same terms and conditions provided for in this act."

The material facts in this case, as set forth clearly and distinctly in the frank and able brief of counsel for plaintiff in error, are as follows:

"The undisputed evidence showed that the bridge was a pivot draw-bridge; that its piers were parallel with the current of the river, but that they were not at right angles with the current, and ranged diagonally across it; that as a consequence the superstructure of the bridge, erected on the piers, ran diagonally across the current of the river at an angle of 18 degrees; that measuring the spans between the piers, along the line or chord of the bridge, gave a distance of over 160 feet; that the open space between the piers, at low-water mark, measured on the line of the bridge structure, was also over 160 feet; but that a line measured at right angles with the current was only 153 feet and a fraction. It also appeared that the draw-bridge, when swinging open to permit the passage of boats, rested upon two timber structures, called upper and lower draw-rests, which had for their foundation cribs sunk in the river and filled with rock. There was also an ice-breaker in front of the upper draw-rest, and forming a part of it. The draw-rests were connected with the pivot pier by cribs sunk in the water. These draw-rests, thus connected with the pivot pier, were situated near the middle of the river, parallel with the current, and all taken together extended up and down the river about the length of the draw, and were necessary parts of the structure. The upper draw-rest, with its ice-breaker attached, was what the petition designated as 'a certain other structure, to wit: a crib or box, built of heavy timbers filled with stone,' and was the structure with which the steamer came in collision. The evidence also tended to show that near the river bank, on the south side of the south draw opening, a row of pontoons was placed, extending from pier No. 1, up the river about 340 feet to the shore, pier No. 1 being about sixty-five feet from the Kansas City shore, and being the pier on which the south end of the draw rested when in position. These pontoons were con-

structed of a number of flat boats from fifty-three to sixty-five feet in length, and from eighteen to twenty feet in width, chained together, so that their outer edge presented a straight line next to the channel. On the trial it was not claimed that these pontoons were any part of the bridge. They constituted what the petition called 'a certain structure composed of heavy timbers and lumber fastened together,' near the southern bank of the river. It further appeared that the pontoons remained floating and in position until the latter part of the winter of 1873–4, when they sank. The evidence for the plaintiff tended to show that they sank transversely, or in a direction quartering out into the river; that there was a cross-current, starting from near the south shore, above the head of the pontoons and running diagonally across the river, in the direction of the upper draw-rest; and that while the boats were attempting to pass the draw-bridge, in charge of skilful pilots, exercising ordinary care and skill, they were caught by the cross-current and hurled against the upper draw-rest and injured thereby. On the other hand, the testimony for the defendant tended to show that no such cross-current existed, and that the injury to the boats occurred solely by reason of want of due care and skill of the pilots in the management of the boats."

The Supreme Court of the State of Missouri, in affirming the judgment of the Circuit Court of Jackson County, also ruled clearly that the distance of 160 feet between the piers of the bridge required by the act of Congress should be obtained by measuring along a line between said piers drawn perpendicular to the faces of the piers and the current of the river; and that as such line would measure but 153 feet and a fraction instead of 160 feet as required, the bridge was not a lawful structure within the meaning of the act.

The substance of the errors assigned and relied on here, relate (1) to the construction given by the state court to the second section of the act of July 25, 1866; and (2) to the ruling of the Supreme Court of the State, approving the giving of plaintiff's instruction No. 1. The plaintiff in error makes no contention here as to the question of jurisdiction

urged in its behalf in the state courts, but, on the contrary, expressly states that it agrees with the decision of the Supreme Court of the State upon that question.

The sole question, therefore, for our decision relates to the construction given by the state court to that part of the act of Congress defining the manner in which the bridge should be built; *i.e.*, that the distance of 160 feet between the piers of the bridge, required by said act, should be obtained by measuring along a line between said piers, drawn perpendicularly to the faces of the piers and the current of the river, and that as such line would measure but 153 feet and a fraction, instead of 160 feet, as required, the bridge was not a lawful structure.

It is strenuously urged by the counsel for plaintiff in error that the bridge we are considering meets the express requirements of the statute; that the word "spans," as used in the statute, means the structures or parts of the bridge which span the river on each side of the pivot pier, and it is these spans which the statute says shall measure 160 feet in *length* in the clear on each side of the central or pivot pier of the draw; and that the bridge having been constructed according to the requirements of the statute, in its own words, is therefore a legal structure; that the Supreme Court of Missouri, in declaring that "we must look to the spirit and reason of the act, the purpose of which manifestly was to reserve for the purposes of navigation 160 feet of open space in the clear, wholly unobstructed, and available for the passage of vessels," ignored the plain language of the provision, and inferred an intention contrary to that language; that there was nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear, wholly unobstructed;" and that the act nowhere defines the precise direction of the bridge, but intrusted that direction to the discretion of the company.

We do not consider this sound reasoning. The statement that there is nothing whatever in the statute to show any intention on the part of Congress to reserve "160 feet of open space in the clear wholly unobstructed" is repelled by every provision in the act specifying the dimensions of the various

parts of the structure. The fact that Congress prescribed in said act such minute details concerning the manner in which the proposed bridge should be built, — the requirement that it should be constructed with a draw over the main channel of the river at an accessible and navigable point, the provision that the piers of said bridge should be parallel with the current of the river, that prescribing the height of the spans above the surface of the water — and the very rigid directions as to the opening of the draw upon reasonable signals, without delay, for the passage of boats, show how careful Congress was in preserving these navigable rivers as highways of commerce, and in guarding the interests of the public, and especially of those engaged in navigating the rivers that would be spanned by the structures authorized by said act.

We concur with the court below that we must look to the spirit and reason of this provision of the law, and construe it with reference to its evident purpose to connect with the exercise of the privileges therein granted such limitations as will guarantee protection to the navigating interests affected by the proposed legislation. Can it be said that the object and purpose of the law was simply that a bridge should be built across the Missouri River at Kansas City for the benefit of the railroad company alone? Manifestly not, for in that case it would have been only necessary to grant the privilege of building a bridge at the place designated without any limitation or condition as to its mode of construction, except such as the discretion of the company might determine.

In what we have said we do not wish to be understood as assenting to the proposition that the strict letter of the statute supports the contention of the plaintiff in error. The word "span" does not, even in architecture, always mean a part of a structure. It is, perhaps, as often used to denote the distance or space between two columns. Such is the obvious import of the term as used in the act under consideration, not merely as a part of the structure itself, but the measure of the distance between the piers of the bridge — the measure of the space left open for navigation purposes. A similar provision to this may be found in an act of the Illinois legislature author-

izing the construction of a bridge across a river, and the word "space" is used, where in this act we have the word "span."

It is said that the act nowhere defines the precise direction of the bridge, but leaves that to the discretion of the company. The answer to this is, that by the express terms of the act of Congress the piers of the bridge across the river are required to be placed parallel with the current. To the word "across," unless it is qualified by some prefix as *diagonally* or *obliquely*, there is attached, in ordinary use, but one meaning, and that is a direction opposite to length. This is especially true when it is used in connection with parallel lines. When the piers are placed parallel with the current of the river they are parallel with one another, and the faces of the piers may properly be considered as so many parallel planes. The spans of the bridge are to be less than 160 feet in length, *in the clear on each side* of the pivot pier of the draw — that is, from the face of the central pier to the face of the next adjacent pier must be a distance of not less than 160 feet in the clear. Now, it is an elementary principle of mathematics that "the distance between two parallel planes is measured on a perpendicular to both."

But if there be any doubt as to the proper construction of this statute, (and we think there is none,) then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor. *Gildart* v. *Gladstone*, 12 East, 668, 675; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544; *Dubuque and Pacific Railroad* v. *Litchfield*, 23 How. 66; *The Binghampton Bridge*, 3 Wall. 51, 75; *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Leavenworth, Lawrence and Galveston Railroad* v. *United States*, 92 U. S. 733; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659.

As persuasive authority in support of the conclusion we have reached with reference to this bridge, may be cited the case of *Columbus Insurance Co.* v. *Peoria Bridge Co.*, 5 McLean, 70; also the case of *Missouri River Packet Co.* v. *Hannibal and St. Joseph Railroad*, 1 McCrary, 281, the latter being a decis-

ion of the Circuit Court of the United States for the Western District of Missouri in a case between the identical parties to this suit and concerning this identical bridge.

In this last case, Judge McCrary says: "If it be granted that a measurement along a line which deviates from a course directly across the channel is the proper one, then it would follow that the actual passage way might be less than that required by the act. The greater the deviation from such a direct line, the less would be the available space between the piers. Such a construction of the act would defeat the main purpose which Congress had in view in its enactment."

We are therefore of the opinion that the Supreme Court of the State of Missouri committed no error in its construction of the act of Congress under consideration.

A reversal of the judgment brought here for review is also asked upon the ground that the Supreme Court of Missouri erred in sustaining the Circuit Court of Jackson County in giving to the jury what is called "Plaintiff's Instruction No. 1." This instruction is as follows:

"The jury are instructed that unless the bridge mentioned in the answer had piers which were parallel with the current of the river, and spans of not less than 160 feet in the clear on each side of the pivot pier, then said bridge is an illegal structure and an unlawful obstruction to the navigation of the Missouri River; and if the jury believe from the evidence that it was not such a bridge, and further believe that the plaintiff's boats, Alice and St. Luke, or either of them, while attempting to pass through the draw of the bridge in charge of pilots exercising usual and ordinary care, struck the draw-rest of the bridge, and were thereby damaged, then the jury will find their verdict for the plaintiff as to such boat or boats."

It is said that by sustaining this instruction the Supreme Court of Missouri held that the mere fact that the bridge had not been constructed as required by the statute rendered the railroad company liable, irrespective of the question whether the improper construction caused the accident; and it is urged that such holding is erroneous.

This, however, does not present any federal question for

the consideration of this court, and therefore we decline to examine into its merits. *Murdock* v. *City of Memphis*, 20 Wall. 590; *Allen* v. *McVeigh*, 107 U. S. 433.

Upon the only questions in this case cognizable by this court, the judgment of the Supreme Court of the State of Missouri is *Affirmed.*

UNITED STATES *v.* SAN JACINTO TIN COMPANY.

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

No. 887. Argued January 26, 27, 30, 1888. — Decided March 19, 1888.

A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel, or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake.

The initiation and control of such a suit lies with the Attorney General as the head of one of the Executive Departments.

But the right to bring such a suit exists only when the government has an interest in the remedy sought by reason of its interest in the land, or the fraud has been practised on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action.

When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the government has no interest in the matter, the suit must fail.

In the case before us the alleged fraud, for which it is sought to annul the patent, is in the survey of a confirmed Mexican grant, on which the patent was issued; and it is charged that at the time the survey was made the Commissioner of the General Land Office, the Surveyor General for California, the chief clerk of the latter's office, and the deputy who made the survey, were interested in the ownership of the grant, and by fraud made a false location of the land to make it contain valuable ores of tin not within its limits if fairly surveyed.

Of all the officers here charged only Conway, the chief clerk, had any real interest in the claim, and he notified the Surveyor General of his interest, and refused to have anything to do with the survey; it is nowhere shown that he in any manner influenced the location of the survey, and it is denied under oath by all who took part in making it.

The fact is much relied on that some of these officers, after the patent was issued, took shares in a joint stock corporation organized to work the

mine, but there is no proof that the shares were a voluntary gift, or were for services rendered in locating the survey, and the fairness of the purchase of these shares after the patent issued is sustained by affirmative testimony.

The fact that this survey was contested at every step by interested parties, and was returned to the surveyor's office for correction, was twice before that office and twice before the Commissioner in Washington, and finally decided after six months' consideration by the Secretary of the Interior, confirming the decision of the Land Office, affords very strong evidence of the correctness and honesty of the survey.

In the *Maxwell Land Grant Case*, 121 U. S. 325, we expressed ourselves fully in regard to the testimony necessary to enable a court of chancery to set aside such a solemn instrument as a patent of the United States. It was there said, "that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." There is no such convincing evidence of fraud in the present case.

Bill in equity to set aside a patent of public land. Decree dismissing the bill, from which complainant appealed. The case is stated in the opinion of the court.

Mr. Solicitor General and *Mr. G. Wiley Wells* for appellant.

Mr. William M. Stewart for appellees.

Mr. Justice Miller delivered the opinion of the court.

The suit in this case, which was a bill in chancery filed April 10, 1883, in the Circuit Court for the District of California, purports to be brought by the Attorney General on behalf of the United States against the San Jacinto Tin Company, the Riverside Canal Company, and the Riverside Land and Irrigating Company. These corporations are alleged to be in possession of a large body of land, nearly eleven square leagues in extent, for which a patent was issued by the United States on the 26th day of October, 1867, to Maria del Rosario Estudillo de Aguirre, and her heirs and assigns. The object of the bill is to set aside this patent, and have it declared void,

upon the ground that the land described in the survey, which description is a part of the patent, is not the land granted by the Mexican government to said Maria, nor that which was confirmed to her under the proceedings before the land commission, and by the judgment of the District Court of the United States, and by this court also on appeal. The essential feature of the grievance relied on by the complainant is, that this survey was thus located by fraud to include different and more valuable land than that granted by Mexico and confirmed by the courts, and on account of this fraud it is prayed that the survey and patent be set aside and annulled.

Perhaps the nature of this proceeding cannot be better stated than in the language that heads the brief or printed argument of the appellant, who was plaintiff below. It is as follows:

"This brief is intended to establish the following general proposition, viz.: That the lands hereinafter described as patented to Maria del Rosario de Aguirre, and her heirs and assigns, on the 26th day of October, 1867, were obtained from the United States by a fraudulent survey of the lands described therein in violation of the decree of the court; and that the persons engaged in said fraudulent survey were the beneficiaries thereof; and that, by reason thereof, said patent to the same is void, and should be set aside, vacated, and annulled."

The case was heard in the Circuit Court on the bill, answer, replication, and voluminous testimony, by the Circuit and District Judges sitting together, who concurred in the decree dismissing the bill.

The bill sets out a grant to one Maria del Rosario Estudillo de Aguirre of the surplus or "sobrante" of the Ranchos of San Jacinto Viejo y Nuevo, or the overplus which remains in the Ranchos of Old and New San Jacinto, the survey thereof to commence from the boundaries of Don José Antonio Estudillo and Don Miguel Pedrorena. It alleges that this grant was afterwards confirmed by the District Court of California on appeal from the land commission. Upon an appeal taken from that court to the Supreme Court of the United States its judgment was affirmed. The decision of the land commission

was to the effect that the claimant was entitled to five square leagues of land within this sobrante or surplus. The District Court, however, held that the claimant was entitled to eleven square leagues, if so much should be found within the sobrante, and to all that was found therein if it were less than that amount.

The language of this decree, as set forth in the body of the bill, and affirmed by the Supreme Court of the United States at its December Term, 1863, *United States* v. *D'Aguirre*, 1 Wall. 311, describes the land confirmed as "the sobrante or surplus lands remaining within the boundaries of the tract of land called San Jacinto, as the same are represented and described in the map of said tract contained in the expediente of Miguel Pedrorena filed in this case and referred to in the grant, over and above certain lands granted to José Antonio Estudillo, and certain other lands granted to Miguel Pedrorena, within the aforesaid boundaries, to the extent of eleven square leagues of land; and if said sobrante or surplus within said boundaries should be less than eleven square leagues, then such less quantity." The bill alleges that the location by survey of the lands confirmed by this decree was not at all within the sobrante of the San Jacinto grant, but that it was located upon other lands than those on which it should have been, because those which were embraced by the survey were valuable as containing ores of tin; and that nearly all the officers engaged in making or establishing it, from and including the Commissioner of the General Land Office down to the deputy surveyors, were interested in the claim at the time.

It is alleged that throughout the whole transaction, from the beginning of the effort to have this survey made until its final completion and the issue of the patent, all the proceedings were dictated by fraud, and all the officers of the government below the Secretary of the Interior who had anything to do with it were parties to that fraud, and to be benefited by it.

The principal points upon which this fraud is said to rest are, that the land surveyed was not within the larger exterior boundaries out of which the sobrante of San Jacinto Viejo y Neuvo was to be taken, but that said survey described a tract

of land of about the same extent, to wit, of about eleven square leagues, situated more than six miles at the nearest point, and more than twenty miles at the farthest point, away from the land in fact granted and conceded by Pio Pico, governor, to the grantee; that the survey of said land was never made in the field, nor from any actual measurements of distances or observation or determination of courses in the field, as the law of the land department required, nor according to the directions of the decree confirming said grant; that the plat and survey were made arbitrarily and without any actual data in the office of the Surveyor General of the United States for California, under the direction and dictation of that officer and one Edward Conway, then chief clerk in charge of that office, and performing the duties of Surveyor General, and by one George H. Thompson, a deputy surveyor acting under the Surveyor General and the chief clerk; that it was so made up without any reference to the expediente that accompanied the grant or juridical possession given at the time of the grant, or to the decree, but that it was made solely with reference to securing, surreptitiously and fraudulently, letters-patent for the land included and described within the said survey and plat, although the same lies outside of the boundaries of the tract called San Jacinto; that the land so surveyed and platted was at that time supposed by said Surveyor General and Edward Conway to contain, and did in fact contain, valuable lodes of tin and other mineral ores, and that all this was well known to the defendant, or to persons composing its stockholders, at the time the patent was issued.

It is further alleged that Upson the Surveyor General, Conway, the chief clerk in his office, and Thompson, the deputy who was directed to make the survey and did make the plat, and Joseph H. Wilson, the Commissioner of the General Land Office at Washington, were all interested in and part owners of the claim at the time this survey was made, and at the very time they acted in reference to its final confirmation. Other persons are also said to be inculpated in this fraudulent proceeding whose names it is not necessary at present to mention.

It will thus be seen that the entire foundation for the relief sought in this case rests upon a fraud alleged to have been committed upon the government by its own officers, they being interested in the claim to be surveyed and patented. There is no pretence of any mere mistake in the matter, but on the contrary it is asserted that the parties knew exactly what they were doing, and that it was intended to cheat the United States out of valuable mineral ores for the benefit and advantage of those parties and their confederates. The issue is thus narrowed exclusively to the question of fraud.

Another question, however, is raised by counsel for the defendant, which is earnestly insisted upon by them, and which received the serious consideration of the judges in the Circuit Court, namely, the right of the Attorney General of the United States to institute this suit.

The question as presented is one surrounded by some embarrassment. But as it is in some form or other of frequent recurrence recently, and if decided in favor of the appellees will require the dismissal of the case without a judgment by this court upon its merits, we feel called upon to give the matter our attention. It is denied that the Attorney General has any general authority under the Constitution and laws of the United States to commence a suit in the name of the United States to set aside a patent, or other solemn instrument issued by proper authority.

It is quite true that the Revised Statutes, in the title which establishes and regulates the Department of Justice, simply declares, in § 346, that "there shall be at the seat of government an Executive Department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof." There is no very specific statement of the general duties of the Attorney General, but it is seen from the whole chapter referred to that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the government. There is no express authority vested in him to authorize suits to be brought against the debtors of the government,

or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits, and all the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control. And notwithstanding the want of any specific authority to bring an action in the name of the United States to set aside and declare void an instrument issued under its apparent authority, we cannot believe that where a case exists in which this ought to be done it is not within the authority of that officer to cause such action to be instituted and prosecuted. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government.

If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures, and deceptions than the private individual, is hardly open to argument. The Constitution itself declares that the judicial power shall extend to all cases to which the United States shall be a party, and that this means mainly where it is a party plaintiff is a necessary result of the well-established proposition that it cannot be sued in any court without its consent. There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, en-

trapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases, while all other just grounds of suing in a court of justice concededly belong to the Department of Justice, and are in use every day? The judiciary act of 1789, in its third section, which first created the office of Attorney General, without any very accurate definition of his powers, in using the words that "there shall also be appointed a meet person, learned in the law, to act as Attorney General for the United States," 1 Stat. 93, c. 21, § 35, must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law. In all this, however, the Attorney General acts as the head of one of the Executive departments, representing the authority of the President in the class of subjects within the domain of that department and under his control.

In the case of the *United States* v. *Hughes*, 11 How. 552, one Godbee had entered and paid for land at the United States land office in New Orleans, but had not taken out his patent. Hughes, well knowing this fact, entered, paid for, and received a patent for the same land, the prior entry of Godbee being overlooked by the land officers. The United States having tendered Hughes his purchase money, the Attorney General filed an information on behalf of the United States to repeal the patent. The defendant, Hughes, demurred on the ground that no authority existed for bringing such a suit; but this court, saying that it cannot "be conceived why the government should stand on a different footing from any other proprietor," p. 568, overruled the demurrer. When the case afterwards came into this court on appeal from the decree on the final hearing, it said: "It was the plain duty of the United

States to seek to vacate and annul the instrument, to the end that their previous engagement might be fulfilled by the transfer of a clear title, the only one intended for the purchaser by the act of Congress." *Hughes* v. *United States*, 4 Wall. 232.

In *United States* v. *Stone*, 2 Wall. 525, Mr. Justice Grier, delivering the opinion of the court, said: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy," p. 535.

In the case of *Mowry* v. *Whitney*, 14 Wall. 434, 439, 440, which was an attempt by a private party to set aside by a bill in chancery a patent for an invention, the court considered the subject rather fully, and said that "the ancient method of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done." The court held that in England "the *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government," referring to *United States* v. *Stone*, above cited. The court denied the right of the private party to sustain a suit to annul the patent, and said: "The general public is left to the protection of the government and its officers. . . . The reasons for requiring official authority for such a proceeding are obvious. The fraud, if one exists, has been practised on the government, and as the party injured it is the appropriate party to assert the remedy or seek relief." p. 441.

In *United States* v. *Throckmorton*, 98 U. S. 61, 70, the court said: "In the class of cases to which this belongs, however, the practice of the English and the American courts has been to require the name of the Attorney General as indorsing the suit before it will be entertained. The reason of this is obvious, namely, that in so important a matter as impeaching the

grants of the government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceeding is not well founded, or is oppressive, he may dismiss the bill."

In *Moore* v. *Robbins*, 96 U. S. 530, 533, the court, speaking of the issuing of patents for land by the government, said: "If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course."

While the cases last cited did not involve directly the power of the Attorney General to institute a suit to set aside a patent of the United States, we have had before us quite recently three cases which did involve that power, brought by the United States for the express purpose of setting aside patents for land issued by the government on the ground of frauds or mistakes in their issue. In the first of these, *Moffat* v. *United States*, 112 U. S. 24, which was prosecuted by the Attorney General, who appeared in this court by the Assistant Attorney General to argue the case, the decree of the Circuit Court setting aside the patent as having been obtained by the fraud of the officers of the land department was affirmed. No question was made of the right of the Attorney General to institute the suit and conduct it to a successful termination.

In the second case *United States* v. *Minor*, 114 U. S. 233, 241, a suit was brought in the Circuit Court for the District of California to set aside a patent for land issued by the government to Minor. The bill alleged that the patent was obtained by the fraud of Minor in making false affidavits and procuring others to be made before the officers of the land department, by which he obtained the patent for the land in question. Although the case was certified here by the judges sitting in that court on a division of opinion upon several points, one of which was whether a demurrer to the amended bill should be sustained, no question seems to have been made of the right

of the government by its Attorney General to institute this suit; the appeal on behalf of the United States being argued by the Solicitor General, an officer under the control of the Attorney General.

Some question was, however, made in the opinion in that case in regard to the right of the Attorney General to bring such a suit, where the only result would have been to take the land from Minor and give it to one Spence, who had a claim upon part of it, the court saying that "the government in that case would certainly have no interest in the land when recovered, as it must go to Spence without any further compensation. And it may become a grave question, in some future case of this character, how far the officers of the government can be permitted, when it has no interest in the property or in the subject of the litigation, to use its name to set aside its own patent, for which it has received full compensation, for the benefit of a rival claimant." The court said, however, that the question did not arise in that case, because Spence only had a claim to one-half of the land covered by the patent. It will be seen that the only question thus suggested did not affect the right of the Attorney General in a proper case to institute and carry on such a suit; and the decree of the Circuit Court was reversed on the ground that the case presented was one which justified relief.

In the still later case of *The Colorado Coal & Iron Company* v. *United States*, 123 U. S. 307, the bill was filed in the name of the United States by the Attorney General to declare void and cancel sixty-one patents for as many distinct pieces of land, situated at different places in Las Animas County, in the State of Colorado, amounting in the aggregate to over nine thousand acres. The allegation in that case was, that the patent had been obtained by the fraudulent use of fictitious names as grantees of the land, and the case was fought through with great vigor on both sides. It was thoroughly and elaborately considered, and the court said, in regard to these transactions, that they "undoubtedly constituted a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of

it, to justify the cancellation of the patents issued to them," quoting the following language from *United States* v. *Minor*, above cited: "Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value."

If the court had entertained the opinion in these cases, that there existed in the Attorney General no right to institute these suits to set aside patents for lands obtained by fraud, it would have been saved the labor of a protracted investigation in each of them into the facts which were supposed to constitute the fraud; and in the two cases first mentioned the court violated its duty in sustaining the government and setting aside the patents if there existed in its judgment no right in the Attorney General to institute such suits.

We are not insensible to the enormous power and its capacity for evil thus reposed in that department of the government. Since the title to all of the land in more than half of the States and Territories of the Union depends upon patents from the government of the United States, it is to be seen what a vast power is confided to the officer who may order the institution of suits to set aside every one of these patents; and if the doctrine that the United States in bringing such actions is not controlled by any statute of limitations, or governed by the rule concerning *laches* be sound, of which we express no opinion at present, then the evil which may result would seem to be endless as well as enormous. But it has often been said that the fact that the exercise of power may be abused is no sufficient reason for denying its existence, and if restrictions are to be placed upon the exercise of this authority by the Attorney General, it is for the legislative body which created the office to enact them.

We do not think, therefore, that it can be successfully denied that there exists in the Attorney General, as the head of the Department of Justice, the right to institute, in the name of the United States, a suit to abrogate, annul, or set aside a patent for land which has been issued by the government in a

case where such an instrument if permitted to stand would work serious injury to the United States, and prejudice its interests, and where it has been obtained by fraud, imposture, or mistake.

One of the difficulties attending the present case and others of like character which have come before us, in which the authority of the Attorney General to institute the suit has been questioned, is, that no specific plea has been filed denying this authority, or alleging that the suit as made by the bill, or established by the evidence, does not come within the class of cases in which that officer can exercise this power.

There is no plea in this case, and all that is said upon this subject in the answer is in the following language: "If said officers" [meaning the President, the Secretary of the Interior, and the Commissioner of the General Land Office, who were such at the time this action was begun] "had consulted the records they would have been easily informed of the truth; but the said Attorney General is now informed and moved and instigated by the same parties who made the contest in the land department before the issuing of the said patent, and M. G. Cobb, the same attorney who drew the bill herein, and instigated the suit and conducts the same, was the attorney of said contestants in said proceedings, and has represented said parties as such attorney and counsel from the filing of said objections by said Stearns and Montalva down to the present time."

But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the

prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will be benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

In all the decisions to which we have just referred it is either expressed or implied that this interest or duty of the United States must exist as the foundation of the right of action. Of course this interest must be made to appear in the progress of the proceedings, either by pleading or evidence, and if there is a want of it, and the fact is manifest that the suit has actually been brought for the benefit of some third person, and that no obligation to the general public exists which requires the United States to bring it, then the suit must fail. In the case before us the bill itself leaves a fair implication that if this patent is set aside the title to the property will revert to the United States, together with the beneficial interest in it. It is argued in the brief that this is not true; that in fact the government is but the instrument of one Baker, who married the widow of Abel Stearns; and that Stearns contested the correctness of this survey with others before the land department very actively and energetically, because he had such an interest in the land covered by it that if it was defeated he would become the equitable or beneficial owner of the land. This view is supported by some pretty strong testimony and by the fact that Baker was the man at whose instance the action was begun.

When the Attorney General required that a bond should be given to save the United States harmless with regard to the costs of these proceedings, Baker was the man who furnished the security and signed the bond himself. The condition inserted in that obligation recited "that whereas the Attorney General of the United States of America has this day filed, *at the request of the above-named R. S. Baker*, a bill in equity in

the name of and on behalf of the United States of America against the San Jacinto Tin Company: . . . Now, therefore, if the said Baker shall well and truly save the United States of America harmless from all costs and expenses which may be incurred by or against them in the prosecution of said suit to its final determination, and pay or cause to be paid on demand all such costs and expenses as may necessarily be incurred in such prosecution, then this obligation to be void." Taking all these circumstances together, it raises a very strong implication that Baker expected that if the patent was set aside his right to the land covered by it, or to a large part of it, would become paramount.

But we are not so entirely satisfied of the want of interest of the United States in the whole or a part of the land which is covered by this patent as to justify us in saying that the bill in the present case ought to be dismissed on that ground.

Coming to the merits of the case, which turn exclusively on the question of fraud in the location of the survey of the grant to the original claimant, we are to observe that the issue is, by the pleadings themselves, as well as by the explicit statement of counsel for appellant, limited to actual fraud in the execution of that survey. There is no denial of the validity of the original grant, nor of its confirmation by the land commission, as well as on appeal by the District Court of the United States for California and by this court. The justice of a claim for eleven square leagues of land within the surplus, technically called "sobrante," of the San Jacinto tract, is not questioned; nor does the decree which is to be carried out by this survey limit the location of the land otherwise than that it shall not be more than eleven leagues, and that it shall be within the outboundaries of this surplus.

There is a statement in the decree that the measurement of the land thereby confirmed is to be commenced from the line of the Estudillo grant as fixed by the act of judicial possession to him, to which reference is made. We consider this last description as nothing more than a statement that the land of Estudillo previously granted within the boundaries of the tract called San Jacinto shall be one of the boundaries of the

claim thus confirmed, and that the survey must not cover the grant to Estudillo. Reference is also made to a map contained in the expediente among the papers before the court.

The question presented would naturally divide itself into two parts, if there had been any allegation of an unintentional or accidental mistake in the location of the grant; but the plaintiffs in this case place themselves outside of the benefit of this claim of mistake except as it may be so gross as to aid the belief of an intentional fraud on the part of those who made it. The main issue, therefore, in the case is on the question of actual fraud committed by those who made and established the survey.

The principal foundation on which this fraud is rested by counsel is, that all the officers of the government below the Secretary of the Interior who had anything to do with the making, considering, confirming, or ratifying of this survey were interested in the claim; that the motive of the fraud was to include within the survey certain lands which were then known to contain mineral ores, believed to be immensely valuable; and that for this purpose the survey was distorted and wrenched from its proper place in order to cover these mineral deposits. As will be shown hereafter, most of the persons charged with having such interest, and with being in position to influence the location of the land by the surveyor, never had any interest in it at all until after the survey was made and confirmed and the patent issued to the claimant. If this be true, of course they were under no temptation to do wrong, and the fraudulent motive attributed to them could have had no existence.

Mr. Edward Conway, who had previously bought the property and received the conveyance of the title from the claimant before the patent issued, asserts in his testimony that at the time the survey was made and was pending before the Land Office he was the only owner of the property, and that no one had any interest, equitable or otherwise, in it but himself. After this he organized a corporation, to which the title of the property was conveyed, which undertook to work the tin mines found upon it, and most of these persons so

liberally charged with fraud in the survey are those who became stockholders therein.

The main instrument of this fraud, according to the theory of plaintiff's counsel, was Conway, who it is charged owned the whole or at least the predominating interest in the grant at the time the survey was made. At that time he was chief clerk in the office of the Surveyor General of the United States for California, and during the period when it was under consideration therein, as well as in the General Land Office and before the Secretary of the Interior. It is charged that he was often the acting Surveyor General, and that this survey was made under his control and direction while he was thus interested as owner of the claim.

It is also charged that George H. Thompson, a deputy surveyor, acting under the Surveyor General and said Conway, intrusted with the duty of making this particular survey, was also interested in the claim with Conway, as well as one Hancock, at some time a clerk in the Surveyor General's office. It is asserted further that the survey was not actually made upon the ground, but as a matter of fact in the office of the Surveyor General by said Conway, Thompson, and Hancock, solely for the purpose of surreptitiously securing letters patent upon the land described and included in the survey and plat, the motive in mislocating said land being that these parties believed that the land so surveyed contained valuable lodes of tin and other mineral ores.

The deposition of Conway was taken during the progress of the suit. He was then sixty years old. He states in that deposition that at the time it was given he had no interest whatever in the San Jacinto Tin Company, or in the lands which were the subject of controversy; that he had long since parted with his shares in the stock of that company, some of which were sold for assessments which he was unable to pay. He gives a history of his connection with the claim, and with the land office during its pendency before it, and also states the connection that other parties sustained to this transaction who are asserted to have been interested in it during that time. It seems to be a fair and candid statement of all the

facts about which he was interrogated. He contradicts himself nowhere during a long examination and cross-examination, and he is not anywhere successfully contradicted by other testimony in the case. He appears to have been sincerely anxious to tell the whole truth, and if his statement is to be believed he had no interest to do otherwise.

Mr. Conway states that during the years 1864, 1865, and 1866 he was chief clerk in the office of the United States Surveyor General for California, in San Francisco; that he entered that office in the fall of 1857, resigned in December, 1866, and again entered it on January 1, 1868, and remained there until December, 1869, his longest service being as chief clerk, although he commenced at a lower grade. He served under Surveyors General Mandeville, Beale, and Upson, and during the entire terms of the two latter with the exception of the year stated. He testifies that the approval of surveys could only be made by the Commissioner of the General Land Office, who was furnished with the field-notes and plats which were certified to be correct by the Surveyor General, who also made a report of his action for the approval or disapproval of that officer; that the first connection he had with the sobrante San Jacinto Viejo y Nuevo was in 1863; that he then told Surveyor General Beale that he wished to resign his place as chief clerk, as he had offers of other business, amongst which was one from Mr. Hancock, then a major in the army of the United States, who informed him that he had control of this sobrante and also of the Rancho San Jacinto Nuevo — that is, of the metals that were in those ranchos — and he wished him to take charge of the business.

Throughout the whole of this story the early connection of Hancock and Conway with the sobrante claim seems to have been under a right purchased by Hancock from Mrs. Aguirre of the mineral products thereof, without any claim to a general grant of the land. The witness Conway says that Surveyor General Beale told him, upon being informed of the above facts, that they constituted no objection to his remaining in the office, and that he did not wish to part with him. He says: "I told him I felt a little delicacy about it, and he

answered that he would look out for the interest of the United States. When Surveyor General Upson came into office I informed him of the circumstances; that I was interested, not in the rancho, but in the veins of metals that were supposed to be there; told him that I wished to have nothing to do with the survey — to have no connection with it — and any reports he wished on the matter he must get from other officers. In April, 1866, the owner of the sobrante offered it for sale for $8000; I think it was $3000 cash and $5000 on time on a mortgage."

He then went on to state that he enlisted Mr. Charles Hosmer, who advanced him the money for the cash payment, and he, Conway, then agreed to hold in trust for him one-eighth of the estate and repay him his advance out of the first proceeds; that the survey of the sobrante was made in 1864 at the request of the grantee, through her attorneys, Patterson and Stow, acting under the authority of Major Hancock, and in regard to this transaction he testifies as follows:

"Edward F. Beale was the Surveyor General at the time, and he issued the instructions for the survey. The deputy who was directed to make the survey of the sobrante was George H. Thompson. Neither Surveyor General Beale nor Thompson had any interest, present or contingent, in the sobrante at that time, or any promise of any interest. I know positively that they had no interest or promise of interest. Surveyor General Beale has never owned any interest in the sobrante rancho, nor ever owned any stock in the San Jacinto Tin Company, either by himself or in trust, or in any other manner. The survey was made by Thompson in Beale's time and under his instructions."

It further appears from his testimony that the survey having been forwarded to the department at Washington, it was there decided that the act of June 2, 1862, 12 Stat. c. 90, 410, under which the survey was made did not apply to California, and it was returned to the office in San Francisco, with instructions, the act of July 1, 1864, 13 Stat. c. 194, 332, having been passed in the meantime, to have it advertised according to the provisions of that statute. By this act the survey and its plat

and field-notes were to be open for public inspection for ninety days after the expiration of the four consecutive weeks of publication which was provided for; then if objections were made to the survey within that time by any party claiming to have an interest in the tract embraced by it, or in any part thereof, they were to be reduced to writing, stating distinctly the interest of the objector, and signed by him or his attorney, and filed with the Surveyor General, together with such affidavits or other proofs as he might produce in support of the objection; and at the expiration of said ninety days the Surveyor General was bound to transmit to the Commissioner of the General Land Office at Washington a copy of the survey and plat, with the objections and proofs filed in support of them, and also copies of any proofs produced by the claimant, all of which the Commissioner was to examine into, and approve the survey or return the same for correction. All this Conway testifies was done. He says: "Exceptions were taken to the survey by Abel Stearns, the owner of the Sierra Rancho on the north, and of the rancho that he claimed as the Temescal on the west. Surveyor General Upson ordered the survey reformed in order to leave space on the north for the Sierra, according to the juridical possession, of one league in width from the Santa Ana River." In all this the witness is confirmed by the records of land offices.

The witness stated that he took no part whatever in these proceedings with reference to either survey, and upon being asked if he exercised any control with respect to this sobrante claim or the survey thereof, said: "I simply gave notice to the Surveyors General, Beale and Upson, of my interest in this rancho, and after that I had nothing to do with it. The report was made by Mr. Hopkins, and I acted in the same manner as a judge would on the bench if he was interested in the case — step down and out." He also says that the instructions in regard to the mode of executing the survey came from the Commissioner of the General Land Office.

The witness then proceeded to state the facts connected with his acquisition of this property, as follows:

"I made my first purchase of an interest in this sobrante on

the 3d of April, 1866, the only purchase I made; . . . I purchased it from Manuel Ferrer and his wife, Maria del Rosario Estudillo de Aguirre. She was the original grantee of the rancho. Her husband joined with her in the deed. No person was interested with me in that purchase, either before or upon the receipt of the deed, except Mr. Hosmer, as I before stated. That was the only interest except my own. I had that deed recorded in the office of the county recorder of San Bernardino County on the 30th of April, 1866. From April 3d, 1866, until April 30th, 1866, I was in San Francisco. The deed was executed in San Diego and sent up to me, and I sent it down for record immediately. . . . In addition to myself and Mr. Hosmer, no person except Jeremiah S. Black and William H. Lowery, attorneys-at-law, of Washington, were interested in that sobrante subsequent to the date of that deed, April 3, 1866, and prior to the date of that patent."

This was the period during which the survey was pending in the office of the Commissioner having charge of public lands, awaiting his approval, and witness says that during that period no interest in the sobrante was held in trust for any other person, to his knowledge, except those mentioned; that Black and Lowery were his attorneys in the case of the Rancho Sobrante San Jacinto before the Commissioner of the General Land Office, and the Secretary of the Interior, and the consideration which they paid for the interest which he, Conway, held for them was their service as attorneys in the matters mentioned. He further says that he resigned his position in the Surveyor General's Office about December 10, 1866, and proceeded to Washington, returning in December, 1867. He then goes on to recount his acquaintance in that city with Joseph H. Wilson, Commissioner of the General Land Office, and several other persons mentioned, and to deny that either or any of them were interested with him in any manner whatever in the sobrante, by purchase or otherwise, directly or indirectly, before his return from Washington on that occasion. He proceeds to say in the further history of the matter that when he returned from Washington, in December, 1867, he thought it best to form a corporation for the

purpose of working the ores in the mines, and offered interests to gentlemen whom he thought responsible, and calculated to further the joint interests of the corporation; that on the 3d day of January, 1868, the corporation was formed, and became the owner of the property; that it agreed to pay off the mortgage, assume the indebtedness to Hosmer and pay him, Conway, $7500, and allow him to retain a certain number of the shares of its stock, which he afterwards states to be about one-sixth of the sum at which it was capitalized; and that all this was done.

Mr. R. C. Hopkins, who is charged as interested in this property and contributing to the successful fraud in the location of the land in controversy, states in his deposition that he was then sixty-seven years of age; that he was in the office of the United States Surveyor General for California from 1855 until 1879, having charge of the Spanish archives, which included the records of the grants made by the governments of Spain and Mexico. Of this witness it may be generally stated that he was shown to be a man of very high character, exceedingly useful to the government on account of his familiarity with and control of these valuable documents, and very much relied on by all persons interested in the location of surveys in that country or in the validity of Mexican grants.

In regard to this particular transaction he states that he was in that office, in the capacity of keeper of the archives, in 1864, when the survey was made which is the subject of controversy, at which time Mr. Beale was Surveyor General; that he saw the written application made by Hancock, through Patterson, for a survey of the rancho at that time, and probably wrote the instructions for it to be made. Upon being asked who was the deputy surveyor who made the survey, he said that it was George H. Thompson. He was then asked, "By whom was he selected?" to which he replied, "I don't know, but I presume that the Surveyor General appointed him on his own motion;" and proceeded to say that the instructions were signed by the Surveyor General. He was then asked, "Was there any person in the Surveyor General's

office at that time who had any interest in this grant?" to which he replied, "To my knowledge, no." The inquiry was then made, "Do you know of any reason, object, or purpose in locating that grant on the part of anybody in the office other than to locate it according to the decree of confirmation?" to which he answered, "I do not." "Had you any interest in this matter before the issuance of patent?" To this he replied, "No, sir; neither directly nor indirectly." He was then asked if either Upson or Beale, the Surveyors General, or Wilson, the Commissioner of the General Land Office, or Thompson, the deputy who made the survey, or Whiting, had any interest in the claim prior to the issuance of the patent; to which he answered in each case that they had not.

He was afterwards interrogated about some shares of the stock of this company, which, he said, he had accepted from Conway as a sort of compensation for previous losses in other speculation, and upon which he paid large assessments and finally gave them up because he was unable or unwilling to continue the payments required. Hancock, Upson, and Wilson, he states, are dead.

He also testifies, that, with the fullest knowledge of the surveys and papers, and after an examination of the records in the office at San Francisco, it seems to him that it would be impossible to attempt to locate the rancho in any other way so as to conform to the decree of the court, and that this land is located within the general limits of the tract called San Jacinto, and did conform to that decree. Upon being asked if it was possible for him to be mistaken about this matter, he replied: "I don't think so; it is a question of landmarks that are unmistakable in their location, having historical names; it is hardly a matter in which judgment is to be much exercised, but is a matter of fact; at least, I looked upon it at that time as such, when I made this report." To the question, "Was that location made arbitrarily, without reference to courses or distances, or under the direction or dictation of Conway?" he answered: "I think it was made under the instructions of the Surveyor General; I presume, without any dictation from any one. There were probably some instructions to follow,

when public lands were surveyed, the lines of the public surveys. . . . That survey, I presume, was made in accordance with the decree of the District Court, and with all the data that could be obtained."

It appears also that Hopkins made the report of the survey to the Surveyor General, and that he does not doubt that it was correctly made.

The deposition of Thompson, the deputy who made the survey, was taken, and his examination of several hundred pages is mainly confined to his acts in regard to it and the means which he had for making it correctly. On this branch of the subject it is sufficient to say that his statement is very clear to the effect that the survey was properly located, although he admits that he did not go upon the land but made the location, under directions from the Surveyor General, from maps in his office showing the actual objects which constituted the outboundaries of the sobrante and the other locations which had priority to this.

During his examination he was asked what he knew about the ownership of the claim at the time the surveys were made. To this he replied in effect, that he did not know Conway was the owner; that he understood the request for the survey proceeded from Hancock, or from attorneys employed by Hancock, who represented the grantee in the decree of confirmation. He nowhere intimates, nor was he at any time asked, whether he had an interest in the survey at that time, and there is in fact a total failure to establish the allegation that he had any interest whatever, either present or prospective, in the claim when the survey was made by him, or was influenced by anybody who had.

Without going farther into the minutiæ of the testimony on this subject, we are of opinion that there is no evidence that establishes any interest in the claim under consideration prior to the issuance of the patent in any man who was connected with the land department of the government, whether as Surveyor General, deputy surveyor, clerk, or otherwise, except Conway; that Conway's interest was well known to the Surveyors General, who at different times had charge

of this matter, as well as to the Commissioner of the General Land Office, and the Secretary of the Interior who finally passed upon it, and that he abstained from any interference with the making of the survey or the officers who had it in charge, except that probably while he was in Washington he looked after its confirmation.

The attempt to deduce an inference of fraud, in the establishment of this survey and the final issue of the patent, from the circumstance that, after its issue, and when Conway had become the sole owner of the property, he with many other persons of distinction, some of whom were engaged in other branches of the government service, and some connected with the land department, coöperated to organize a joint stock company for its development and improvement, the shares of which they took and upon which they paid many assessments, and from the further fact that a very few of them may have received such stock as compensation for aid rendered to Conway in his struggle to establish the title is, we think, entirely repelled by the testimony, which shows that none of these persons had any interest in it at the time the fraudulent transactions are alleged to have occurred. It does not appear that the stock which they got was in any sense a compensation for services rendered in establishing the survey, except in the case of Black and Lowery, who were the attorneys employed for that purpose and received some of its shares as their compensation. To hold that these parties, such as Hopkins, Thompson, Upson, and perhaps others, when they found the stock of a corporation for sale which had promise of profit in it, by taking its shares became *participes criminis* in a conspiracy to defraud the government, of which they knew nothing at the time the fraud is alleged to have been committed, and that the mere fact of their taking these shares of stock is evidence they took part in the conspiracy, is a species of logic on which patents granted by the United States should not be set aside.

We do not hesitate to say that there is a total failure of evidence to establish any participation in this fraud on the part of any of the persons in the service of the government,

who are charged with having been engaged in it. While we do not wish to give countenance to the idea that an officer of the government, before whom any matter may come for his action, or to be acted upon in his office, should voluntarily acquire an interest in such matter, even though he disclose that interest, but, on the contrary, think that he should accept no such delicate position; nevertheless that circumstance alone should not be permitted to divest the rights of others, unless it be shown that such position was used in aid of an actual fraud.

As to Conway, who had the principal, if not the sole, interest which could induce an effort to secure the false location of the grant, there is no sufficient evidence in the record to show that he undertook in any way to control the actual survey of this land. His testimony, given at a time when he could have had no pecuniary interest in the result of this suit, and delivered with a candor and apparent readiness to answer promptly all questions put to him, without any of the evasive expressions, such as, "I don't know," or "I cannot remember," so commonly used by false witnesses, commands our confidence.

The strongest argument against the commission of any fraud, and in favor of the correctness of the location of the grant by the survey, is to be found in the fact that it went through all the different offices in the land department to which it could possibly be taken, from its being filed by Thompson in the office of the Surveyor General up to its consideration by the Secretary of the Interior himself, and in all these offices ample time was given for careful examination, and an actual scrutiny of the matter was made by reason of the contest of Stearns, who succeeded in having the lines of the survey changed, so as to exclude property in which he was interested. After this change was made, it was again brought before the Commissioner and argued by counsel on both sides, and considered in the light of all the facts which either party chose to bring before the office, and abundant time was given for its investigation. Mr. Wilson, the Commissioner, was a man of many years' experience in the class of cases to which this belongs, and which he was then called upon to decide. He made a full

report, which is in the record, to the Secretary of the Interior, Hon. O. H. Browning, a lawyer of eminence and a man accustomed to weighing testimony, who, after having the case under consideration from May 22, 1867, to October 19 of the same year, made the following decision, which he referred back to the Commissioner of the General Land Office for execution:

"Sir: I have received your letter of the 22d May last, submitting for consideration the papers of the private land claim in California known as the 'Sobrante de San Jacinto,' and asking for instructions on the 'application for a patent to issue in accordance with the survey approved by the Surveyor General of California.' A careful examination of the papers and consideration of the arguments of counsel have led me to concur in your opinion that all the requirements of the law have been complied with, and that [the] patent should issue in accordance with the survey."

We consider this examination of the case in the office of the Commissioner and its reëxamination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud, which was mooted before them, as well as the question of the proper location of the grant. No stronger evidence could be given of the honesty of Commissioner Wilson and his belief in the correctness of the survey than the fact of his reference of the whole matter to the Secretary of his own motion without any appeal by either party from his decision. They had in the Land Office abundant materials for the investigation of all the matters in dispute; they had before them the interested parties, with all the evidence which they could collect, the records, the Mexican archives and control of all the papers of the government since the territory came into the possession of the United States, as well as ample time, more than this court has, to consider all these subjects. Very little that is new or that throws any light upon the questions at issue is now produced on the hearing of this case.

With regard to the question of fraud, we have no hesitation in saying that there is no such case made of intentional fraud, or actual fraud, committed upon the government of the United

States in this transaction as justifies the cancellation of the patent. We have quite recently given our views upon this subject very freely in the *Maxwell Land Grant Case*, 121 U. S. 325, in regard to the character of the testimony necessary to set aside such a solemn instrument as a patent of the United States. It was there held, p. 381, "that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal."

So far from there being the satisfactory evidence here pointed out of a fraud against the government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as "fraud," "deceit" and "imposition." If the case stood alone upon the testimony introduced by the government it would, so far as any fraudulent purpose is concerned, do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the government, and not always by the most appropriate means; but when the testimony for the defence is considered it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion of having used underhand and improper means for the accomplishment of their purposes.

As regards the correctness of the location by survey of the grant, whose validity and justice is not questioned, we do not know that we can do better than to copy the language of the circuit judge presiding when the decree was rendered. In his opinion delivered on that occasion, and concurred in by the district judge, he said: "It is confidently assumed on the part

of complainant that the location of the lands patented is palpably wholly outside of the exterior limits described in the original petition, Mexican grant, and the decree of confirmation; that this is so obvious that the grant must have been wilfully and fraudulently located where it is. This is an assumption that, in our judgment, is wholly without justification in the documentary and other evidence in the case. Upon a careful consideration of the subject we are of the opinion that the most that can be reasonably said against the location is, that the record presents a fair case for an honest difference of opinion; that a plausible argument can honestly be made in support of either side of the proposition. An erroneous location is certainly not so obvious as to necessarily stamp it as a fraud."

When we consider the greater facilities possessed by the land department of the government for ascertaining the true location, and their superior fitness for deciding questions pertaining thereto, over those of the judicial department; and when we also remember that this location underwent the scrutiny of the officers in the office of the Surveyor General for California, as well as those of the General Land Office at Washington, and even of the Secretary of the Interior himself, and was finally approved by them all, we are not disposed to make further inquiry as to whether the location was in all respects in exact accordance with what it might possibly be if a resurvey were made under the additional light, if any, now thrown upon the subject.

The result of all these considerations is, that

The decree of the Circuit Court is affirmed.

Mr. Justice Field, concurring:

I concur in affirming the decree of the court below dismissing the bill in this case. The bill was filed to set aside a patent of the United States issued to Maria del Rosario Estudillo de Aguirre, and her heirs, for land situated in Southern California, in what is now known as San Bernardino County, granted to her by the Mexican government. The grant was

of the sobrante, or surplus lands remaining within the boundaries of a tract called San Jacinto, after satisfying two previous grants. The claim under it was presented to the Board of Land Commissioners created by the act of Congress of March 3, 1851, 9 Stat. 631, c. 41, to ascertain and settle private land claims in California, and was adjudged to be valid to the extent of five leagues. On appeal to the District Court of the United States for the Southern District of California, the claim was confirmed to the surplus land lying within the designated boundaries, not exceeding in extent eleven square leagues. The case being brought to this court, the latter decree was affirmed. The judgment here was rendered at the December term, 1863. Then followed a protracted contest, accompanied with much feeling, for the location of the claim. There being within the San Jacinto tract a tin mine, then supposed to contain a rich body of metal, every step in the survey was contested. Witnesses were examined, and repeated arguments made by counsel representing the parties for and against the location sought. As there were no boundaries of the sobrante marked, by which the claim could be specifically designated, much was left to the judgment of the Surveyor General, after having examined the topography of the country, and heard the statements of witnesses familiar with it. The limitation made by the grant itself only required that the claim should be located within the exterior boundaries of the San Jacinto, and not encroach upon the land covered by the previous grants. In the determination of the survey and location several years were occupied. The matter was at different times before all officers of the Land Department whose judgment could control any of the several steps of the proceedings, the United States Surveyor General for the State, the Commissioner of the General Land Office, and the Secretary of the Interior. Every objection now urged against the survey as ground for revoking the patent was taken before them, fully argued, and held to be untenable. At length, on the 26th day of October, 1867, a patent was issued to the claimants, from whom the defendant, the San Jacinto Tin Company, derives its title.

In April, 1883, after the company had been in possession of the property for nearly sixteen years, and after all the other land within the exterior boundaries of the San Jacinto tract had been patented to the previous grantees, or sold by the United States, so that if the location and survey, on which the patent was issued, could be set aside, there would be no land left to satisfy the grant without annulling titles which the United States had conveyed to other parties, this suit was brought. And it was not brought upon any new fact produced, nor any new reason assigned why the original survey should be disturbed. All the grounds of complaint presented for the new litigation had been urged, and fully considered before. And as if convinced that no beneficial result could come to the United States from the reopening of the old controversy; as if afraid that the United States might be cast in the litigation, a bond was taken from one R. S. Baker, with sureties, to keep the United States harmless from all costs and expenses which might be incurred by or against them in the prosecution of the suit. The original contest upon the survey was carried on, and the expenses of it borne, by one Abel Stearns. Since his death this R. S. Baker married the widow of Stearns, and has sought to retry the issues as to the survey which were decided and determined in the Land Department years before, when Abel Stearns was living. The bond recites that "the Attorney General of the United States of America has this day filed, at the request of the above named R. S. Baker, a bill in equity in the name of and on behalf of said United States of America against the San Jacinto Tin Company" to vacate the patent. Not for the interest of the United States, not for the protection of their property, or to vindicate their honor, but at the request of a private litigant, the name and power of the United States are invoked by the Attorney General to set aside a patent issued after a protracted contest upon the survey with the predecessor of this litigant.

If this were a solitary instance where the name and power of the United States have been used to serve the interests of private parties, it might be passed by with the simple statement of the facts. But, unfortunately, it is not a solitary

instance. The records of this court show that it has been a frequent practice of the Department of Justice in authorizing suits for the cancellation of patents. In *United States* v. *Throckmorton*, 98 U. S. 61, which was here at the October term, 1878, it appeared that the District Attorney of California was directed by the Attorney General to bring suits to vacate patents for lands in that State, upon security being given by one John B. Howard, or a deposit made by him of a sufficient sum to defray the expenses which might be incurred in the litigation; and the bills filed upon such authority were not sworn to, nor even authenticated by the signature of the Attorney General. In this case the bill bears the signature of the Attorney General in office at the time it was filed. His signature gives some assurance, which was wanting in the *Throckmorton* case, of his belief in its allegations, and that the suit is really brought by the United States to protect their rights, and not merely to promote the interests of private individuals. In that and other cases, brought on the authority of the Attorney General, the patents embraced many thousand acres of land, and one of the judges holding the Circuit Court observed that: "It is not to be supposed that if the Attorney General were persuaded that so large and valuable a property belonged to the United States he would have made the assertion of its rights to depend upon the willingness or ability of private individuals to defray the expense of the litigation." *United States* v. *Flint*, 4 Sawyer, 42, 83. In the present case the bill seeks, by setting aside a patent of the United States, to restore eleven leagues of land to the public domain. And yet, so doubtful did the Attorney General appear to consider the rights of the United States to this vast tract, that he required from the party, at whose instance the suit was brought, a bond of indemnity against the expenses of the proceeding.

In commenting upon a similar bond, when the case of *Throckmorton* was here, the court, speaking by Mr. Justice Miller, said: "It would be a very dangerous doctrine, one threatening the title to millions of acres of land held by patent from the government, if any man who has a grudge or a claim

against his neighbor can, by indemnifying the government for costs, and furnishing the needed stimulus to a district attorney, institute a suit in chancery in the [name of the] United States to declare the patent void. It is essential, therefore, to such a suit, that, without special regard to form, but in some way which the court can recognize, it should appear that the Attorney General has brought it himself, or given such order for its institution as will make him officially responsible for it, and show his control of the cause." p. 71. And yet this requirement does not seem to have been potential enough to induce such an examination of the rights of the United States as to justify in the present case the attempt to enforce them without security from private parties.

I cannot admit that the Attorney General can, at the request of private parties, rightfully allow the use of the name and power of the United States in proceedings for the annulment of patents, upon such parties executing a bond as security for costs, or upon any other stipulation of indemnity to them. If the United States have not sufficient interest in property to justify the expenses of proper litigation for its maintenance, they had much better let it go. It would seem that Congress designed to put its mark of condemnation upon the practice of obtaining services from private parties, without incurring liabilities for them, such as was adopted in this case, when, on May 4, 1884, it declared that "hereafter no Department or officer of the United States shall accept voluntary service for the government, or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 Stat. 17, c. 37. The language here used clearly indicates that the government shall not, except in the emergencies mentioned, place itself under obligations to any one. The principle condemned is the same, whether the party rendering the service does so without any charge or because paid by other parties. The government is forbidden to accept the service in either case.

It is not to be supposed that any head of the Department of Justice has or would intentionally lend the name and power

of the government to further private ends, and yet there is no practical difference between that course of procedure and the one adopted in this case. The opinion of the court shows above all controversy the utter groundlessness of the charges upon which it is sought to set aside the survey. A very little attention to the proceedings had before the Land Department in the contest upon that survey would have satisfied the Attorney General of the futility of any attempt to disturb it, and it is not probable that he would have authorized any.

But independently of these considerations I cannot assent to the position announced in the opinion of the court, that the Attorney General has unlimited authority by virtue of his office to institute suits to set aside patents issued by the government. He is the head of the Department of Justice, and as such he is charged with the superintendence and direction of all district attorneys of the United States, and generally of all litigation in which the United States are interested. He is also the legal adviser of the heads of the executive departments, and if they are fraudulently imposed upon in the discharge of their duties, or have mistaken the law, he may at their request take such legal proceedings as are necessary to correct their errors and revoke their action. The legislation of Congress points out the infinite variety of cases where legal proceedings may be taken on behalf of the United States in the enforcement of their rights, the protection of their property, and the punishment of offences, and wherever no authority is conferred by statute express or implied for the institution of suits, none in my judgment exists. Whenever Congress has felt it important that patents for lands should be revoked, either because of fraud in their issue, or of breach of conditions in them, it has not failed to authorize legal proceedings for that purpose. In a multitude of cases titles to lands, upon which whole communities live, rest upon patents of the United States. In several instances, cities having more than a hundred thousand people residing within their limits are built on land patented by the government. I cannot believe that it is within the power of the Attorney General, to be exercised at any time in the future, this generation or the next — as no

statute of limitations runs against the government — to institute suits to unsettle the title founded upon such patents, even where there are allegations of fraud in obtaining them. There must be a time when such allegations will not be heeded. The examination into alleged frauds, when the patents are applied for, ought to close all controversy respecting them; clearly so, unless, upon newly discovered evidence of the most convincing character, Congress should direct proceedings to be instituted to set aside the patents, and that result can be obtained without impairing the title of innocent parties. The power of the Attorney General, if admitted when a single person holds title under a patent, may be exercised in cases where a whole community holds under a similar instrument. If, without the authority of Congress, such proceedings may be instituted by him upon the repetition, as in this case, of old charges, or upon the unsupported statements of interested parties, a cloud may at any moment be cast upon the titles of a whole people and there would be in his hands a tremendous weapon of vexation and oppression. I can never assent to the position that there exists in any officer of the government a power so liable to abuse and so dangerous to the peace of many communities.

I do not recognize the doctrine that the Attorney General takes any power by virtue of his office except what the Constitution and the laws confer. The powers of the executive officers of England are not vested in the executive officers of the United States government, simply because they are called by similar names. It is the theory, and I may add, the glory of our institutions, that they are founded upon law, that no one can exercise any authority over the rights and interests of others except pursuant to and in the manner authorized by law.

In the case of *The Floyd Acceptances*, 7 Wall. 666, 676, speaking of the powers of an officer of the government — in that case of the Secretary of War — this court said: "When this inquiry arises, where are we to look for the authority of the officer? The answer which at once suggests itself to one familiar with the structure of our government, in which all

power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President, down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority."

If the Attorney General possesses the powers ascribed to him in the absence of any law defining them, we have this singular condition presented, that the owner of property derived from the United States by the most solemn instruments, holds his possession subject to the liability that it may be disturbed at any time by a suit of the government, brought at the will of that officer, a not very creditable commentary on our institutions; but if the owner can trace his title to some other source, he may have a reasonable degree of certainty that he will not be unnecessarily disturbed.

Aside from the qualifications thus expressed to the views of the court, there is much in the opinion which gives me great satisfaction. It holds that in suits brought by the government for relief against an instrument alleged to have been obtained by fraud or deceit, or any practice which would justify a court in granting relief, the government must show, like a private individual, that it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States have no pecuniary interest in the remedy sought, and are under no obligation to the party, who will be benefited, to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of their own, they can no more sustain such an action than any private person could under similar circumstances.

From this ruling some degree of peace and security may come to holders of titles derived by patent from the government.

Syllabus.

From the clear and full statement, in the opinion of the court, of the case and of the controversies before the Land Department, involving the same questions now presented, there can be but one conclusion, and that is, that the decree below dismissing the bill was in consonance with justice and right.

CLEMENT *v.* PACKER.

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

No. 143. Argued January 23, 24, 1888. — Decided March 19, 1888.

An assignment, as error, that the court below rejected certain patents of land offered in evidence by the plaintiff is fatally defective, if the record does not contain copies of the patents.

In an action of ejectment in a Circuit Court of the United States, sitting in the State of Pennsylvania, which involves a question concerning the location of the boundary of a private estate, that rule of evidence respecting the admission of declarations of deceased persons touching the disputed boundary which is laid down by the highest court of that State is the rule to govern the action of the Circuit Court at the trial; and it is well settled in that State that declarations of a deceased person touching the locality of a boundary which was surveyed and located by him, which declarations were made to the witness in pointing out that locality, are admissible in evidence.

Hunnicutt v. *Peyton*, 102 U. S. 333; and *Ellicott* v. *Pearl*, 10 Pet. 412, distinguished.

In Pennsylvania, original marks and living monuments are the highest proof of the location of a survey; the calls for adjoining surveys are the next most important evidence of it; and it is only in the absence of both that corners and distances returned by the surveyor to the land office determine it.

Surveys constituting a block are not treated in Pennsylvania as separate and individual surveys, but are to be located together as a block on one large tract; and if the lines and corners of the block can be found, this fixes its location, as they belong to each and every tract of the block as much as they do to the particular tract which they adjoin.

When the location of a survey in Pennsylvania can be determined by its own marks upon the ground, or by its own calls, courses, and distances, it cannot be changed or controlled by the marks or lines of an adjoining junior survey; but when, by reason of the disappearance of these

Statement of the Case.

original landmarks from the senior survey, the location of a line or the identity of a corner is uncertain and is drawn in controversy, then original and well established marks found upon a later survey, made by the same surveyor about the same time, and adjoining the one in dispute, are admissible — not to contest or control the matter — but to elucidate it and thus aid the jury in discovering the location of the senior survey.

After the lapse of twenty-one years from the return of a survey in Pennsylvania, the presumption is that the warrant was located as returned by the surveyor to the land office, and in the absence of rebutting facts, the official courses and distances determine the location of the tract; but this presumption is not conclusive, and may be rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances.

The court stated the case as follows:

The plaintiff below, Packer, brought an action of ejectment to recover from the defendant below, Clement, one hundred and twenty acres of land located in Mount Carmel Township, Northumberland County, Pennsylvania. He claimed this 120 acres as part of a tract of land surveyed in October, 1794, under a warrant dated 26th of November, 1793, issued in the name of William Elliott, the title to which was in him, the plaintiff. On the trial he adduced evidence, showing that this William Elliott tract was one of six tracts of a block of surveys — a term which, under the Pennsylvania land system, means a series of surveys made by one surveyor at the same time upon warrants issued upon the same day, owned by the same person, dependent upon each other in succession, calling for each other, and returned to the land office at the same time, and so located on the ground that the tracts each adjoin the other side by side as a body. In that State the warrant and survey thereon and the return of the survey constituted the legal mode of acquiring lands from the Commonwealth. The block just mentioned was known as the Le Fevre block, and the tracts composing it were designated by the names of the persons to whom they were warranted, as follows: The Ebenezer Branham, Nathaniel Brown, Lewis Walker, William Shannon, William Elliott, and the Joseph Tyson, all of which

were dated November 26, 1793, surveyed on the 21st and 22d days of October, 1794, and returned into the land office by William Gray, deputy surveyor, February 23, 1795.

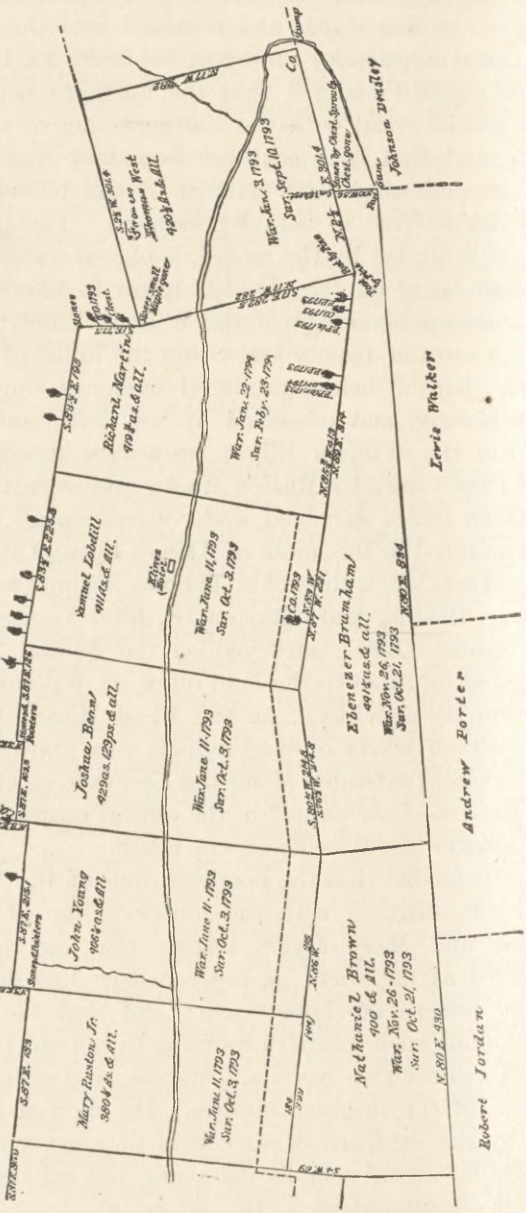
The plaintiff claimed that the northern boundary of this tract was identical with the southern line of the defendant's tracts, and that such southern boundary was about 60 rods further north than that claimed by the defendant, and down to which he was in actual possession. The question in the case, as exhibited by the record, is one of location, the burden of proof being on the plaintiff below to show the location of the northern boundary of the William Elliott tract, and that the 120 acres in dispute are within the limits of that tract.

The plaintiff below produced evidence showing that the tracts claimed and possessed by the defendant lying directly north of the William Elliott tract were known as the Mary Myers and Charlotte Ruston tracts, and were two of a block of eleven tracts, surveyed under warrants, all dated June 11, 1793, granted in the name of Daniel Reese, Charlotte Ruston, Mary Myers, John Reynolds, Thomas Billington, Mary Ruston, Thomas Ruston, Mary Ruston Jr., John Young, Joshua Bean, and Samuel Lobdil, surveyed on the 2d and 3d of October, 1793, and returned to the land office by William Gray, deputy surveyor, as one block, on the 3d of March, 1794; and that these eleven tracts of land (which were known as the Brush Valley block) extended along the Le Fevre block on the north, and were specially named in the official returns of the surveys of the latter as adjoining on the north.

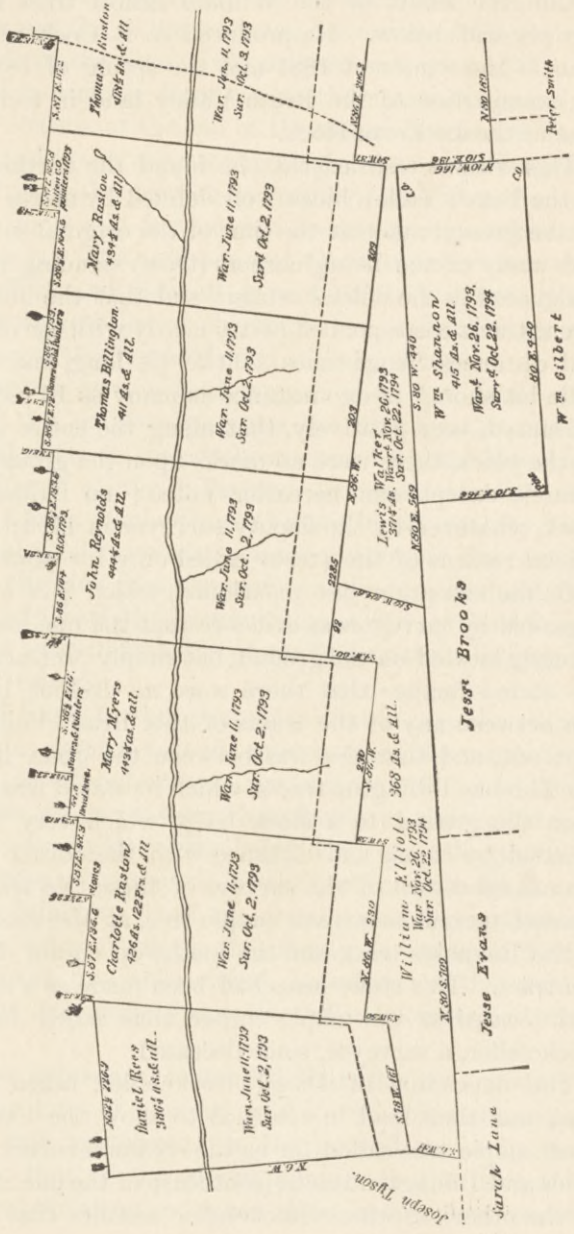
He contended that the northern line of the William Elliott tract was identical with the southern line of the Charlotte Ruston and Mary Myers tracts; that his right, therefore, extended as far north as the southern line described in the official returns of those tracts; and that the true mode of ascertaining such southern line was to run out the lines of said tracts according to courses, distances, and calls, in the official returns of the original surveys. He showed by the returns and by the evidence of surveyors that the southern line thus located by official courses, distances, and calls would leave the land in dispute outside of the defendant's tracts, and therefore

No. 3.

MAP OF
BRUSH VALLEY AND LE FEVRE BLOCKS
IN CONNECTION WITH THE
RICHARD MARTIN AND FRANCIS WEST.



Statement of the Case.



within the limits of the William Elliott tract belonging to the plaintiff below. He produced A. B. Cochran, a surveyor, who in the winter of 1881 and the spring of 1882 had made an examination of the Brush Valley land in connection with that of the Le Fevre block.

This witness testified that he found the northern boundary of the Brush Valley block well defined by marks still existing on the ground made at the time of the original survey in 1793, and many of the living corners (trees) standing in the places designated in the official return; and that the lines of the different tracts corresponded pretty nearly with the official courses and distances, "sometimes a little bit long, and sometimes a little bit short," in one instance as many as 18 rods difference. He stated, very positively, that along the entire southern side of the block there were no marks upon the ground; no living corners, except one hereafter noted; no indication of any work, whatever, by the deputy surveyor in 1793; and that the official returns of the survey called only for posts for corners, with the exception just mentioned, which fact he stated was regarded by surveyors as evidence that the line had never been actually located on the ground, but simply protracted on paper. He stated further that there were no division lines actually run between any of the tracts of this Brush Valley block, except one, and that line was between the John Reynolds and the Thomas Billington tracts, which he stated was well marked upon the ground to a stone heap, which very nearly corresponded by course and distance with the corner called for in the official return of the surveys of these two tracts, and designated therein as a small maple tree, at the southeast corner of the Reynolds tract, and the southwest corner of the Billington tract. This stone heap had been made as a mark in 1847, and located as the maple corner thus called for, by David Rockefeller, a surveyor, since deceased.

The deposition of David Rockefeller, taken on a former trial, was then read in evidence to show the location of this small maple tree called for as the common corner of the Reynolds and Billington tracts, (southeast of the one and southwest of the other,) in which Rockefeller testifies that in surveying

Statement of the Case.

these lands in 1847 he found the line between these two tracts (the Reynolds and the Billington) well defined upon the ground by marks made at the time of the original survey in 1793, and that he found in running from the northern corner, according to the official courses, at the end of the official distance, a small maple stump and maple sprouts growing around it, and a small maple tree lying on the ground, the trunk of which was burned entirely away for 6 or 7 feet, so that no surveyor's mark could be found upon it. The testimony of Cochran and others was to the same effect, and they all gave it as their opinion that this was the true location of the maple tree called for as the common corner of the Reynolds and Billington tracts.

He also showed, by the testimony of these and other witnesses, that if this maple stump was the true location of the maple tree called for as the southeast corner of the Reynolds and the southwest of the Billington, it would establish the southern line of the whole Brush Valley block; and by running it east and west from that point, according to the courses and distances, the land in controversy would be outside of the Mary Myers and Charlotte Ruston tracts owned by the defendant below, and within the limits of the Elliott tract belonging to the plaintiff below.

The plaintiff below further contended that in case the maple stump, which he claimed to have proved to be the maple tree called for in the official return, was not proved to be such corner, then the whole southern boundary was protracted on paper without any actual survey being done upon the ground; and in the absence of any marks whereby such southern boundary could be definitely fixed, the true mode of ascertaining its location, as determined by the deputy surveyor in 1793, was to start from the well-marked boundary on the north, and run out the lines according to the official courses and distances.

In reply, the defendant contended that the true mode of ascertaining the lines of a survey was to run them according to the marks and monuments on the ground made by the surveyor at the time of the survey, along with the lines and distances of the official return, when these latter corresponded

with such marks and monuments upon the ground; but in case of a conflict or variance, the original marks and monuments were to prevail and determine the location of the survey.

He denied that the southern line of the Brush Valley block had been platted on paper, and alleged, on the contrary, that it was run at the time of the original survey, and marked upon the ground far enough south of the line contended for by the plaintiff to include the 120 acres in dispute within the limits of the Charlotte Ruston and Mary Myers tracts. He introduced M. B. Trescott, and several other surveyors, who testified that the point located by Rockefeller, as the maple tree corner called for at the end of the Reynolds and Billington dividing line, was several perches north of the official distance, and several perches outside of the official courses. He had read from the deposition of Rockefeller, already offered by the plaintiff, the statement that he, Rockefeller, had been county surveyor of Northumberland County for 16 or 18 years, and that he knew from the official papers in his hands, during that period, that one Henry Donnel was at the time these surveys were made a regular deputy surveyor of William Gray, and that his (Donnel's) district embraced all this side of the river, including the Shamokin and Mount Carmel coal regions, where the surveys are that are involved in this controversy.

To show the true location of the maple at the common corner of the Reynolds and Billington tracts to be 60 rods south of where Rockefeller had claimed to locate it, he offered in evidence the deposition of John Fisher, deceased, taken in several cases pending in the Common Pleas Court of Northumberland County, between the plaintiff in error and the Northumberland Coal Company in 1878, it having been admitted that John Fisher was dead. This deposition was offered to prove by John Fisher that in 1815 Henry Donnel was surveying the Brush Valley lines, and he, Fisher, was with him as chain-carrier. That when they were running the line between the Billington and Reynolds tracts, and were at a point about 60 rods south of the stump located by Rockefeller at a swamp, they found a stone corner — "stones piled up." Donnel said: "This is the corner; here is where we located these warrants 21 or 22 years ago."

Statement of the Case.

The plaintiff below objected to the admission of these declarations of Henry Donnell. The court sustained the objections and rejected those portions of the deposition embraced in brackets, and sealed the bill of exceptions at the instance of the defendant.

The portions rejected are as follows: Donnel said: ["While there at the corner, 21 or 22 years ago, we located these warrants." When we got to the corner, Mr. Donnel said: "Here is the corner," pointing to it.] [All Donnel said was: "This is the corner; here is where we located these warrants 21 or 22 years ago." This was when we were running the line between the Billington and Reynolds. Donnel said it was the line. I knew it was the line.] And again: [At the time Henry Donnel said he located these warrants, 21 or 22 years ago, he was surveying the Brush Valley lands — I mean the Ira Clement lands.]

The defendant also introduced several surveyors who testified to the fact of original marks east of and in a direct line with the point at which he claimed the maple stood, and also to two other line trees bearing the marks of the survey of 1793, showing that the southern boundary of the Brush Valley lands is from thirty to sixty rods below that contended for by the plaintiff below.

In confirmation of this being the true location of the line in question, the defendant below showed from the evidence elicited on cross-examination of a witness for the plaintiff, and also by numerous surveyors who appeared as witnesses for the defendant, that the Ebenezer Branham (which was the extreme eastern and controlling warrant of the Le Fevre block) had still existing on its northern boundary authentic and original marks and monuments made at the time of the survey, and answering to the official calls thereof; nearly all of whom testified that these marks thus defining the northern boundary of the Ebenezer Branham tract were sufficient to establish the entire northern boundary of the Le Fevre block, which northern boundary, they stated, would be identical with the southern line of the Brush Valley block, located as claimed by the defendant.

To give additional support to his theory of constructing the dividing line in question he put in evidence the location of two surveys outside of the Brush Valley block, made by the same surveyor about the same time, whose established lines and corners he proposed to show were in perfect harmony with the location of the Brush Valley block contended for by the defence. It appeared in evidence that the first of these surveys was warranted to one Francis West, surveyed on the 10th day of September, 1793, located east and within a mile of the Brush Valley block, and that its lines, boundaries, corners, and calls were established by original undisputed monuments on the ground. It was also proved that the other tract was warranted to one Richard Martin, and surveyed on the 23d day of February, 1794, and called to adjoin the Francis West on the east and the Samuel Lobdil on the west; this last being the extreme eastern tract of the Brush Valley block. It also appeared in evidence that the eastern line of the Lobdil and the western of the Martin were reported by the return to be of the same length.

The surveyors, hereinbefore referred to as witnesses for the plaintiff, state that the Francis West and the Richard Martin have a common corner the southwest of the former, and southeast of the latter; that this corner is also called for as a mark on the northern line of the Ebenezer Branham, as above noted; that, starting from this recognized corner, called for by the three surveys, (the Francis West, the Richard Martin, and the Ebenezer Branham,) and following the southern line of the Richard Martin, (which is also the northern line of the Ebenezer Branham tract, and which all the surveyors, on both sides, testify is marked by monuments counting back to 1793, for a distance of 150 perches,) in its official courses and distances, it intersects the common line between the Lobdil and Martin tracts extended 32 perches south of its official length; that at this point of intersection there is a well-established corner common to the Martin and Lobdil tracts; that if the southern line of the Brush Valley block was run, starting from this southeast corner of the Lobdil tract, according to the official courses and distances, it would be carried actually

upon the line claimed by the defendant below, indicated by the marked line trees and monuments, and strike the point at which he claimed the maple corner was located in the edge of the swamp; and therefore would place the land in controversy without the Elliott tract, and within the Charlotte Ruston and Mary Myers surveys.

He also introduced evidence to show that the eleven surveys of the Brush Valley block and the Richard Martin survey were all in the hands of the deputy surveyor at the same time, and that the deputy returned the Richard Martin into the land office before the return of the Brush Valley lands, stating that its western line was 320 rods in length; and three days after returned the Samuel Lobdil, giving it the same course and length of line.

These witnesses expressed the opinion, from their experience as surveyors, that the northern line of the Richard Martin was run on the ground at the same time as the Brush Valley block of surveys; that the dividing line between the Brush Valley block and the Le Fevre block of surveys should be located from the work done by the same deputy surveyor on the adjoining surveys; and that these monuments pointed out the line run by the deputy surveyor in 1793. The defendant below therefore contended that what the surveyor did, in locating the Richard Martin and the Francis West surveys, should be considered with all the other evidence in the case, in determining the question whether the southern line of the Brush Valley block was actually run upon the ground or not, and, if so, where it was run.

The plaintiff below offered rebutting testimony tending to show that the trees relied on by the defendant below, as line trees and original monuments of the survey in 1793, bore no such marks, and that no such monuments for the southern boundary of the Brush Valley block could be found, or ever existed on the ground. He contended also that the Martin, being a junior survey to that of the Brush Valley block, could not be used for the purpose of locating the southern line of the latter.

Numerous exceptions were taken during the trial, and

exceptions were also taken to the charge of the court. The jury returned a verdict for the plaintiff below, upon which judgment was rendered. The defendant below then sued out this writ of error.

Mr. S. P. Wolverton and *Mr. Franklin B. Gowen* for plaintiff in error.

Mr. James Ryon and *Mr. John W. Ryon* for defendant in error.

Mr. Justice Lamar, after stating the facts in the foregoing language, delivered the opinion of the court.

The first assignment of error is to the effect that the court below erred in rejecting the offer of the plaintiff in error of six patents issued by the Commonwealth to Peter Graul for the Joseph Tyson, William Elliott, Lewis Walker, William Shannon, Nathaniel Brown, and Ebenezer Branham surveys, bearing date the 12th, 13th and 17th of April, 1797, respectively, for the purpose of locating, and showing that the Commonwealth confirmed the location of said surveys as a block, by granting patents to each one of them, and for the purpose of showing how much land the Commonwealth granted in pursuance of these several surveys.

Objection by plaintiff below to this was sustained, and exception taken. The plaintiff in error, however, has not embodied copies of these patents in the record returned. The court is therefore left uninformed as to the contents of the patents, or as to their materiality. What effect might have been given to this assignment of errors, had evidence of the contents of the patents mentioned been sent up with the record, we need not consider in disposing of this case. It is sufficient to say that this assignment of error is fatally defective for the reason given above, and it cannot be sustained.

The second specification relates to the rejection by the court of a portion of the deposition of John Fisher, referred to in the above statement. We gather from the brief of counsel

that the ground on which these declarations were ruled out was, that they were not within any of the exceptions to the general rule, that hearsay evidence is inadmissible to establish any specific fact which in its nature is capable of being proved by the testimony of a person who speaks from his own knowledge.

In *Mima Queen* v. *Hepburn*, 7 Cranch, 290, 296, Chief Justice Marshall says: "To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. . . . Also matters of general and public history."

Upon the subject of boundary there is a general agreement that, by the English rule, evidence of the declarations of deceased persons as to the boundary of parishes, manors, and the like, which are of public interest, is admissible, but that such evidence is inadmissible for the purpose of proving the boundary of a private estate, unless such boundary is identical with another of public interest. In many of the States this strict rule has been extended, and these declarations have been admitted to prove the boundaries of lands of private persons. This extension of the rule has, we think, been sustained by the weight of authority in the American state courts, as justified upon grounds as strong as those on which the original rule rests.

Mr. Justice McLean states one of these grounds. In *Boardman* v. *Lessees of Reed*, 6 Pet. 328, 341, he says: "That boundaries may be proved by hearsay testimony is a rule well settled; and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Landmarks are frequently formed of perishable materials. . . . By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries." This was a case of private boundaries purely, and the declarations were rejected not upon the ground of hearsay, but because they were con-

sidered as immaterial, and not tending to elucidate any question before the jury.

The limitations upon this extension of the original rule are different in different States. We do not deem it necessary, in the present case, to lay down any definite rule applicable to all cases, as to when declarations of deceased persons constitute valid evidence to establish private boundaries.

The question is one involving the ownership of real property in Pennsylvania, and it becomes our duty to ascertain the rule established in that State, especially as respects the admissibility of the declarations of deceased surveyors in cases of boundaries between private estates.

In the case of *Caufman* v. *Presbyterian Congregation of Cedar Spring*, 6 Binney, 59, the plaintiff claimed a certain number of acres which were surveyed by one Wilson, an assistant of the deputy surveyor, since deceased. The deputy surveyor returned to the land office a smaller quantity than was contained in Wilson's actual survey. On the trial of the case evidence of what was said by Wilson was objected to by the defendant upon the ground that the official return of the survey was the best evidence of the survey. The evidence was held by the Supreme Court of Pennsylvania to have been rightly received. Chief Justice Tilghman said: "It will be recollected that Wilson is dead; otherwise nothing less than his own oath could have been received. Where boundary is the subject, what has been *said* by a deceased person is received as evidence. It forms an exception to the general rule. It was necessary for the plaintiffs to show their possession of the lands. . . . It was impossible for the plaintiffs to show the extent of their possession, without showing the lines run by Wilson. Those lines were the plaintiffs' boundaries; at least such was their claim. It appears to me, therefore, that what was said by Wilson came within the exception which admits the words of a deceased person to be given in evidence in a matter of boundary." pp. 62, 63.

In *Kennedy* v. *Lubold*, 88 Penn. St. 246, the declarations of a deceased surveyor, made thirty-five years before the trial, were allowed to go to the jury, but the court below, in charg-

ing the jury as to the nature and force of this evidence, used the following language: "There is evidence of what Herrington or some surveyor said when he went to this tract corner. That is hearsay evidence, and we admitted that with a good deal of reluctance. We hardly believe it is evidence. We say to you in determining that evidence, it is weak evidence. It is not as strong evidence as that of witnesses who come here upon the witness stand and submit to cross-examination in testifying to what is the true corner from the very necessity of the case." The case being carried up by a writ of error to the Supreme Court of Pennsylvania, Chief Justice Agnew delivered the opinion of the court, and said: "These two cases were argued together. They seem to have been tried upon the doctrine of leaving first principles, and going on to perfection. But old surveys are not to be so tested. Most perfect in the beginning, they are constantly undergoing change and decay, until by wind, fire, rottenness, and the acts and frauds of men, their evidences lie only in memory and hearsay. Hence when the learned judge said of the acts of the surveyors, who forty years before went upon the ground, ran the lines, blocked the trees, counted the growths, found original marks, and pronounced the hickory the numbered corner of donation lot No. 1260, it was mere hearsay, he hardly believed it evidence, admitted it with reluctance, and it was weak evidence in determining, he clearly misled the jury. The reverse is true — the evidence was strong, and ought to prevail unless clearly rebutted, by showing either a mistake of the witness relating the facts, or error in the surveyors making the declaration. . . . The declarations as to the corners when found, blocked, and counted were a part of the *res gesta*, and so far from being doubtful evidence were competent and always admitted when the transaction is old and the surveyor dead." p. 255.

In *Kramer* v. *Goodlander*, 98 Penn. St. 366, the witness having testified that he had owned the land in dispute thirty years before the trial, and employed one Ferguson, a surveyor since dead, to trace the lines, it was offered to prove what Goodlander said as to the lines whilst he was on the ground

searching for them. This was rejected as purely hearsay. Justice Trunkey, delivering the opinion of the court, said: "From an early day in this State, in litigations respecting boundaries, it has been competent to prove, after the death of a surveyor who had examined a line, what he said respecting it at the time and on the ground. . . . The offer should have been admitted."

In *McCausland* v. *Fleming*, 63 Penn. St. 36, 38, Justice Agnew, delivering the opinion of the court, said: "Pedigree and boundary are the excepted cases, wherein reputation and hearsay of *deceased* persons are received as evidence. The statements of deceased persons relative to boundaries of which they spoke from actual personal knowledge have been frequently received as evidence in this State."

There is one case in which the principles of this rule of hearsay evidence in respect to boundaries were fully considered in the Circuit Court of the United States. *Conn* v. *Penn*, 1 Peters C. C. 496. The opinion of the court was delivered by Mr. Justice Washington, and the substance of it is as follows (p. 511): The courses and distances laid down in a survey, especially if it be ancient, are never, in practice, considered as conclusive, but are liable to be materially changed by oral proof, or other evidence, tending to prove that the documentary lines are those not actually run. Reputed boundaries are often proved by the testimony of aged witnesses, and the hearsay evidence of such witnesses has been admitted to establish such lines, in opposition to the calls of an ancient patent. It is not the lines reported, but the lines which have been actually run by the surveyor, which vests in a patentee a title to the area included within those lines.

These decisions clearly require the admission of the testimony rejected by the court below, and the decisions cited by the counsel for defendant in error also seem to us in harmony with the tenor and effect of them.

The case of *Bender* v. *Pitzer*, 27 Penn. St. 333, 335, is an interesting case in its examination of the qualifications and some of the aspects of this rule. The declarations of a deceased surveyor who had not made the original survey, nor

subsequently examined it, nor run the lines upon the ground, and who was not an adjoining owner, and did not point out the lines at the time of those declarations, were held to be rightfully rejected. But Justice Knox, while rejecting the evidence, took especial care to reiterate the principles laid down in the cases heretofore cited. In delivering the opinion of the court he said: "It has long since been settled, both in this country and in England, that ancient boundaries are provable by general reputation, in a question involving public rights. In Pennsylvania a still greater latitude has been allowed in questions of boundary. Here the declarations of a deceased person touching the locality of boundary between adjoining owners have been admitted where the survey was made by the person making the declaration, or where the declaration was made by an adjoining owner, who pointed out the boundary line between the tracts to the witness at the time the declarations were made." *Caufman* v. *Congregation of Cedar Spring*, 6 Binney, 59; *Hamilton* v. *Menor*, 2 S. & R. 70.

To sustain the rejection of the evidence much reliance is placed on the decisions of this court in the cases of *Hunnicutt* v. *Peyton*, 102 U. S. 333, and *Ellicott* v. *Pearl*, 10 Pet. 412. But as the question is one of Pennsylvania law, to be controlled by Pennsylvania decisions, the observations of the court, in the cases cited, are not pertinent.

The first of these cases states the English rule, and summarizes some of the results to be deduced from the decisions of the state tribunals. The court concedes that, had the Supreme Court of Texas decided differently, it would have felt constrained to apply the Texas rule to the case in question; but even under the summary of the general law in this country, as it was conceived to exist on the subject at that time, the evidence rejected in the present case ought to have been received. It is not necessary for us to approve or disapprove the departures from the original rule, because the court held that the evidence there offered was not admissible under any well-established exceptions to the rule. The court is particular to say the declarations of Moore were made, not when

he was pointing out the boundaries of the Basquez survey, but when he was at a distance from the place of beginning of that survey and from its upper line. That Moore had made the survey, or had ever been upon its upper line, or on the upper line of the reserve, was proved only by his assertion, which the court allowed to be given in evidence. There was no such proof *aliunde*.

The case of *Ellicott* v. *Pearl*, *supra*, was brought to this court by a writ of error in the Circuit Court of the United States for the District of Kentucky. And, in the decision here, this court adhered to the English rule, and rejected the evidence of the declaration of a deceased surveyor, as to the boundary of a private estate. In so doing, this court was simply enforcing the rule as it existed in Kentucky at that time. In *Cherry* v. *Boyd*, Litt. Sel. Cases, 8, decided by the Supreme Court of that State in 1800, it was held that evidence of the parol declarations of a surveyor concerning the marks or lines of a private estate were inadmissible. This being the settled law of Kentucky, this court could not have decided otherwise than it did in *Ellicott* v. *Pearl*. But even in that case the court uses the following guarded language: "The doctrine in America, in respect to boundaries, has gone further, and has admitted of general reputation as to boundaries between contiguous private estates."

The remaining assignments of error relate to the answers to the requests by the counsel of the respective parties for instructions to the jury, and to the general charge of the court below. They are so many in number that it would greatly protract this opinion to review them *seriatim*, and in the order of their presentation.

At the request of the plaintiff, the court below said to the jury, "that in the absence of marks on the north made for the William Elliott in 1794, by the deputy surveyor, the William Elliott must go to its calls for adjoiners on the north; that as there is no evidence of any such original marks, the William Elliott must go to its northern calls for the Daniel Reese, Mary Myers, Charlotte Ruston, and John Reynolds, and, therefore, the William Elliott will embrace the land in dis-

pute by locating the Mary Myers and Charlotte Ruston, according to the official courses and distances from their northern line, or from the Rockefeller maple corner."

We think the learned judge in giving this charge fell into error. If it was not a positive and imperative direction to the jury to find for the plaintiff, it would be difficult to convince them that this was not the manifest intention of the court. In its logical effect it is a syllogism; the conclusion of which is, that the land in dispute is within the limits of the William Elliott, and belongs, therefore, to the plaintiff. Its terms are, *first*, that in the absence of any original marks on the north of the William Elliott, made by the surveyor, at the date of the survey, the William Elliott will go to its northern adjoining tracts, to wit, the Mary Myers and Charlotte Ruston; *second*, that there is no evidence of any such original marks on the north of the William Elliott; *third*, that, therefore, the William Elliott must go to its adjoining tracts on the north, (the Myers and Ruston,) and thus embrace the land in dispute. The direct tendency, if not the avowed purpose, of the statements contained in this charge, is to withdraw from the consideration of the jury a very considerable amount of pertinent and important testimony for the defence. It should be borne in mind that the William Elliott is not a single separate tract, but one of a block of several tracts, surveyed at the same time, by the same surveyor, under warrants of the same date, and for the same owner, and returned into the land office as one body.

By the settled law of Pennsylvania, applicable to the location of surveys, original marks and living monuments on the ground constitute the survey, and they are the highest proof of its true location. The next most important evidence of location is the calls for adjoining surveys; and in the absence of both of them, and then only, the lines according to courses and distances, returned by the surveyor into the land office, determine the location. But it is equally well settled, by an unbroken current of decisions in that State, that the surveys constituting a block are not to be treated as separate and individual surveys; nor can each tract be located independently

of the rest, by its own individual lines or calls or courses and distances; but such surveys are to be located together as a block or one large tract. If lines and corners made for such a block of surveys can be found upon the ground, this fixes the location of the block, even to the disregard of the call for adjoiners. The lines and corners found upon any part of the block of surveys belong to each and every tract of the block, as much as they do to the particular tract which they adjoin.

In *Pruner* v. *Brisbin*, 98 Penn. St. 202, the question came before the court below, and the principles just laid down were enunciated in that court, and upon a writ of error to the Supreme Court of Pennsylvania, Mr. Justice Sterrett said: "The thirteen tracts having been surveyed in a block and so returned must be located upon the ground as a block; neither of them can be arbitrarily located in disregard of the lines and corners found upon other parts of the block. All the lines and corners marked upon the ground and returned must be considered in ascertaining the proper location of the block. Those found upon any part of the block belong to each and every tract of which it is composed, and if sufficient lines and corners can be found they determine the location of the entire block, without regard to its calls for adjoiners or for waters, if such calls conflict with the lines actually run upon the ground and returned." He added: "It requires neither argument nor citation of authority to show that the learned judge was clearly right in thus instructing the jury." p. 210.

In *Fritz* v. *Brandon*, 78 Penn. St. 342, 351, Chief Justice Agnew says: "When one person is owner of all the warrants, they may be surveyed together in a single block by exterior lines, leaving the interior lines to be settled by the owner himself. *Mock* v. *Astley*, 13 S. & R. 382; *Stevens* v. *Hughes*, 3 W. & S. 465; *Collins* v. *Barclay*, 7 Barr [7 Penn. St.] 73; *Hagerty* v. *Mathers*, 7 Casey [31 Penn. St.] 348. The legal effect is, that the entire block is viewed as one tract. Hence, Chief Justice Lewis said, in *Hole* v. *Rittenhouse*, 1 Casey [25 Penn. St.] 491, 'Under these circumstances it is evident that the whole fifteen surveys adjoining each other in a single block, without interior lines, all made at one time and owned

by the same party, were essentially but one tract.' . . . This principle was in the mind of Chief Justice Woodward when he said, in *Malone* v. *Sallada*, 12 Wright [48 Penn. St.] 425: 'And when we are dealing with blocks of surveys we must remember that the marks on any part of the block belong to each tract in the block.' So Judge Strong said, in *Darrah* v. *Bryant*, 6 P. F. Smith [56 Penn. St.] 75: 'And if they were surveyed as a block, they must be located as a block.'"

In *Malone* v. *Sallada*, 48 Penn. St. 419, Chief Justice Woodward says: "Located by these adjoiners, Isaac Miller would take the land in dispute, but several of its courses and distances and the configuration of the survey as returned into the land office would essentially be changed. Notwithstanding these consequences, however, the defendants insisted upon its location by its calls. . . . The plaintiffs, on the other hand, contended that the whole block of twenty-five surveys should be located by the marks on the ground, with no other reference to calls for adjoiners than such as would be consistent with the marks on the ground; and that it is immaterial that no marks are found on the Miller survey, since authentic marks are found on other tracts of the block sufficient to locate the whole block, and that these marks apply with decisive effect to Isaac Miller. They deny also that Merrick Starr was called for on the west of Isaac Miller; but if it was, they say it was a mistake, and must be rejected in favor of the courses and distances as returned. In a word, the plaintiffs would locate the Isaac Miller by the marks on the ground of other tracts, in connection with which it was surveyed and returned. . . . And when we are dealing with *blocks* of surveys we must remember that the marks on any part of the block belong to each tract of the block. Interior lines were never run and marks are not to be looked for on them; but if marks are found upon the ground to establish an exterior line of a particular tract of the block, and we find other tracts returned with that same line, we are to presume it was adopted as the boundary of these tracts, no less than of the tracts which bear the marks. When the surveyor, for instance, ran from the

pine corner of Gilbert and Brooks to the stone corner of Lomison and Paul, his course for more than three hundred perches was S. 10° E. and his only other course for eighty-nine perches was S. 4½° E. and these two courses carried him the whole width of the Gilbert and Miller tracts, and formed the western boundary of these respective tracts. No marks are found on these lines, but the pine and stones are sufficient to locate them." p. 425.

In *Northumberland Coal Co.* v. *Clement*, 95 Penn. St. 126, it was held: "When original surveys have been made and returned as a block into the land office, the location of each tract therein may be proved by proving the location of the block. In ascertaining the location of a tract the inquiry is not where it should or might have been located, but where it actually was located. Every mark on the ground tending to show the location of any tract in the block is some evidence of the location of the whole block, and therefore of each tract therein." p. 137.

We think these authorities are conclusive upon this point. The principle itself was invoked by the defendant in error and by the judge below, when, at the request of the former, the judge charged the jury that if the actual position upon the ground of one single maple corner could be established, this would fix the southern line of the whole block of eleven surveys and of every member of the block. If, therefore, any original marks could be found called for and established on the northern line of any tract of the Le Fevre block, that would fix the northern line of the whole block of six surveys.

It was conceded by the plaintiff and defendant below, and stated by the learned judge in his charge to the jury, that the William Elliott was a member of the Le Fevre block, of which the Ebenezer Branham was the leading warrant and controlling survey.

A. B. Cochran, a surveyor produced by the plaintiff below as a witness in his own behalf, testified that the "post by a pine," called for by the Ebenezer Branham as a monument on its northern line, was a well recognized mark on that line; and that he found three other trees on that line west of the "post

by a pine" in the line of official courses, for 150 perches. And there were not less than five surveyors, who, as witnesses produced by the defendant, testified that they found five or six trees on the northern line of the Ebenezer Branham, in the official courses of the same line. These marks, if the jury believed the witnesses, must be regarded, according to the authorities, marks and monuments sufficient, if not overcome by the force of rebutting evidence, to fix the entire northern line of the Le Fevre block and of each tract composing it, including the William Elliott. For these reasons we consider that the inevitable effect of that portion of the charge in question was to mislead the jury.

In regard to the Francis West and Richard Martin tracts, the location of which the defendant below offered in evidence for the purpose of showing that the southern line of the Brush Valley block was run at the time of the original survey and marked upon the ground far enough south of the official courses and distances to include the land in dispute, the court charged the jury in these words:

"The Richard Martin, being a junior survey, cannot control or enlarge the dimensions of the Samuel Lobdil and the other members of the Brush Valley block, which are earlier surveys.

"The location of a junior warrant may throw some light upon the location of a senior survey which it calls to adjoin. Hence, what the deputy surveyor did in locating the Richard Martin has been admitted in evidence, and may be considered by the jury in connection with all the other evidence in determining the question whether or not the chestnut oak and the gums relied on by the defendant are trees marked by the surveyors in 1793 to define the southern line for the Brush Valley block; but should the jury find that none of those trees were marked for the survey of 1793, then the Richard Martin can have no weight in determining the location of the Brush Valley block, but the eleven surveys of that block must then be located from their fixed corners upon the northern line according to the official courses and distances, (unless, indeed, the jury should find in favor of David Rockefeller's location of the maple corner.)"

We cannot concur with this charge as a correct application of the general law of the State of Pennsylvania to the facts of this case. It is unquestionably true that a junior survey cannot control or enlarge the dimensions of a senior survey. We understand this to mean, that when the location of a survey is or can be ascertained and determined by its own marks upon the ground, its own calls and courses and distances, it cannot be changed or controlled or enlarged or diminished by the marks or lines of an adjoining junior survey; but when, from the disappearance of these original landmarks, caused by time and other agencies, from the senior survey, the location of a particular line, or the identity of a corner, is left in uncertainty or becomes the subject of controversy, then the original and well-established marks found upon a later survey made by the same surveyor about the same time, and adjoining the one in dispute, are regarded as legitimate evidence, not to contest or control, but to elucidate, throw light upon, and thus aid the jury in discovering the exact location of the older survey. In stating to the jury that such marks on the junior survey (the Richard Martin) might be considered in determining the single question whether or not the chestnut oak and gums, relied on by the defendant, were marked by the surveyors in 1793 to define the line for the Brush Valley block, "and that no weight can be attached to the Richard Martin," if the jury find that none of these trees were so marked, the judge committed error. In restricting the operation of this evidence to this one single question, to the exclusion of all other questions connected with the location of the southern boundary of the Brush Valley block, we are of the opinion that he was in direct conflict with the rule laid down by the Pennsylvania courts.

In *Clement* v. *Northumberland Coal Co.*, 87 Penn. St. 291, this very question came up as to the effect of the "post by a pine," and the pitch-pine upon the southern line of the Richard Martin, in fixing the southern line of the Mary Myers. The court below allowed this evidence to go to the jury to be considered in determining the southern line of the Mary Myers. The Supreme Court affirmed the well-established rule, that

marks upon an adjoining junior survey cannot control or enlarge the dimensions of an earlier survey, (even though the junior survey adopts the lines of the older,) but that such marks may be submitted to the jury as evidence tending to discover the actual location of the older survey. The court said: "The point, though made in the oral argument against the instruction of the learned court below, we think, is without a sufficient foundation in the charge. The judge very correctly held that a subsequent survey could not control the lines of a former, but he did not leave the case upon this single instruction, by omitting to inform the jury that the subsequent acts of the deputy surveyor in locating a junior warrant and the marks left by him on the ground, might be considered as evidence tending to disprove the actual location of the older survey. On the contrary, he answered the third point of the plaintiff below, which raised the question very plainly, so as to bring the true distinction fairly before the minds of the jury. The point is clear, and he replied: 'Marks found upon adjoining surveys made about the time of the survey are evidence upon the subject of location, but they cannot control or enlarge the dimensions of an earlier survey, even though they may adopt its lines.' Thus the jury was left to locate the earlier survey by those marks, if they should conclude that they indicated the true place of the earlier location; and were at the same time informed that the lines of a later survey cannot alter or enlarge the lines of a former survey, although the courses and distances of these former lines may be adopted. Certainly, this was a fair instruction, and brought the charge within the precedents cited. The difference between that which is evidence of a fact and an effect which controls the fact is plain. Then, when the judge came to state the evidence of the marks found, he most distinctly referred to the pitch-pine on the southern line of the Martin tract, and the post or pine as the material matter in determining the question as to the southern boundary of Mary Myers. In the next paragraph he refers to his answers to the points and leaves the question of the boundary, as indicated by those marks, to the jury." p. 294.

The phraseology employed in this opinion of the court seems to have been adopted for the special purpose of excluding, by anticipation, the qualification added to the rule in the general charge of the court below. The case just cited says that the marks ("post by a pine" and the pitch pine) on the Martin line were rightly submitted to the jury as material matter in determining the question of the southern boundary of the Mary Myers. But the learned judge below in this case said that the Richard Martin can have no weight in determining the location of the Brush Valley block, and, therefore, of the Mary Myers, unless the jury find that certain trees relied on by the defendant bore certain marks.

In the case of the *Northumberland Coal Co.* v. *Clement*, 95 Penn. St. 126, the Supreme Court of Pennsylvania passed upon this same question as to the effect of marks upon the southern line of the Richard Martin, (which marks were "post by a pine" and the pitch pine,) as evidence to fix the location of the line that divides the Billington tract from the Walker tract, defining the southern limit of the former and the northern limit of the latter. The court said: "The official survey of the Thomas Billington calls for a small maple as its southwest corner. Maple sprouts are found at the place claimed by the defendant in error to be the southwest corner of the tract. The original surveys of all these tracts were made by Henry Donnel, acting as a deputy surveyor. It is shown that the same Donnel, in 1814, in running the northern line of the Lewis Walker tract, fixed the line between it and the Thomas Billington to be where it is now claimed by the defendant in error. The official survey of the Richard Martin calls for a white pine tree in its south line. That tree is standing and identified. That warrant was located by the same surveyor, and the return of survey was made three days before the survey of the Billington tract was returned. It calls for the Samuel Lobdil on the west, and the line between the tracts is of the same length in each survey. He had the warrants in his hands at the same time. The location of the latter throws light on the former. The location claimed by the defendant in error for the Billington is not only in harmony

with the block of surveys of which it forms a part, but also with the location of the Richard Martin made by the same surveyor soon thereafter." The counsel for the plaintiff below, in their able brief, say that there are some errors of fact in that case which detract very much from it as an authority. We do not discover in it any material errors of fact, but it is hardly necessary to consider the suggestion in view of the general concurrence of authorities in the principle therein laid down. See *Pennsylvania Canal Co. and others* v. *Kunkel*, 33 Leg. Int. 339; see also *Sweigart* v. *Richards*, 8 Penn. St. 436; *Bellas* v. *Cleaver*, 40 Penn. St. 260.

Counsel for defendant in error say in their brief: "This admitted principle of evidence, that the call of the younger was some evidence upon the subject of boundaries upon the location of the older, when both were indicated by the same deputy surveyor, never did have much weight in our court." We see nothing in the cases cited and especially relied on to sustain this assertion, but much to confirm the authority of the rule. The brief cites *Pruner* v. *Brisbin*, 98 Penn. St. 202, and says "the attempt was made, as was done in the present case, to avoid the conclusiveness of the official return of survey by the calls of a junior survey, and to locate the older surveys by such junior calls." This is not an exact statement of the issue in the case. It is just the reverse. The attempt was made to avoid the conclusiveness of the *original marks of a survey upon the ground* by the calls of its own leading warrant and by the calls of a junior survey. In that case there were original marks sufficient to establish the line of the older survey that was in dispute, and the only contest about that line arose, not from the absence of original marks upon it, but from the marks and calls of junior surveys, and also the marks of older surveys. The court decided that "the jury was properly instructed that the block of 1793, as returned to the land office, *must be located by its own marks*, and not by calls *of later surveys, or by marks found upon the ground younger than 1793*." The construction put by counsel upon this language would bring the decision of the court into direct conflict with its own holding made at the same term and reported in the same volume.

The learned counsel for the defendant in error argue with great force and ingenuity that the rule is firmly established as the law of Pennsylvania, that after a survey has been returned into the land office for the period of twenty-one years unchallenged by any adverse claimants in the mode required by law, it is a conclusive presumption that the survey was actually made and marked upon the ground as shown by the official return. After a careful examination of the decisions of the Supreme Court cited by counsel, and some others relating to the subject, we are convinced that they are all in harmony with the conclusions herein announced. After the lapse of twenty-one years from the return of a survey the presumption is that the warrant was located as returned by the surveyor to the land office; and in the absence of rebutting facts the official courses and distances determine the location of the tract warranted. But this presumption is not conclusive, and is rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances. Where younger surveys of fixed lines called for the older the fact is admissible, in the language of the authorities, "to aid the jury in discovering the actual location of the survey."

There are other assignments of error by the counsel for plaintiff in error; but inasmuch as they involve somewhat the principles of the points already passed upon, we do not deem it necessary to consider them farther.

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

HARTRANFT *v.* SHEPPARD.

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

No. 191. Argued and submitted February 17, 1888. — Decided April 2, 1888.

Quilts composed of cotton and eider-down, or silk and eider-down, eider-down being in each case the component material of chief value, are subject to a duty, on importation into the United States, of twenty per cent ad valorem as manufactured articles not enumerated.

THE case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. F. D. Pritchard, for defendants in error, submitted on the printed record.

The following opinion, prepared by MR. CHIEF JUSTICE WAITE, was delivered by the court as its opinion.

The single question in this case is, whether quilts composed of cotton and eider-down, or silk and eider-down, the eider-down in each case being the component material of chief value, are dutiable, on importation into the United States, as manufactures of cotton or of silk, not enumerated, at thirty-five per centum ad valorem if of cotton, and at fifty per centum ad valorem if of silk, or at twenty per centum ad valorem as manufactured articles not enumerated, the latter being the amount admitted to be due by the importer in his protest. The collector demanded the highest rates, which were paid, and this suit was brought to recover back the difference between these amounts and a duty of twenty per cent.

The case depends upon the effect to be given the following provisions of the act of March 3, 1883, c. 121, 22 Stat. 488 [amending the Revised Statutes]: "Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided

for in this act, and corsets, of whatever material composed, thirty-five per centum ad valorem." Ib. § 2502, Schedule I, p. 506. The quilts made of cotton and eider-down were assessed under that provision.

"All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem." Schedule L, Ib. 510. Those of silk and eider-down were assessed under that provision.

"There shall be levied, collected, and paid, on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem." Ib. § 2513, p. 523. The claim of the importer was that the articles should be assessed at twenty per centum under that section.

By § 2499, Ib. 491, it was provided as follows: "And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable. If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

Quilts are non-enumerated manufactured articles, composed of two or more materials. Eider-down is on the free list. Ib. § 2503, p. 518. As eider-down is the component material of chief value in the quilts involved in this suit, and that is free, it follows that they are manufactured articles not provided for, and therefore chargeable with the duty of twenty per centum ad valorem under § 2513, rather than thirty-five per centum as a manufacture of cotton, or fifty per centum as a manufacture of which silk is the component material of chief value.

As such was the opinion of the court below, its judgment to that effect is *Affirmed.*

MISSOURI, *ex rel.* WALKER *v.* WALKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 910. Submitted February 15, 1888. — Decided April 2, 1888.

A contract, made under authority of a statute, by a State with an individual to prosecute at his own expense before Congress and the Departments certain specified claims of the State against the United States, and to receive as full compensation for his services a certain rate of commission on the amounts collected by him, does not confer upon the agent a power, coupled with an interest in the subject of the contract, which makes the contract of agency irrevocable.

Hall v. *Wisconsin*, 103 U. S. 5, and *Jeffries* v. *Mutual Life Ins. Co.*, 110 U. S. 305, distinguished.

THIS was an application to a state court of Missouri for a mandamus, which was refused. The relator sued out this writ of error. The case is stated in the opinion of the court.

Mr. William M. Williams for plaintiff in error.

Mr. B. G. Boone, Attorney General of the State of Missouri, for defendant in error.

The following opinion, prepared by MR. CHIEF JUSTICE WAITE, was delivered by the court as its opinion.

On the 19th of March, 1881, a statute was enacted by the General Assembly of Missouri, authorizing and empowering the Fund Commissioners of the State, if they deemed it expedient, to employ a competent agent to prosecute to final settlement before Congress and the proper departments at Washington certain specified claims of the State against the government of the United States. The agent thus appointed was to give security for the faithful performance of his duties. He was to prosecute the claims at his own expense, and receive, as full compensation for his services, such commissions on the amount collected by him as might be agreed upon between himself and the fund commissioners, not exceeding

five per cent on claims for money that had already been paid out by the State, and fifteen per cent on the others. The officers of the United States were authorized to pay the agent his agreed commissions; but all other payments by the United States must be made to the treasurer of the State. Section 3 of this act is as follows: "Sec. 3. With a view to the prompt and satisfactory settlement of the claims of this State against the government of the United States, and referred to in this act, the adjutant general, state auditor, and other officers of the State having in their possession any papers, accounts, pay-rolls, orders, receipts, vouchers, or other evidences of indebtedness necessary to the establishment of said claims, shall, upon the written order of the governor, deliver to such agent all such papers, documents, pay-rolls, receipts, vouchers, or other evidences of indebtedness, (or authenticated copies of the same, where such copies will answer,) and take his receipt for the same; and in all cases wherein it is held by the government of the United States to be necessary to the establishment of said claims, that such original papers, pay-rolls, vouchers, receipts, or orders, etc., should be filed in the departments at Washington, it shall be the duty of the agent, and he is hereby authorized, to deliver the same to the proper authorities to be so filed, but before delivering the said original papers he shall withdraw from file all authenticated copies of the same heretofore filed by this State, or the agents thereof; and in all cases wherein copies shall not have been made of such original papers, etc., as it may be necessary to file as aforesaid, it shall be the duty of said agent to prepare, or cause to be prepared, and properly authenticate, copies of the same, which copies so made, together with those heretofore made and by him withdrawn from file, as hereinabove provided for, shall be returned by such agent to the proper state officers of this State, and the fact of the return of such copies shall be by said officers respectively, certified to the governor of this State."

On the 28th of November, 1884, the fund commissioners, acting under the authority of this statute, employed John R. Walker as the agent of the State in that behalf, and agreed

that he should receive for his services and expenses the maximum of compensation provided for. Walker accepted the employment, furnished the necessary security, and agreed, in consideration of the compensation specified, to proceed without delay to the prosecution of the claims. It is averred in the petition, that thereafter "he entered upon the discharge of the duties of his said employment, and has continued therein ever since, and has incurred large expense and expended a great deal of time, in and about the collection of said claims under his contract, and has faithfully demeaned himself in the prosecution of the same, and in the transaction of the business so intrusted to him;" but it does not appear, either in the pleadings or the proof, that any specific claim has ever been put in his hands for collection, or that anything has been done by any officer of the State under § 3 of the statute to furnish him the means of proceeding under his employment.

On the 28th of March, 1885, the act of March 19, 1881, was repealed without any saving clause, and on the same day another statute was passed, providing for the authentication and payment of certain claims against the State for military service, and which were of the class in respect to which Walker had been employed as agent. The act then provided for the delivery of these claims "to the agent for the collection of the claims of the State against the government of the United States." Then followed § 8, of which this is a copy: "Sec. 8. It shall be the duty of the said agent of the State to prepare, present, and prosecute to settlement, the demands of the State for reimbursement by the government of the United States, of such sums of money as may be paid out under the provisions of this act; and as full compensation for such services, said agent shall receive the amount of his expenses actually incurred in the prosecution of said work; and when such collection shall have been made, said agent shall file a statement of his said expenses, verified by his oath, with the state auditor, who shall thereupon draw his warrant upon the state treasurer in favor of said agent for the amount of said bill of expense: Provided, however, That the amount paid on said bill of expense shall not exceed five per cent of the amount of the collection so made for the State."

Under this statute the claim of James P. Haynes, public administrator of Ray County, having in charge the estate of John King, deceased, was presented and allowed to the amount of $466.59, and Walker demanded it from the Auditor of State for collection from the United States under his employment as agent pursuant to the act of 1881, but this was refused because that act had been repealed. Thereupon Walker applied to the Supreme Court of the State for a mandamus on the auditor to make the delivery, his position being that the repealing act of 1885 impaired the obligation of his contract with the State under the act of 1881, and to that extent was void. The court denied the writ, and in so doing decided that the employment of Walker was "one of agency, pure and simple," which the State could revoke at its will, as it did by the repealing act. For a review of a judgment based on that decision this writ of error was brought.

The fund commissioners were only authorized to employ an agent for the State, and to agree with him as to the commissions he should receive on the amount collected, as full compensation for his services, and all expenses incurred by him in that behalf. This they did, and there can be no doubt that the agency thus created was withdrawn by the repealing act of 1885, unless a consideration was given for it, or it was so coupled with an interest in the subject-matter of the agency, that is to say, in the claims to be collected, as to make it irrevocable.

There was no consideration in money paid for the employment. The agreement to prosecute the claims faithfully is no more than would be implied in law from the acceptance of the appointment; and the provision for the payment of expenses is only a declaration that the commissions stipulated for shall be in full for services and disbursements. There is nothing, therefore, in the consideration for the employment to prevent this agency from being revoked like any other.

The interest coupled with a power, to make it irrevocable, must be an interest in the thing itself. As was said by Chief Justice Marshall, in *Hunt* v. *Rousmanier*, 8 Wheat. 174, 204, "the power must be engrafted on an estate in the

thing. The words themselves seem to import this meaning. 'A power coupled with an interest,' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate law language, be said to be 'coupled' with it." Such is undoubtedly the rule.

Here there was no actual assignment of the claims or any part of them. Walker had no authority, under his employment, to take the money from the United States except to the extent of his commissions. The vouchers and evidences of debt were not turned over to him. All he could do was to present the claims in the name of the State and as its representative. He could not even get the vouchers or other evidences of debt which were necessary for the establishment of the claim, by application to the proper custodian, but must go to the governor of the State for his written order directing their delivery to him. There is nothing whatever in the transaction, from the beginning to the end, which shows an intention on the part of the legislature to part with any interest in or control over the claims, except to the extent of the commissions of the agent after they had been earned. Walker was given no power to compromise any claim. All he could do was to establish the claim, and, when the State was ready to pay it, take his commissions. Clearly such an agency is not irrevocable in law because of its being coupled with an interest in the thing to be collected. If the vouchers and other evidences of debt had actually been delivered to him for collection, and he had expended time or money under his employment, in endeavoring to make the collection, a revocation of his authority might not require him to return the papers he held until he was compensated for what he had already done; but that is not the question here, because the purpose of this suit is to get possession of new vouchers, not to assert a lien upon such as he already had in hand.

There is nothing in the cases of *Hall* v. *Wisconsin*, 103 U. S. 5, or of *Jeffries* v. *Mutual Life Insurance Company*, 110 U. S. 305, in conflict with this. In *Hall's* case the question was whether his employment was an office, or under a contract for work and labor, and it was held to be under a contract, because, although he was appointed a commissioner to make a "geological, mineralogical, and agricultural survey of the State," the law providing for the survey and for his appointment required that the governor "make a written contract" with him for the performance of his allotted work, and "the compensation therefor;" and it also declared that "such contract shall expressly provide that the compensation to such commissioner shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year" as he may actually be engaged in the discharge of his duty as such commissioner. The contract actually entered into was by its terms "to continue till the third day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, . . . or unless a vacancy shall occur in his office by his own act or default." In deciding the case it was said: "In a sound view of the subject, it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations, limited in point of time, with a state, for the erection, alteration, or repair of public buildings, or to supply the officers or employés who occupy them with fuel, light, stationery, and other things necessary for the public service." There was in that case a positive contract by the State for employment in a particular service, for a particular term, made under the authority of law; and because it was such a contract the State could not, any more than a private individual, rescind it at will. The employment in this case, however, has no such provision. There is no agreement as to time, and the matter stands precisely as that of Hall would, if a statute had been passed authorizing a geological, mineralogical, and agricultural survey of the State, and he had been employed to make it and receive for his services a compensation depend-

ent on the amount of work actually done, or the time actually employed. It would hardly have been contended that under such a contract the State could not stop the survey and require Hall to quit work at any time it pleased. The difference between the two cases is the difference in the two contracts.

In *Jeffries's Case* the contract was by an administrator of a deceased person's estate with a firm of attorneys, to prosecute a doubtful claim, "for a portion of the proceeds, with full power to compromise it as they should please," and we held that such an agency was not revoked by the death of the administrator who made the contract and the appointment of another in his place. The question was as to the validity of a compromise made by the attorneys, on that authority, after the death of the first administrator. In the present case there was no authority to compromise. Walker could do nothing to establish the claim. He could not even receive the money belonging to the State after he had got the allowance of the claim by the United States.

We find no error in the record, and the judgment is

Affirmed.

SPENCER *v.* MERCHANT.

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

No. 872. Submitted February 7, 1888. — Decided April 2, 1888.

A judgment of the highest court of a State, sustaining the validity of an assessment upon lands under a statute of the State, which was alleged to be unconstitutional and void because it afforded to the owners no opportunity to be heard upon the whole amount of the assessment, involves a decision against a right claimed under the provision of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law, and may be reviewed by this court on writ of error, although the Constitution of the State contains a similar provision, and no constitutional provision is specifically mentioned in the record of the State court.

If the legislature of a State, in the exercise of its power of taxation, directs the expense of laying out, grading or repairing a street to be assessed upon the owners of lands benefited thereby; and determines

Statement of the Case.

the whole amount of the tax, and what lands, which might be so benefited, are in fact benefited; and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land; there is no taking of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Pursuant to an act of the legislature of New York, the expense of grading a street was assessed by commissioners upon the lands lying within three hundred feet on either side of the street, and which would, in the judgment of commissioners, be benefited. After the sums so assessed upon some lots had been paid, the Court of Appeals of the State adjudged the assessment to be void, because the act made no provision for notice to or hearing of the land-owners. The legislature then passed another act, directing a sum equal to so much of the first assessment as had not been paid, adding a proportional part of the expenses of making that assessment, and interest since, to be assessed upon and equitably apportioned among the lots, the former assessment on which had not been paid, first giving notice to all parties interested to appear and be heard upon the question of the apportionment of this sum among these lots, but not as to any apportionment between them and those lots, the former assessments upon which had been paid. *Held*, that an assessment laid under the latter statute was not a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

This case was submitted to the general term in Kings County of the Supreme Court of the State of New York under § 1279 of the Code of Civil Procedure, without process, upon an agreed statement of facts signed by the parties, the substance of which, and of the statutes therein referred to, was as follows:

On June 20, 1883, the parties made a contract in writing, by which the plaintiff agreed to sell to the defendant a parcel of land in the town of New Lots in that county, and to execute and deliver a deed thereof, with full covenants of warranty, and free of all incumbrances, in consideration of the sum of $8000, part of which was paid, and the rest was payable on delivery of the deed. Upon examination, the defendant discovered that there remained unpaid on the land an assessment of $1221.73, with interest from November 3, 1881, and demanded that the plaintiff should pay it, but he refused. The assessment was made under the following circumstances:

By the statute of the State of New York of 1869, c. 217, as

amended by the statute of 1870, c. 619, it was enacted in § 1, that the Supreme Court held in the county of Kings should, upon the application of one or more freeholders of the town of New Lots, appoint three commissioners, who, by § 2, should immediately proceed to lay out in that town a street or avenue in continuation of Atlantic Avenue in the city of Brooklyn, and, by § 3, take the lands lying within the boundaries of the avenue so laid out, and, after public notice in two or more newspapers of the county, "at least twenty days before meeting for that purpose, of their intention to proceed to make the award and assessment required by this act, and of the time when and the place where they will meet for that purpose, at which meeting all persons interested may appear and be heard in relation to the said award and assessment," award damages to the owners of those lands, and assess the amount of the award and the attendant expenses upon the lands lying within three hundred feet on either side of the avenue, which in their judgment should be benefited by opening and extending it, and report such award and assessment to the court for confirmation, after public notice that all persons having any objection to it might be heard before the court; and that upon its confirmation the amount of the assessment should be added by the county supervisors to and made part of the annual taxes for three years, one third each year, with interest on the portions unpaid, and, when collected, be paid over to the owners of the lands taken.

The statute of 1869, as amended by the statute of 1870, further provided, in § 4, that upon the confirmation of the report as to the opening of the street, the commissioners should be authorized to enter upon the land taken, to cause it to be regulated, prepared and graded for public travel, and to assess the expense of such regulating, grading and preparing for travel "upon the lands and premises which, in their judgment, shall be benefited by such improvement, in proportion to the benefit accruing to them by reason thereof, the district of assessment to extend back as provided heretofore in this act;" and that the amounts so assessed, together with interest at the rate of seven per cent a year from the making of the assess-

ment, should be added to and made a part of the annual taxes for the ensuing year upon the lands assessed, and, when collected, be applied to the payment of bonds issued under that statute.

The commissioners were appointed, laid out the street, and regulated, graded and prepared it for travel, and made the award and assessments, as directed by the statutes aforesaid. The assessment made under § 4 for the expense of regulating, grading and preparing the street for travel, amounted to more than $100,000. The sums so assessed upon some lots were paid; but the sums assessed upon other lots remained unpaid, the owners of these lots contesting the validity of the assessment. The principal amount of the unpaid part of that assessment, being $40,664.96, was returned for five years as uncollected by the treasurer of Kings County to the comptroller of the State, and, together with interest thereon at the yearly rate of five per cent and amounting to $8293.33, was paid or credited in account by the State to the treasurer of Kings County. On June 18, 1878, the Court of Appeals declared that assessment void. *Stuart* v. *Palmer*, 74 N. Y. 183. On January 29, 1879, the comptroller of the State cancelled the unpaid assessment, and charged the county with the amount thereof, being $40,664.96, together with the interest thereon to February 1, 1879, amounting to $8293.33.

On August 12, 1881, the legislature of New York, by the statute of 1881, c. 689, directed the board of supervisors of Kings County to levy on the assessment roll of the town of New Lots for 1881, upon the lands, the assessment made upon which, under § 4 of the act of 1869, had been so cancelled by the comptroller, and charged to the county of Kings, "a sum equitably apportioned among the several parcels comprising said lands, which shall be sufficient to refund to the State of New York the sum its due by reason of such cancellation, which sum, amounting to $40,664.96, was duly credited August 28th, 1876, by the comptroller of said State to the treasurer of Kings County, and the interest charged thereon by said comptroller, as required by law, to February 1st, 1879, amounting to $8293.33, together with further interest thereon,

at six per centum per annum, from February 1st, 1879, to the date of such levy. Before proceeding to levy such sums, the said board shall apportion the same among the several parcels of land hereinbefore mentioned, and said board shall give ten days' notice of the time and place when they will meet to make such apportionment, which notice shall be published daily in a newspaper published in the county of Kings, and all parties interested in said lands shall be entitled to be heard before said board upon the question of said apportionment." The statute of 1881 further provided that the sums so levied should be collected by the collector of taxes of the town of New Lots, and paid over to the county treasurer, and by him applied "to pay the amount so due the State of New York by reason of such cancellation."

Under and pursuant to this statute, the supervisors of Kings County added to the aforesaid sums of $40,664.96, being the unpaid balance of the previous assessment, and $8293.83, being the interest thereon to February 1, 1879, further interest thereon at the yearly rate of six per cent from that date to November 3, 1881, the day of the final conclusion of their report, and assessed and levied the aggregate sum of $55,653.52 upon the plaintiff's and other lots.

The lots so assessed were isolated parcels, not contiguous, and many of them not fronting on the avenue. Most of the territory benefited as fixed by the statute of 1869, and a great portion of the original assessment, were not included in the statute of 1881, nor directed to be taken into consideration in making the new assessment. But this assessment included a proportionate part of the expenses of the former assessment, which had been declared void by the Court of Appeals.

The case stated by the parties, after setting forth the foregoing facts, continued and concluded as follows:

"The plaintiff claims that said assessment of 1881 in question is not a lien or cloud on the title to said premises; and the defendant refuses to pay the balance of said consideration until the plaintiff allows it to be deducted from the consideration money or pays the same, neither of which is the plaintiff willing to do; and the plaintiff also claims that the statute

of 1881, c. 689, is unconstitutional, and therefore void, for the reason that it is an attempt made by the legislature of this state to validate a void assessment (and to do the same without giving the property-holders an opportunity to be heard as to the total amount of the assessment, only providing for a hearing on the apportionment), which was levied upon said premises under and pursuant to c. 217 of the laws of 1869, as amended by c. 619 of the laws of 1870; and that the statute of 1881 is clearly void for the further reasons that the defect in the former assessment was jurisdictional, and it has been so declared and decided by the Court of Appeals in the case of *Stuart* v. *Palmer*, 74 N. Y. 183, and is special and invidious, and unjustly and illegally apportioned upon certain individuals without reference to a uniform standard, and is an arbitrary exaction, and is levied on an individual or individuals to the exclusion of others in the same district. The defendant doubts the said claim of the plaintiff. The question submitted to the court upon this case is as follows:

"Is the assessment levied on the property in 1881 in question a good and valid lien or cloud on said property?

"If this question is answered in the affirmative, then judgment is to be rendered in favor of the defendant and against the plaintiff, requiring the plaintiff to pay said assessment to deliver a deed according to contract.

"If it be answered in the negative, then judgment is to be rendered in favor of the plaintiff, requiring the defendant to take title to said premises in accordance with the contract above mentioned, without the plaintiff paying said assessment or tax, and without deducting the same out of the consideration money."

The Supreme Court of New York gave judgment for the defendant, and the plaintiff appealed to the Court of Appeals, which affirmed the judgment and remitted the case to the Supreme Court. 100 N. Y. 585. The plaintiff sued out this writ of error, and assigned for error that it appeared by the record that both those courts held that the statute of 1881, c. 689, and the proceedings under it were constitutional and valid, "whereas the said courts should have decided that the

said statute and the proceedings thereunder were in violation of the Constitution of the United States and were void, for the reason that they deprived the said plaintiff and the other persons assessed thereunder of their property without due process of law."

Mr. Matthew Hale and *Mr. Albert Day* for plaintiff in error.

Mr. Walter E. Ward for defendant in error.

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

The leading facts of this case are as follows: The original assessment of the expenses of regulating, grading and preparing the street for travel was laid by commissioners, as directed by § 4 of the statute of 1869, upon all the lands lying within three hundred feet on either side of the street, and which, in the judgment of the commissioners, would be benefited by the improvement. After the sums so assessed upon some lots had been paid, the Court of Appeals of the State declared that assessment void, because the statute, (although it made ample provision for notice of and hearing upon the previous assessment for laying out the street under § 3,) provided no means by which the land-owners might have any notice or opportunity to be heard in regard to the assessment for regulating, grading and preparing the street for travel under § 4. *Stuart* v. *Palmer*, 74 N. Y. 183. The lots, the sums assessed upon which had not been paid, were isolated parcels, not contiguous, and some of them not fronting upon the street. By the statute of 1881, a sum equal to so much of the original assessment as remained unpaid, adding a proportional part of the expenses of making that assessment, and interest since, was ordered by the legislature to be levied and equitably apportioned by the supervisors of the county upon and among these lots, after public notice to all parties interested to appear and be heard upon the question of such apportionment; and that sum was levied and assessed accordingly upon these lots, one of which was owned by the plaintiff.

The question submitted to the Supreme Court of the State was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, as well as of art. 1, sec. 7, of the Constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the Supreme Court, affirmed by the Court of Appeals of the State, necessarily involved a decision against a right claimed under the Fourteenth Amendment to the Constitution of the United States, which this court has jurisdiction to review. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, 142; *Murray* v. *Charleston*, 96 U. S. 432, 442; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579.

The jurisdiction of this court, as is well understood, does not extend to a review of the judgment of the State court, so far as it depended upon the Constitution of the State. *Provident Institution for Savings* v. *Jersey City*, 113 U. S. 506, 514. Yet, as the words of the two constitutions are alike in this respect, the decisions of the highest court of the State upon the effect of these words are entitled to great weight. The substance of the former decisions, and the grounds of the judgment sought to be reviewed, can hardly be more compactly or forcibly stated than they have been by Judge Finch in delivering the opinion of the Court of Appeals, as follows:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted un-

justly or without appropriate and adequate reason. *Litchfield* v. *Vernon*, 41 N. Y. 123, 141; *People* v. *Brooklyn*, 4 N. Y. 427; *People* v. *Flagg*, 46 N. Y. 405; *Horn* v. *New Lots*, 83 N. Y. 100; Cooley on Taxation, 450. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the legislature determines it in a case within its general power, its decision must of course be final. We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits. The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power. That power of taxation is unlimited, except that it must be exercised for public purposes. *Weisner* v. *Douglas*, 64 N. Y. 91. Certainly if the acts of 1869 and 1870 had

never been passed, but the improvement of Atlantic Avenue had been ordered, the legislature might have imposed one part or proportion of the cost upon one designated district and the balance upon another. Practically just that was done in this case. In *Re Van Antwerp*, 56 N. Y. 261, an assessment for a street improvement had been declared void by reason of failure to procure necessary consents of property-owners. The legislature made a reassessment, imposing two thirds of the expense upon a benefited district and one third upon the city at large. The act was held valid as a new assessment and not an effort to validate a void one.

"These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot

criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions, of the mode and amounts of the apportionment itself. We think the act was constitutional." 100 N. Y. 587–589.

The general principles, upon which that judgment rests, have been affirmed by the decisions of this court.

The power to tax belongs exclusively to the legislative branch of the government. *United States* v. *New Orleans*, 98 U. S. 381, 392; *Meriwether* v. *Garrett*, 102 U. S. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548; *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Providence Bank* v. *Billings*, 4 Pet. 514, 563. See also *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 497. Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a State court cannot inquire. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 80.

The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. *Willard* v. *Presbury*, 14 Wall. 676; *Davidson* v. *New Orleans*, 96 U. S. 97; *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704; *Hagar* v. *Reclamation District*, 111 U. S. 701. If the legislature pro-

vides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law. *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, and *Hagar* v. *Reclamation District*, above cited.

In *Davidson* v. *New Orleans*, it was held that if the work was one which the State had the authority to do, and to pay for by assessments on the property benefited, objections that the sum raised was exorbitant, and that part of the property assessed was not benefited, presented no question under the Fourteenth Amendment to the Constitution, upon which this court could review the decision of the State court. 96 U. S. 100, 106.

In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax, and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.

In § 4 of the statute of 1869, the assessment under which was held void in *Stuart* v. *Palmer*, 74 N. Y. 183, for want of any provision whatever for notice or hearing, the authority to determine what lands, lying within three hundred feet on either side of the street, were actually benefited, was delegated to commissioners.

But in the statute of 1881 the legislature itself determined what lands were benefited and should be assessed. By this statute the legislature, in substance and effect, assumed that all the lands within the district defined in the statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it, and interest thereon; and determined that the lots upon which no part of that assessment had been paid, and which had therefore as yet borne no share of the burden, were benefited to the extent of a certain portion of this sum. That these lots as a whole had been benefited to this extent was conclusively settled by the legislature. The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled.

It is objected to the validity of the new assessment, that it included interest upon the unpaid part of the old assessment, and a proportionate part of the expense of levying that assessment. But, as to these items, the case does not substantially differ from what it would have been if a sum equal to the whole of the original assessment, including the expense of levying it, and adding the interest, had been ordered by the statute of 1881 to be levied upon all the lands within the district, allowing to each owner, who had already paid his share

of the original assessment, a credit for the sum so paid by him, with interest from the time of payment.

Judgment affirmed.

Mr. Justice Matthews, with whom concurred Mr. Justice Harlan, dissenting.

I am unable to agree with the judgment of the court in this case, and will state very briefly the ground of my dissent.

In *Stuart* v. *Palmer*, 74 N. Y. 183, the Court of Appeals of the State of New York declared the statute of the State of New York of 1869, chapter 217, as amended by the statute of 1870, chapter 619, and the assessment made in pursuance thereof, to be unconstitutional and void. In the opinion of the court in that case, delivered by Earl, Judge, and which was the unanimous opinion of the court, the ground of its judgment was stated as follows (p. 188): "I am of opinion that the Constitution sanctions no law imposing such an assessment without a notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." And, on page 190, it was further said: "The legislature can no more arbitrarily impose an assessment, for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded upon 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 Constitutions. It is a limitation upon an arbitrary power, and 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."

Accordingly, the assessment for the expense of regulating and grading the avenue under the act of 1869, as amended by the act of 1870, was declared null and void as against parties refusing to pay.

Subsequently, by the statute of 1881, chapter 689, the legislature of New York directed the levy to be made upon the lands, the assessment made upon which under the act of 1869 had been declared void and cancelled, of the same sum which had been assessed under the act of 1869, together with interest thereon to February 1, 1879, amounting to $8293.33, and further interest thereon at six per cent per annum from February 1, 1879, to the date of such levy. This act required the Board of Supervisors of Kings County to apportion this sum among the several parcels of land mentioned, after giving ten days' notice of the time and place when they would meet to make such apportionment, to the parties interested in said lands, who should be entitled to be heard before the board upon the question of the apportionment. It is to be observed, however, that this apportionment is only to be made as between the lands in respect to which the prior assessment had been cancelled as being void. The question of the original apportionment between those lands and the remaining lands, on which the owners had paid the first assessment, was not left open under the act of 1881. By this act, therefore, the owners of the lands

in question were deprived of the opportunity of being heard upon the question whether the apportionment as between them and the other land owners, embraced within the original assessment district for the same improvement, was equitable and fair. They were, therefore, deprived by the act of 1881 of the very thing of which they were deprived by the act of 1869, on account of which the Court of Appeals of New York held the latter act to be unconstitutional and void. It is impossible for me, therefore, to reconcile the opinion of the Court of Appeals of New York now under review and the opinion of the same court in the case of *Stuart* v. *Palmer*. The same objection applies to both statutes with equal force. As I think the Court of Appeals was right in its judgment upon the first statute, I am of opinion that its judgment upon the act of 1881, involved in this writ of error, should be reversed.

The argument against this conclusion, which seems to be chiefly relied on, is, that in the act of 1881 the legislature made a new assessment upon a new assessment district created for that purpose by the statute, and fixed the whole amount to be raised, leaving the question of apportionment open as between the parties, upon notice and a hearing, and that all this was within the admitted competency of the legislative power of the State, the exercise of which cannot be construed as depriving the parties of their property without due process of law. But it seems to be a mere evasion to say that this was an original assessment upon a district created by law for that purpose, consisting of the lands adjudged by the legislature to be benefited by the improvement. The improvement was ordered by the act of 1869, and the assessment district was created by it, and so far as the laying out of the street and the appropriation of private property for that purpose, and awarding damages to the owners thereof, and assessing the amount of such awards, and the attendant expenses upon the lands lying within three hundred feet on either side of the avenue, which in the judgment of the commissioners should be benefited by opening and extending the street, that act and what was thus far done under it were not invalidated, but were held to be in conformity with the Con-

stitution. In the act of 1881, the legislature of New York did not profess to undo anything which had been done under the act of 1869, and certainly did not begin *de novo* in dealing with the improvement. On the contrary, they took that portion of the old assessment for the expense of regulating, grading, and preparing the street for travel which remained unpaid, and which had been declared to be void, and revived it by a mere act of legislation as against the parties who had been judicially declared not to be bound by it, adding interest upon it from the time when it was first charged to the State by virtue of the cancellation, as well as a part of the expenses incurred in making the original assessment. Such an act of the legislature seems to me to be in violation of that provision of the Fourteenth Amendment to the Federal Constitution which declares that no State shall deprive any person of his property without due process of law.

I am authorized by Mr. Justice Harlan to say that he concurs in these views.

SAGE *v.* MEMPHIS AND LITTLE ROCK RAILROAD COMPANY.

MEMPHIS AND LITTLE ROCK RAILROAD COMPANY *v.* SAGE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

Nos. 126, 127. Argued January 6, 9, 1888. — Decided March 19, 1888.

Whether a receiver of the property of a railroad company shall be appointed by a court of equity, is a matter within the discretion of the court, and this discretion is to be exercised sparingly, and with great caution, and with reference to the special circumstances of each case as it arises.

A bill in equity, brought by a judgment creditor of a railroad company against the company, which alleges in substance that the property of the company is so heavily mortgaged that if the plaintiff should attempt to enforce payment of his debt by seizure and sale on execution there would

be no bidders at more than a nominal amount, while, if the property were placed in the hands of a receiver by the court, and held together and carefully used in transporting passengers and freight, there would be a large surplus each year for the payment of the plaintiff's debt, contains ample averments to give a court of equity jurisdiction to appoint a receiver of the property: but this point is decided on the facts of the present case, and the court does not mean to say that one or more of the judgment creditors of a railroad company can, as matter of right, require such a property to be put in the hands of a receiver merely because the company fails or refuses to pay its debts.

The fact that a judgment creditor filing a bill in equity to obtain the appointment of a receiver of the debtor's property did not first sue out execution and have a return of *nulla bona* is immaterial, if not objected to by the debtor, and if it appears on the admitted facts that so doing would have been an idle ceremony.

If a court of equity is induced by imposition to appoint a receiver of the property of a railroad company when one would not have been appointed had the court been aware of the exact situation, and the receiver is discharged on learning the imposition, and during the receivership a fund has accumulated from surplus earnings, trustees, representing mortgage creditors of the corporation, who did not intervene in the suit pending the receivership and set up no claim to the fund during the receivership and had no claim to it except as mortgage trustees out of possession, are not entitled to the fund.

It is again held that the mortgagor of a railroad is not required to account to the mortgagee for earnings, even though the mortgage covers income, while the mortgaged property remains in the mortgagor's possession, and no demand has been made for it or for surrender of its possession under the provisions of the mortgage.

Mortgage bondholders of a railroad company who obtain judgment on their bonds or coupons and intervene individually and without the appearance of their trustees in a suit brought by a judgment creditor of the company whose debt is not secured by the mortgage, in which a receiver has been appointed, do not thereby deprive the plaintiff creditor of his priority of right in the accumulating income from the property in the hands of the receiver.

THE case was stated by the court as follows:

The decree from which these appeals are taken relates to the distribution of a fund in the registry of the Circuit Court arising from the operation, by its receiver, of the Memphis and Little Rock Railroad Company (as reorganized). The decree directed it to be paid to the surviving trustees in a certain mortgage executed by that company, for distribution

among the beneficiaries under said mortgage. Sage and the railroad company each complain of that decree; the former insisting that the money should have been applied in satisfaction of a judgment obtained by him against the company, while the latter insisted that it was entitled to receive it.

The history of the claims of the respective parties is as follows:

On the 24th day of June, 1882, the Memphis and Little Rock Railroad Company (as reorganized) in an action brought by Russell Sage, on that day, in the Circuit Court of the United States for the Eastern District of Arkansas, confessed judgment in his favor for the sum of one hundred and twenty-five thousand nine hundred and twenty-one dollars and thirteen cents, that sum being the aggregate amount, principal, and interest, of a demand note for $115,479.03 executed by that company, June 20, 1882, to the president of the Missouri Pacific Railway Company, and indorsed by him to Sage, and of another note of $10,000 held by the latter against the same defendant.

On the same day on which this judgment was entered, Sage commenced in the Chancery Court of Pulaski County, Arkansas, a suit in equity against the Memphis and Little Rock Railroad Company (as reorganized). The bill, after setting out the judgment, alleged that the entire tangible property of the company consisted of its railroad — extending from its junction with the St. Louis, Iron Mountain, and Southern Railroad, through the counties of Pulaski, Lonoke, Prairie, Monroe, St. Francis, and Crittenden to the Mississippi River — an inclined track used to transfer its rolling-stock across that river to Memphis, a steamboat, certain lands and depot in that city, locomotives, cars, and other property, such as are usually employed in the management of a railroad; that the defendant by deed of May 1, 1877, duly recorded, mortgaged its property to trustees to secure the payment of bonds, amounting to $250,000, and maturing in instalments of $50,000 each, on the first day of May in the years 1879 to 1883, inclusive, of which instalments four were then due and unpaid; that by deed of May 2, 1877, duly recorded, defend-

ant mortgaged its property, rights, and franchises of every description to secure the payment of other bonds with coupons attached, amounting to $2,600,000, payable July 1, 1907, and bearing interest, after July 1, 1882, at the rate of eight per cent per annum; that both of said mortgages authorized the trustees to take possession of and sell the mortgaged property upon the non-payment of any of the bonds or interest at maturity; that the aggregate amount of the mortgages exceeded the salable value of the property and franchises of every description owned by the company, or, at least, the sum for which they would sell under execution; that by reason of the existence of the mortgages no bidders could be found at more than nominal amounts for the property; that a large part of the bonds secured by the mortgages being due and unpaid, the trustees would interfere with the sale of any part of the property under execution if the plaintiff should attempt, in that mode, to enforce payment of this judgment; and that for these reasons the suing out of execution upon such judgment would cause useless expense and delay, and result in no benefit whatever to plaintiff.

The plaintiff also alleged that if the company's property was held together, and carefully used in the transportation of passengers and freight, it would produce a large income, sufficient to pay all operating expenses and necessary repairs, leaving each year a large surplus to pay off and discharge plaintiff's debt; that such income could be made only by working the property as a unit, for purposes of transportation; consequently, the seizure and sale of it, or of any material part thereof, would destroy its capacity to produce such income, without benefit to the plaintiff, and at the same time incommode the public by destroying the use of the road in the manner contemplated by the State.

The bill further alleged that the company had hitherto failed and refused to apply its surplus income to the payment of its debts, and unless prevented would continue in that course, and apply its surplus to other uses to his great injury and loss.

The relief asked was that the court take possession of and

operate the road, by a receiver, and, in that manner, seize upon the only means in reach of the law for satisfying the plaintiff's demands; such relief to be subject to all the rights and equities of the holders of bonds or of said trustees.

The railroad company appeared and waived notice, and the court being of opinion that the relief asked was necessary for the protection of the plaintiff's interests and rights, E. K. Sibley was appointed receiver. He was directed to take possession of the entire railroad, with the inclines, connections, tracks, depots, rolling-stock, books, papers, and all other property of the company of every kind. The company was ordered to surrender possession and the receiver directed to operate the railroad, in the usual manner, in the carriage of passengers, freights, and express matter, keeping account of all receipts and expenses, and making report of all his acts and doings, as might be required. Such surrender was made, and possession was taken by the receiver.

John L. Farwell and Robert K. Dow, as stockholders of the company, respectively intervened, October 14, 1882, and November 1, 1882, as defendants, and assailed the proceeding in which the receiver was appointed as being merely a financial expedient, by which Sage and others could make a successful speculation in the stocks and securities of the company. They charged that the company was not really indebted to Sage in any sum, and, among other things, they asked that he be enjoined from prosecuting his judgment, and that the receiver be discharged. On the 10th of November, 1882, they filed their respective petitions for the removal of the cause to the Circuit Court of the United States, and it was so removed.

On the 1st of December, 1883, Dow and many others, holding judgments rendered by default upon preferred mortgage and general mortgage coupons, filed their claims. These judgments aggregated nearly $200,000. Two days thereafter, December 3, 1883, an order was entered requiring the receiver at once to surrender *to the railroad company* all the property of whatever kind in his custody as receiver; to pay out of the money in his hands all sums and dues authorized by the order appointing him; to retain the balance subject to

the order of the court; and to make full report of his acts, showing what moneys he had received and for what purpose they had been expended. The order declared that the railroad and other property in the hands of the receiver were delivered to the defendant only upon the condition — to which it assented — that it assume all the liabilities of the receiver and agree to pay and discharge, out of the property or its income, all demands which might be legally established by judgment against the receiver; in default whereof the court might retake possession, and, by proper order, enforce the payment of such judgments.

On the 12th day of February, 1884, the receiver filed a report of his administration of the property, from which it appeared that there were a few unsettled accounts for traffic balances due to and from him, which he was unable to adjust. The company assuming in open court to pay such balances as were due from the receiver, it was, by consent of the parties, ordered that the receiver transfer to it all balances due to him, and that it receive and retain them for its own use. Thereupon the complainant filed a petition praying that the receiver, out of the funds in his hands, pay his judgment in the bill mentioned. The defendant filed a motion to strike from the files sundry claims of H. Sanford and other creditors of the defendant, and that the money in the hands of the receiver, after paying the amount due the complainant, be paid to the defendant and to certain named creditors.

Upon the hearing, February 14, 1884, of the motion to strike out the claims of H. Sanford and others, said creditors respectively amended their claims by adding the following: "Claimant says that the bill filed in this suit, and all the subsequent proceedings therein, have been simulated, collusive, and fraudulent, and intended to cheat, hinder, and delay this claimant, and others in like cases, in the collection of their just debts, one of which is evidenced by said judgment in favor of claimant; wherefore he prays that his said claim be paid out of said fund in preference to all unsecured debts against said defendant." The court, thereupon, overruled the motion to strike out the claims of Sanford and others.

Statement of the Case.

The cause was then referred to the master to report upon the charges of fraud and collusion made in the amended claims. By subsequent order, the master was directed to show by his report the total amount of money which came to the hands of the receiver; the amount expended by him in new construction and improvement of the road; the operating expenses of the road while in his hands; the amount paid out by him in costs and attorneys' fees in this suit, to whom paid, and for what services; and the total amount of money with which the receiver should be charged in a final settlement of his accounts.

On the 23d of February, 1884, Dow and Matthews, trustees in the mortgage of May 1, 1877, filed their claim and petition of intervention, they having previously brought suit to foreclose. In that petition they prayed that the moneys in the hands of the receiver be applied in discharge of the bonds secured by such mortgage. April 15, 1884, Dow, Matthews, and Moran, trustees in the mortgage of May 2, 1877, (the latter being successor of Pierson,) filed their claim of intervention praying that if the fund in court was not paid out on the claim and intervention theretofore filed by Dow and Matthews, it be paid in discharge of overdue interest on the bonds secured by the latter mortgage.

On the 22d of May, 1884, the master made a report embodying among others the following findings: 1. That the total amount which came to the hands of the receiver during his term of office was $1,675,919.73; 2. That the amount expended, during his administration, for new construction, was $310,992.92, not including certain sums expended for bridge repairs, cross-ties, repairs to locomotives, and maintenance of cars; 3. That the amount chargeable to the receiver on final settlement of his accounts was $218,998.98, which he had deposited as required by the court, and that he was thereby fully acquitted; 4. That the suit instituted by Sage was collusive in that it was brought with the connivance of the railroad company, for the purpose of shielding it by means of a receivership, against suits by the company's creditors; 5. That during the receivership, the railroad was largely improved by

the receiver out of the income of the property, and that the receiver was honest, competent, and faithful; 6. That Dow, one of the trustees in both the preference and general mortgages of the company, was the managing trustee, having or seeming to have the chief direction of all litigation involving either the trustees or the holders of bonds secured by the general mortgage; 7. That the intervenors were holders of bonds secured by the general mortgage, and that at no time during the continuance of the receivership did the trustees, as trustees of either mortgage, seek to intervene in the cause, or to take any action in regard to the property, or to cause its restoration to the defendant company, or to take any steps to put an end to the receivership; 8. That before the failure of the company to pay any instalment of interest, Dow stated and threatened that in case any default in the payment of such interest occurred, the bondholders would not take any steps to foreclose the mortgage, but would bring as many separate suits at law in the United States Circuit Court as could be separately brought upon coupons taken from the bonds secured by the mortgages every six months.

Exceptions by Sage and the company to the master's report having been overruled, it was adjudged that the money in the registry of the court be paid to Robert K. Dow and Watson Matthews, surviving trustees in what is called the preference mortgage of May 1, 1877, for distribution by them among the beneficiaries under that mortgage, and that plaintiff pay all the costs of this suit. From that decree Sage and the railroad company have separately appealed. No appeal was prosecuted by bondholders having judgments at law, and who, by the decree, were placed upon an equality with other bondholders secured by the same mortgage, who had not obtained judgments for the amount of their unpaid coupons.

Mr. Wager Swayne for Sage, and for the Memphis and Little Rock Railroad Company as against intervening trustees and judgment creditors.

Mr. U. M. Rose for the trustee.

Argument for Trustee.

We are not concerned with the question as to whether the railroad company could have claimed the money accumulated by the receiver; for the company did not claim it. Of course it was contended in the court below that the railroad company had unlimited control over the fund; and reference was made to *Gilman* v. *Illinois Tel. Co.*, 91 U. S. 603, 607; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 483, and *American Bridge Company* v. *Heidelbach*, 94 U. S., 798, where it is declared in effect that where a mortgage executed by a railroad company grants its income, with privilege to the mortgagor to use its income until possession is taken by the trustees named in the mortgage, in operating the road, the trustees cannot claim any part of the income accruing before they take, or at least demand possession.

Those cases were, however, in no wise like that at bar; they were cases where there were contests between the trustees and *bona fide* creditors of the mortgagor. We have then all the difference between an honest creditor and a fraudulent claimant who has trumped up a spurious claim for the purpose of cheating, hindering, and delaying honest creditors. The methods that the law has devised for the protection of the one can hardly be invoked for the accomplishment of the ends of the other.

It is a requirement of public policy that parties dealing with the corporation, or injured by it, shall have the right not only to sue the party with which they deal, or which has injured them in the prosecution of its business, but also to secure themselves upon any moneys or chattels, the proceeds of that dealing and business, by means of the remedies provided for in like cases between natural persons. *Smith* v. *Eastern Railroad*, 124 Mass. 157. This rule is established for the advantage of meritorious creditors; and can have no application for the purpose of propping up a scheme devised for their overthrow.

In *Gilman* v. *Illinois Tel. Co.*, it is conceded that any money derived from operating the road after the appointment of a receiver could go to the trustees. The court say: "It is clearly implied in these mortgages that the railroad company

should hold possession and receive the earnings until the mortgagees should take possession, *or the proper judicial authority should interpose.*" In this case judicial authority did interpose. Pending the receivership the fund accumulated in court after all the operating expenses of the road were paid. By the terms of the mortgage the mortgagor is estopped from claiming this money, which is dedicated to the payment of its bonds.

While the receiver was in possession the trustees could not take the property into their custody so as to appropriate its income; and certainly the bondholders should not suffer a loss because by collusion with another the mortgagor has prevented the bondholders and trustees from securing the same fund in another and a legitimate manner.

By the terms of the mortgages the trustees could only enter into possession on the written request of a majority of the bondholders in value; a troublesome process requiring time for its execution. In the meantime the debtor was accumulating a fund, not to be used for the legitimate purpose of operating the road, but in payment of the spurious demand of a fraudulent accomplice. Certainly a case of this kind requires a separate treatment; for if the fund is to be paid over to the fraudulent parties, the court must not only condone the fraud, but must pay a reward for its commission.

Where under a mortgage like that now before the court the question as to the right to the surplus income is between the mortgagor and the mortgagee alone, the surplus must be awarded to the latter, because such is their contract, and any other disposition of the fund would be an act of bad faith. *Pullan* v. *Cincinnati and Chicago Railroad Co.*, 5 Bissell, 237.

But apart from the clause in the mortgage pledging the income and money of the company to the trustees, the money was properly decreed to them; for, by reason of the trust relationship between the parties and the admitted insolvency of the company, a court of chancery had jurisdiction to apply the fund to the payment of the bonds whose holders were represented by the trustees, though nc judgments at law had been recovered on them. *Case* v. *Beauregard*, 101 U. S. 688.

Argument for Trustee.

In that simple aspect of the case the suit would be one for equitable garnishment. *King* v. *Payan*, 18 Arkansas, 583. As between the claims represented by the trustees and the simulated demand of Sage a court of chancery could not hesitate.

The suit seemed to be based on a contention that when a corporation gets in debt beyond its present means of payment, it may fly to a court of chancery as to a house of refuge; and may ask its assistance to keep its creditors at bay. The object of the plaintiff and defendant in this suit being to keep the property of the latter in the hands of a receiver indefinitely, during which time there should be no officer of the defendant upon whom legal process could be served, the whole proceeding was stamped with the grossest fraud. As was said in *Drury* v. *Cross*, 7 Wall. 299, 303: "If the law permits the debtor in failing circumstances to make choice of the persons he will pay, it denies him the right in doing it to contrive that the unpreferred creditor shall never be paid. In other words, the law condemns any plan in the disposition of property which necessarily accomplishes a fraudulent result."

It has often been remarked that the statutes against fraudulent conveyances are merely declaratory of the common law, which unaided would have worked out the same results. But the statute in Arkansas is amply broad enough to cover the device to which recourse was had in this case. That statute declares that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, *suit*, judgment, decree, or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchasers prior and subsequent, shall be void." Mansfield's Digest, 1884, § 3374.

"Every attempt by a debtor to violate or evade the law, so as to delay his creditors in the collection of their debts, to the hindrance of the due course and execution of the law, is unquestionably fraudulent and void as against such creditors."

Kimball v. *Thompson*, 4 Cushing, 441, 447; *S. C.* 50 Am. Dec. 799.

If Sage could expect to participate in a fund raised through the fraudulent device contrived by him and the defendant, the statute would necessarily be violated; for, instead of his scheme being "void," it would be thoroughly effectual; and the guilty party, by virtue of a decree in chancery, would carry off the spoils. The law would not only be annulled, but the courts, by assisting in the success of the unlawful device, would render themselves accessory to the fraud. A contention that so far violates fundamental principles cannot be sustained. *Bean* v. *Smith*, 2 Mason, 252; *Smith* v. *Craft*, 11 Bissell, 340; *Wilson* v. *Horr*, 15 Iowa, 489, 493.

In Arkansas there is a statute against fraudulent conveyances: "Every person who shall be a party to any conveyance or assignment of any real estate, or interest in any real estate, goods or chose in action, or any rents or profits issuing therefrom, or to any charge upon such estate, with intent to defraud any prior or subsequent purchaser, or to hinder, delay, or defraud creditors or other persons, shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than $500." Mansfield's Digest, 1884, § 1649.

If Sage had a judgment at law, yet in the eyes of a court of chancery, by the light shed on the transaction by the testimony in this case, that judgment is no judgment. If he has a debt against defendant, it is simply a debt evinced by the contract. *Hill* v. *Elliott*, 12 Mass. 31; *Harris* v. *Sumner*, 2 Pick. 137; *Riggs* v. *Murray*, 2 Johns. Ch. 565; *Beach* v. *Viles*, 2 Pet. 675, 678.

It is not necessary to dwell on these cases, as they have no application to the case where a corrupt motive is charged and proved. Where a deed is executed in contravention of some principle of law, but without any fraudulent intent, the courts may hold that the grantee is not to be punished for mere inadvertence; but where a well-defined intent to defraud others is manifest, the courts cannot confer any benefit on a party to the fraud without making themselves a party to the fraudulent device. If they should do so, they would with one

breath condemn the transaction and enforce its execution. In a case of a deed that is constructively fraudulent the conveyance is simply void; and the creditor stands with regard to his debt just as if the deed had not been executed; but in this case, fraud entered into the inception of the transaction and gave color to it from beginning to end.

The creation of the supposed debt on which the judgment was based was a part of one indivisible scheme to defraud and injure others. Such a claim cannot be allowed to enter into competition with the claims of creditors that are without suspicion; and certainly we can find no case where a creditor has ever been guilty of actual fraud in a proceeding by means of which a fund has been raised, where he has been allowed to participate in the fund.

This case is, however, far worse than any that has ever come before the courts; for it is apparent that the defendant did not owe Sage anything; and that behind the scenes the whole pretence of a debt due to him was, as the master reported "a juggle" between the defendant and the Missouri Pacific Railway Company, which owned substantially all the stock of the defendant company, the sole object and purpose being to cheat, hinder and delay the creditors of the latter.

The bondholders being very numerous, the trustees properly represented them in the court below. *Kerrison* v. *Stewart*, 93 U. S. 155; *Carey* v. *Brown*, 92 U. S. 171; *Boyd* v. *Jones*, 44 Arkansas, 316.

"The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actual parties; and whatever binds him, if he acts in good faith, binds them." *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611.

Finally, we are unable to perceive on what theory Sage's appeal is prosecuted. In his bill he only prayed the relief sought "subject to all the rights and equities of the holders of said bonds, or of their trustees." He cannot therefore complain of a decree establishing the superior claim of the trustees. *Water Works Co.* v. *Barret*, 103 U. S. 516; *Pacific Railroad* v. *Ketchum*, 101 U. S. 289; *United States* v. *Babbitt*, 104 U. S. 767.

Argument for Trustee.

We submit that if there had been no clause in the mortgage as to money and income, the trustees might have claimed the fund simply by this proceeding as an equitable garnishment. They had a duty to perform for the protection of the numerous bondholders scattered throughout the world. The company admitted its insolvency. There was a fund in court unappropriated, which could only be reached by an intervention. The right of the trustees to intervene was clear. *Day* v. *Washburn*, 24 How. 352; *Wiswall* v. *Sampson*, 14 How. 52, 66; *American Bridge Co.* v. *Heidelbach*, *ubi supra*; *Williams* v. *Gibbes*, 17 How. 238, 256; *Ex parte Boyd*, 105 U. S. 647, 652; *In re Howard*, 9 Wall. 175; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459.

The New York statute referred to in *Ex parte Boyd* has been enacted in Arkansas. Mansfield's Digest, 1884, § 3084.

Prior to the beginning of the equitable proceeding that act requires the issue of a writ of execution, and a return of "no property found." That part of the act was repealed by an act approved March 31, 1887, which enacts "that in suits to set aside fraudulent conveyances and to obtain equitable garnishments, it shall not be necessary for the plaintiff to obtain judgment at law in order to prove insolvency; but in such cases insolvency may be proved by any competent testimony, so that only one suit shall be necessary in order to obtain the proper relief." Statutes of Arkansas, 1887, p. 193.

This act is substantially similar to one enacted in West Virginia, and lately acted on by this court in *West Fairmont Gas Coal Co.* v. *Dewey*, 123 U. S. 329.

The property of the railroad company could not be sold under execution by judgment creditors whose judgments were based on coupons secured by the mortgages. *Tice* v. *Annin*, 2 Johns. Ch. 125, 130.

Nor can the property of a railroad company be sold under execution. *Gue* v. *Tide Water Canal Co.*, 24 How. 257; *Railroad Co.* v. *James*, 6 Wall. 750; *Jackson* v. *Ludeling*, 21 Wall. 616, 623.

Where an execution can accomplish nothing its issue is not a prerequisite to the filing of a creditor's bill. *Wright* v. *Campbell*, 27 Arkansas, 641.

Besides, the admission of Sage that the property mortgaged would not suffice to pay the mortgage debt showed that the issue of an execution would have been unavailing. *Lex neminem cogit ad vana seu inutilia.* Moreover, as was said by Chief Justice Marshall, "it is also true that if a claim is to be satisfied out of a fund which is accessible only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim be first established in a court of law."

[The counsel also argued that the Railroad Company was not entitled to the fund, as against the Trustees.]

Mr. Justice Harlan, after stating the facts in the above language, delivered the opinion of the court.

We do not understand upon what principle the court below held that the trustees in the mortgage of May 1, 1877, were entitled, as against both the mortgagor company and Sage, to claim the net earnings of the road during the receivership. The latter was a judgment creditor of the company, and it was at his instance, in a suit commenced by him, that its property was put in the hands of a receiver. This was done because in the opinion of the court the appointment of a receiver was necessary "to protect plaintiff's interests and rights." If the grounds set forth in the bill were not sufficient to justify the appointment of a receiver, they were ample to give a court of equity jurisdiction to do so. In *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 458, the court said: "The co-plaintiffs with Hervey were judgment creditors of the Paris and Decatur Company, with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Company, and the necessity for a receiver, in the interest of all the creditors of all four of the corporations, to prevent the levy of executions on such property; and it prayed for a judicial ascertainment and marshalling of all the debts of all the corporations and their payment and adjustment as the respective rights and interests of the creditors might appear, and for

general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits."

In the present case, it is true, Sage did not sue out execution upon his judgment and have a return of *nulla bona*. But that point has become immaterial. The railroad company made no such objection at the time the receiver was appointed. Besides, suing out an execution would, according to the facts and the admission of the parties, have been an idle ceremony, causing useless expense, and bringing no real benefit to the plaintiff. It is true, also, that Sage did not sue in behalf of all the creditors of the company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege, under the law, to sue for his own benefit, and it was within the power of the court, for his protection as a judgment creditor, to place the property of the debtor company in the hands of a receiver, for administration under its orders. We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as matter of right, to have its property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is that, under the circumstances presented in this case, the appointment of the receiver was within the power of the court. The order appointing him and directing him to operate and manage the property was not a nullity.

But it is contended that the suit instituted by Sage was collusive and an imposition upon the court; that, as held by the Circuit Judge, when the receiver was discharged, after having served seventeen months, and the property was turned

over to the company the process of the court was not used "in good faith to collect complainant's judgment, but as a means of placing the property and business of a railroad company in the hands of the court, to be managed through a receiver, to the end that the defendant may not be subject to suits in the ordinary course of judicial proceedings, and in order to enable the plaintiff and defendant, by agreement between them, through the receiver, to apply all the earnings of the road during a series of years to the improvement and betterment of the property;" and that, consequently, the proceeding was not, in fact, an adversary one. 5 McCrary, 643; 647; 18 Fed. Rep. 571, 573. Whether this characterization of that proceeding be just or not, it is not necessary in the present case, and in the view we take of it, to determine. For if it be just, the court below applied the proper remedy for the abuse of its process, that is, it discharged the receiver and turned the property back to the possession and control of the company, which, in the view taken of the facts by the Circuit Judge, ought never to have been disturbed. And the court proceeded, as was its duty, to dispose of the net earnings of the property, while under the management of its officer, acting under its directions.

But did the imposition, if any, practised upon the court, inducing it to appoint a receiver when one would not have been appointed had it been aware of the exact situation, add anything to the legal or equitable rights of the trustees in the mortgage executed by the railroad company? Had the receiver never been appointed, and had the railroad company operated the property just as the receiver did, producing the same amount of net earnings that were in the hands of the receiver, at the time of his discharge, would the trustees in the mortgage of May 1, 1877, have been entitled to demand that such earnings be paid over to them? Clearly not. "It is well settled," this court said in *Dow* v. *Memphis and Little Rock Railroad Co.*, 124 U. S. 652, 654, "that the mortgagor of a railroad, even though the mortgage covers income, cannot be required to account to the mortgagee for earnings, while the property remains in his possession, until a demand has

been made on him therefor, or for a surrender of the possession under the provisions of the mortgage. That is the effect of what was decided by this court in *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 483." See also *Gilman* v. *Ill. and Miss. Tel. Co.*, 91 U. S. 603; *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798; *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378; *Teal* v. *Walker*, 111 U. S. 242, 250.

The trustees filed their bill of foreclosure June 26, 1883, but they did not intervene as trustees in this suit until February 23, 1884, some time after the discharge of the receiver, and after the property had been surrendered to the company. Their claim and intervention shows upon its face that no part of the interest accruing upon the bonds secured by their mortgage subsequent to January 1, 1882, had been paid at the time they so intervened. By the terms of that mortgage, it was provided that, in case of continuous default by the railroad company, for thirty days, after maturity, in paying any of the sums specified in the interest coupons, the principal sums in all the bonds "shall immediately become due and payable," and, thereupon, the trustees, upon the written request of the holders of a majority of said bonds, "shall enter upon and take possession of all and singular the charter, franchises, and property hereby conveyed, and shall and may sell the same to the highest bidder for cash in hand," etc. There was no moment pending the receivership when these trustees, upon the request of the holders of a majority of the bonds, might not have appeared in this suit, or in a separate suit in the same court, and asked that the receiver hold for them as well as Sage, or that he be discharged and they put in possession of the mortgaged property, for the purposes of sale, pursuant to the mortgage. Neither they nor the bondholders elected to pursue that course. It may be that their action was dictated in part by the fact, found by the master, that the railroad, the principal security for their debts, was being largely improved during the receivership out of the income of the property, and that no part of that income was being diverted to pay Sage's judgment or the debts of the company. If the trustees, pending the receivership, had intervened and asked

possession of the property, they might perhaps have been entitled, as against general creditors, to the income of the property thereafter accruing, upon the principles announced by this court in *Dow* v. *Memphis and Little Rock Railroad Co.* (as reorganized), 124 U. S. 652. But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was, in effect, an equitable levy for his benefit, upon the net income of the property. Other creditors, who filed their claims, based upon judgments, gain nothing, as between themselves and Sage, by the fact that their judgments were rendered upon coupons, which were secured by lien upon the mortgaged property. Neither they nor their trustees, prior to the termination of the receivership, chose to assert this lien. Nor did they, pending the receivership, ask that the receiver should, from and after their appearance, hold for them as well as for Sage. They took action as simple contract creditors, whose claims were reduced to judgment. If the bondholders, when intervening simply as judgment creditors, acquired an interest in the fund, they could not, upon any recognized principles of equity, deprive the creditor, at whose instance and for whose benefit the receiver was appointed, of his priority of right, arising from the institution of suit for the purpose of reaching the income of the debtor's property. The judgments at law obtained by bondholders upon their coupons were all rendered after the receiver took possession of the property; some in the spring of 1883, the larger part of them in October and November of that year, just before the receiver was discharged.

These conclusions are not affected by the fact that Sage, in his bill, alleges that he seeks relief, subject to all the rights and equities of the holders of bonds and of their trustees. It was only meant by this to give assurance that he had no purpose, in asking the relief he did, to affect injuriously their security, or the liens created in their behalf by the mortgages

referred to. Taking the allegations of his bill to be true, he sought only, by means of a receivership, to reach the net income of the railroad company in satisfaction of his debt.

But it was insisted in argument that the judgment which Sage obtained against the railroad company was fraudulent, in that the debt for which it was rendered was fictitious; that he never in fact owned a real note executed by that company, based upon any valuable consideration whatever. The record not containing the note or a copy of it, some question was also made, in argument, if we did not misunderstand counsel, whether any such note was ever in existence. We could not sustain these propositions without reaching the conclusion that there had been the most shocking perjury upon the part of witnesses in this cause; a conclusion which the evidence does not warrant. The judgment which Sage obtained by confession of the defendant company, in the Circuit Court of the United States, recites that it appeared to the court, "as well from the promissory notes with the complaint filed as from the said confession and consent, that the defendant is indebted to the plaintiff in the sum aforesaid," etc. The record shows that Sage, under date of June 20, 1882, addressed to the president of the Missouri Pacific Railway Company a communication, offering to give fifty cents on the dollar, payable in ninety days, for its debt and note "against the Memphis and Little Rock Railroad Company (as reorganized), amounting, as I am informed, to the sum of $115,479.03, your company guaranteeing that the said amount is justly due to it from the Memphis and Little Rock R. R. Co." The records of the former company recite that on motion of Mr. Dillon, seconded by Mr. Eckert, that offer was accepted, and that said debt and note "are hereby transferred and assigned to said Sage, and that the president be and he is hereby authorized to execute any further assignment of said debt that counsel may advise, and also to indorse and deliver said note to the said Sage." Sage swears in his deposition that he purchased, held, and brought suit upon said note. The treasurer of the Missouri Pacific Railway Company testifies that his company did, in June, 1882, hold the note of the Memphis and Little Rock Company

(as reorganized) for $115,479.03, given by the latter company for advances made by the Missouri Pacific Railway Company to meet coupons of the former company. It is true, that, independently of the evidence furnished by the note, it does not clearly appear that the advances made by the Missouri Pacific Railway Company to the other company aggregated the full amount of the note. But this deficiency in the proof is more than made good by the fact that the note was given and that the Memphis and Little Rock Railroad Company (as reorganized) confessed judgment for its amount, and does not now dispute the debt; although, by its appeal, it claims that the fund in court should be paid to it rather than applied to Sage's judgment.

It is contended that Sage does not show that he has ever paid to the Missouri Pacific Railway Company the amount he agreed to give for the note of the Memphis and Little Rock Railroad Company (as reorganized). Proof of that fact was not vital in the case. After the acceptance of his offer to purchase the note, and after it had been transferred by indorsement to him, he came under a legal obligation, which he recognizes, to pay what he agreed to pay. He cannot escape that obligation.

For the reasons stated we are of opinion that the decree below was erroneous in that it did not, in the order directing the distribution of the fund remaining in court, give a preference to the judgment at law obtained by the appellant Sage.

The decree reversed and cause remanded, with directions for further proceedings consistent with this opinion.

WALL *v.* BISSELL.

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

No. 22. Argued April 12, 13, 1887. — Decided March 19, 1888.

It seems, that under the statutes of Indiana an executor named in a will, who has never qualified, or been appointed by the Court of Probate, or taken out letters testamentary, has no power to redeem a mortgage of real estate, either as an executor, or as trustee under the will.

In equity, a mortgage of real estate, made to one of two creditors to secure the payment of a debt due to them jointly, is incident to the debt, and may be released, after the death of the mortgagee, by the surviving creditor; and a release, made in good faith by the survivor, of part of the land from any and all lien by reason of the mortgage, is valid against himself and the representatives of the deceased, although he is in fact executor of the latter, and describes himself as such in the last clause and the signature of the release, and has by law no authority to enter the release as executor, for want of letters testamentary.

THIS was a bill in equity by George P. Bissell against Abraham G. Barnett, his wife, Byron H. Barnett and James W. Barnett his minor sons, his sisters Susan B. Shoaff and Mary Ann Wall and their husbands, Henry J. Rudisill, Oscar A. Simons and John H. Bass, Henry Burgess, Charles A. Zollinger, and the representatives of John J. Kamm, to foreclose mortgages of real estate in Indiana. Answers and cross bills were filed by the various parties, setting up their different interests, and a final decree was rendered for the plaintiff, from which Mr. and Mrs. Wall, Mr. and Mrs. Shoaff, and the two minor sons of Abraham G. Barnett, appealed to this court. The case appeared by the pleadings and proofs to be as follows:

In 1869 Abraham G. Barnett, his brother John H. Barnett, and Newton B. Freeman, were partners in a paper mill, and desired to raise money for the use of the partnership and to pay up Freeman's share of the capital. At the request of the two Barnetts, and of Rudisill (who appears to have been promised an interest in the partnership), Bissell lent to the

Statement of the Case.

two Barnetts the sum of $8000, the whole of which was put into the firm and $5000 of which was credited to Freeman. Pursuant to an agreement then made by the three partners and Rudisill and Bissell, the following instruments were executed:

On July 15, 1869, the two Barnetts executed to Bissell eight bonds for $1000 each, payable in ten years, with interest semi-annually, secured by mortgage from John H. Barnett to Bissell of land in the city of Fort Wayne.

On the same day, Rudisill executed to John H. Barnett a bond, reciting that "said Henry J. Rudisill has received from said Barnett the sum of $5000, part of a loan made by J. H. Barnett and Abraham G. Barnett for the sum of $8000 of George P. Bissell, secured by" the bonds and mortgage aforesaid; and conditioned to "pay said sum of $5000 of said bonds, with interest thereon, as it becomes due."

On December 23, 1871, as security for the payment of this bond, Rudisill executed to John H. Barnett a mortgage of land, upon all of which, except a small piece, there existed a prior mortgage, made by Rudisill to his mother to secure the payment of an annuity to her, and now held by Simons and Bass.

On January 23, 1872, John H. Barnett died, leaving a will containing the following provisions:

First. A devise of part of the land, mortgaged by him to Bissell as aforesaid, to Mrs. Wall, with successive remainders to Byron H. Barnett, to his children, and to Abraham G. Barnett.

Second. A devise of the rest of that land to Mrs. Shoaff, with successive remainders to James W. Barnett, to his children, and to Abraham G. Barnett.

Third and Fourth. Devises of other lands to Mrs. Shoaff and to Abraham G. Barnett and his children.

"Fifth. Now, as to my interest in the paper mill and business carried on at the city of Fort Wayne under the name of Freeman & Barnett, which is regarded as one-third in extent of said business effects, real and personal, &c., &c., stock, assets, machinery, dividends, dues, &c., I devise and bequeath,

subject to the conditions and agreements, performed or unperformed, which were named at the time I became a party in interest in said paper business so carried on by and in Freeman & Barnett's name, and which conditions and agreements are known to my brother, A. G. Barnett, I give and bequeath unto my said brother, A. G. Barnett, and to my nephews, James Barnett Wall and Charles W. Wall, sons of my sister, Mary A. Wall, all my interest in the paper mill and business aforesaid, real and personal, or otherwise, so carried on and owned by said Freeman & Barnett: To have and to hold to each of said devisees or legatees, three in number, so named, one full third of my said interest in said paper business, mill, &c. The sole control of the respective interests of said James B. and Charles W. Wall shall be under the control of my brother, A. G. Barnett, until said James B. shall reach the age of twenty-five years. The profits arising out of said interest so bequeathed to said Charles and James B. respectively shall be at reasonable periods each year paid said legatees respectively by said Barnett, or by any other person who may be authorized to control said interest in the progress of said business, by law or otherwise. And I hereby give the said A. G. Barnett the right to sell said interests of said Charles and James B., if he shall deem such sale expedient for the best interests of said Charles and James, he, the said A. G. Barnett, first giving said Charles and James security for faithfully accounting to them for the proceeds of said sale; or if he shall desire to buy said interests, or either of them, before either shall be of age, then some third party shall qualify as guardian, and proceed to sell the same to said A. G. Barnett under order and authority of law.

"Sixth. I name my brother, A. G. Barnett, my executor, to act himself, or jointly with one he may choose; if acting alone, then he shall and may do so without bond as such executor, but if acting with another, both shall give bond and take out letters testamentary and proceed according to law; but if he shall act alone, then, as executor, he shall have authority under this will to proceed as if he had letters testamentary to execute the trusts devolved on him as executor, as also those

which may incidentally arise in the execution of this trust as executor, but not any others arising out of a different relation, such as trustee or guardian of some of the parties named herein or of some of the trust funds named hereinbefore. He shall have power to proceed to collect all debts, judgments, or choses in action, due me at my death, all rents due me at my death, of any and all my real estate, except the homestead, and to have control of and dispose of all my personal property, moneys and effects, reducing them to availability, and to collect all rents on the lots devised respectively, located in the city of Fort Wayne, until such rents and the reasonable use of the whole homestead place, including that devised to Mrs. Susan Shoaff and to himself, until such funds so arising from rents, use of homestead, moneys, personal property, &c., shall be enough to pay my debts, funeral expenses, debts of last illness, and to purchase a lot in Lindenwood cemetery, properly and fairly improve it, pay for exhuming the remains of my father and mother, their interment, and the erection of a monument suitable to their condition in life in said lot, and this shall be done speedily as the nature of the business shall allow, after which the devisees respectively herein lastly named, and incidentally referred to, shall control said property as the same is intended in the respective clauses wherein said property is devised."

On February 7, 1872, the will was duly admitted to probate, on the testimony of the subscribing witnesses, in a court of the State of Indiana.

Abraham G. Barnett never qualified or gave bond as executor, as required by the statutes of Indiana, and the court of probate never made any order appointing him executor, or directing letters testamentary to issue, and no such letters were ever issued. But he assumed to act as executor, and as such took control of the real and personal property, collected the rents of the real estate for some months, (after which he turned it over to the devisees,) paid the testator's debts and funeral expenses, purchased a burial lot, removed the remains of the testator's father and mother to it, and erected a monument upon it. The other devisees knew of all these acts, and

made no objection, supposing him to be authorized by the will to do them.

On January 23, 1875, Rudisill sold and conveyed by warranty deed to Burgess, Zollinger and Kamm part of the land included in the mortgage from him to John H. Barnett, and in the annuity mortgage to his mother; she released from her mortgage this part of the land; and Abraham G. Barnett executed, on the margin of the record from Rudisill to John H. Barnett, a release of the same part, in the following words:

"I hereby release from any and all lien by reason of this mortgage the following of the premises herein described: All that part of S. E. $\frac{1}{4}$ of sec. 35, t'p 31, R. 12 East, this day conveyed by Henry J. Rudisill to H. Burgess, Charles A. Zollinger, and J. J. Kamm. Witness my hand and seal as such executor, January 23, 1875.

"Abraham G. Barnett, [seal.]

"Executor of the Estate of John H. Barnett, deceased."

On the same day, and as part of the same transaction, Rudisill executed to "Abraham G. Barnett, as executor of the estate of John H. Barnett, deceased," a mortgage of other lands, partly included also in the annuity mortgage. All the parties to this transaction acted in good faith. But the transaction was not shown to have been known to the devisees until about the time of the beginning of this suit, or to have ever been assented to by them.

The bill prayed for a foreclosure of the mortgages from John H. Barnett to the plaintiff, and from Rudisill to John H. Barnett, or, if the court should hold the release of the latter good, then for a foreclosure of the mortgage from Rudisill to Abraham G. Barnett.

The Circuit Court decreed that the release was valid, and that the title in the land so released be quieted in the present holders as against all other parties to this suit, and that the various parcels of land be sold and applied to the payment of the debts secured by the several mortgages in an order not objected to by the appellants, supposing the release to be valid, which they denied.

Mr. L. M. Ninde for appellants.

Mr. R. S. Taylor for appellees Simons, Bass, Hoffmeister, McCurdy, and Hattersley.

Mr. S. R. Alden for appellees Burgess and Kamms.

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

The principal question in this case is the validity of the release, executed by Abraham G. Barnett, of the mortgage from Henry J. Rudisill to John H. Barnett. By the law of Indiana, a mortgage creates only a lien to secure the mortgage debt, leaving the legal title of the land in the mortgagor. *Fletcher* v. *Holmes*, 32 Indiana, 497.

It was argued for the appellees that this release was valid, considering Abraham G. Barnett in any one of three capacities: 1st. As executor of the will of John H. Barnett. 2d. As trustee under that will. 3d. As surviving joint owner, in equity, of the bond and mortgage executed by Rudisill to John H. Barnett to secure the payment of a debt due to John H. Barnett and Abraham G. Barnett jointly.

1. The title of an executor in the personal property of his testator, being derived from the will, doubtless vests in him from the moment of the testator's death. *Dixon* v. *Ramsay*, 3 Cranch, 319, 323; *Hill* v. *Tucker*, 13 How. 458, 466. At common law, he might, before proving the will in the Probate Court, not only take possession of the property, but sell or dispose of it, pay debts of the estate, receive or release debts owing to it, bring actions for property which was in the testator's actual possession, and do almost any other acts incident to his office, except that he could not maintain any other actions without producing a copy of the probate and letters testamentary at the trial. 1 Williams on Executors (7th ed.) 293, 302, 303, 629.

But the statutes of Indiana provide that whenever any will shall have been admitted to probate, letters testamentary shall be issued to the persons named therein as executors (being

competent by law to serve as such) who shall qualify; and further provide as follows:

"SEC. 3. Every person named in the will as executor, who shall qualify and give bond, shall be named in such letters, and every person not thus named shall be deemed superseded.

"SEC. 4. Any person who is appointed executor, who shall renounce his trust in writing filed with the clerk, or who shall fail to qualify and give bond within twenty days after probate of such will, shall be deemed to have renounced such appointment, and such letters shall issue to any other person named in the will, capable and willing to accept such trust.

"SEC. 5. No executor named in the will shall interfere with the estate intrusted to him, further than to preserve the same, until the issuing of letters; but for that purpose he may prosecute any suit to prevent the loss of any part thereof."

"SEC. 19. Every person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute a separate bond," with sureties, "in a penalty payable to the State of Indiana, of not less than double the value of the personal estate to be administered, conditioned that he will faithfully discharge his duties as such executor or administrator, and shall take and subscribe an oath or affirmation that he will faithfully discharge the duties of his trust according to law;" and the bond, as well as the oath or affirmation, is required to be recorded. 2 Gavin & Hord's Stat. 484, 489, 490, 491; Indiana Rev. Stat. 1881, §§ 2222–2225, 2242, 2243.

These statutes clearly manifest the intent of the legislature that, although the personal property shall vest from the death of the testator in the executor named in his will, yet, in order to secure the interests of creditors and of legatees, every executor shall give bond and take out letters testamentary before he can do any act as executor, except such as may be necessary to preserve the property and prevent the loss of any part of it. The prohibition is absolute that, except for that purpose, "no executor shall interfere with the estate" until the issuing of letters testamentary.

The direction in the will of John H. Barnett that Abraham

G. Barnett may act as executor, without giving bond or taking out letters testamentary, as the statutes require, is of no legal effect.

The current of decision in other states, so far as we are informed, is to the effect that under similar statutes (some of them less peremptory in their terms) any acts done by an executor by way of disposing of the property are invalid, unless he takes out letters testamentary, or is appointed executor by an order of the court of probate, equivalent to the issue of such letters. *Monroe* v. *James*, 4 Munford, 194; *Martin* v. *Peck*, 2 Yerger, 298; *Cleveland* v. *Chandler*, 3 Stew. (Ala.) 489; *Carpenter* v. *Going*, 20 Alabama, 587; *Ex parte Maxwell*, 37 Alabama, 362, 364; *Kittredge* v. *Folsom*, 8 N. H. 98, 111; *Rand* v. *Hubbard*, 4 Met. 252, 257; *Gay* v. *Minot*, 3 Cush. 352; *Carter* v. *Carter*, 10 B. Monroe, 327; *Stagg* v. *Green*, 47 Missouri, 500; *Hartnett* v. *Wandell*, 60 N. Y. 346, 350; *McDearmon* v. *Maxfield*, 38 Arkansas, 631.

We have been referred to no decision of the Supreme Court of Indiana that directly bears upon this case. The only one that approaches it is *Hays* v. *Vickery*, 41 Indiana, 583. In that case, an heir, named in the will as executor, had, without qualifying as such, or taking out letters testamentary, but with the consent of all the other heirs, devisees and legatees, acted as executor, and made distribution of the property. A subsequent order of the probate court, made without notice to him, upon the application of one of those heirs, appointing another person administrator with the will annexed, was reversed on appeal, and letters testamentary directed to be issued to the executor upon his qualifying and giving bond according to law. The opinion proceeded upon the ground that the delay in taking out letters testamentary had been waived by the mutual arrangement of all parties interested; and it contained no intimation that the acts of an executor, who never took out letters testamentary, could affect the rights of any person interested in the estate who had not assented to them.

In the present case, whatever effect the facts that the other devisees knew that the executor was acting as such, and made no objection, might have against those of full age, the minor devisees could not be thereby estopped to assert their rights.

Letters testamentary issued to an executor, upon his qualifying according to law, may relate back and legalize his previous tortious acts. 1 Williams on Executors, 269; *Priest* v. *Watkins*, 2 Hill (N. Y.) 225. Or an order of the court of probate, appointing an executor, may not be subject to be impeached collaterally by showing that he did not in fact qualify; and may of itself be sufficient evidence of his authority, without the production of letters testamentary. *Vogel's Succession*, 20 La. Ann. 81; *Piatt* v. *McCullough*, 1 McLean, 69, 74.

But where, as in this case, the executor has never qualified, nor been appointed by the court, and no letters testamentary have been issued, we have found no decision, under statutes like those of Indiana, that any disposition of the property by the executor is valid as against persons interested who are not estopped by having consented to it.

In the absence of any decision upon the point by the Supreme Court of Indiana, we are therefore not prepared to hold that the release in question has any validity as an act done by Abraham G. Barnett as executor.

2. The difficulties are quite as great in the way of holding the release valid, considered as executed by Abraham G. Barnett in the capacity of trustee under the will, distinct from his office as executor.

In the first place, the will, after naming Abraham G. Barnett executor, and directing that he may act as such without giving bond or taking out letters testamentary, provides that "as executor he shall have authority under this will to proceed, as if he had letters testamentary, to execute the trusts devolved on him as executor, as also those which may incidentally arise in the execution of this trust as executor." By this iteration of the words "as executor," the testator clearly shows that he did not intend that in performing the usual duties of an executor he should act in any other capacity.

In the next place, it was not within the power of the testator to defeat the provisions and the policy of the testamentary law of the State, by bequeathing personal property to a trustee, without the intervention of an executor. As was

said by Chief Justice Shaw, delivering the opinion of the Supreme Judicial Court of Massachusetts, "It is an established rule of law, that all the personal property of the testator vests in the executors for some purposes, before probate of the will; but to all intents and purposes, upon its probate. This they take not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees or of one or more trustees for particular purposes, such direction would be nugatory and void." *Newcomb* v. *Williams*, 9 Met. 525, 533. So in the earlier case of *Hunter* v. *Bryson*, the Court of Appeals of Maryland said: "But suppose Bryson not to be created executor by the clause in the will which has been referred to, and that the testator's design was that the persons appointed should act literally as trustees, without taking out any letters testamentary or of administration. The appointment is a nullity, as far as the personal estate is concerned, being an attempt to evade the provisions of our testamentary system, in a way which the law does not tolerate." 5 Gill & Johns. 483, 488.

3. We are then brought to a consideration of the question whether the release can be upheld, because of the authority vested in Abraham G. Barnett as surviving creditor, under the settled rule that one of two joint creditors or mortgagees, or the survivor of them, may release the joint debt. *Penn* v. *Butler*, 4 Dall. 354; *People* v. *Keyser*, 28 N. Y. 226. The case, so far as affects this question, stands thus:

John H. Barnett and Abraham G. Barnett borrowed $8000 of Bissell, and lent $5000 of it to Freeman, and thereby became, at law as well as in equity, joint debtors to Bissell in the sum of $8000, and joint creditors of Freeman in the sum of $5000. Rudisill executed to John H. Barnett a bond, secured by mortgage, conditioned to pay to him the sum of $5000, describing it in the bond as part of the sum of $8000 borrowed by the two Barnetts of Bissell, thus clearly identi-

fying the debt, which Rudisill's bond and mortgage were intended to secure, as the $5000 which the two Barnetts had lent to Freeman, and which Freeman owed to them jointly. Rudisill's bond and mortgage, therefore, although they ran to John H. Barnett alone, and could have been enforced at law in his name only, yet in equity, having been made with the sole object of securing the payment of the debt which Freeman owed to both Barnetts jointly, belonged to them as joint creditors. *Batesville Institute* v. *Kauffman*, 18 Wall. 151.

Upon the death of John H. Barnett, the debt of Freeman was due to Abraham G. Barnett personally as surviving creditor, with authority as such to sue for and recover it, although he would of course be bound to account to John H. Barnett's representatives for half of anything that he might recover; and Rudisill's bond and mortgage continued to stand as security for that debt, and, while the legal title in this bond and mortgage vested in Abraham G. Barnett as executor, yet the equitable interest in them belonged half to him as executor and half to him personally. If he had received from the mortgagor payment of the sum secured by the mortgage, whether as executor or as surviving creditor, in either case he would hold half of that sum to his own use and half as executor. So a valid release of the whole or part of the land mortgaged, made by him, whether as executor or as an individual, would bar him both in his official and in his private capacity; and any substituted security, received by him as a consideration for the release, would ultimately enure to the benefit of the same persons, that is to say, one half to his own benefit, and the other half to the benefit of those entitled under the will. In short, neither the parties to whom, nor the amount in which, he would be liable to account for anything received upon a payment or release would be affected by the capacity in which he assumed to act. If he had never been named as executor, a release of the debt by him, being surviving creditor, would have been valid at law, and his release of the mortgage, which was security for that debt, would have been good in equity. There is no reason, therefore, which can influence a court of equity, why he might not

as surviving creditor release part of the mortgaged land from the mortgage.

The two characters of executor and of surviving creditor being united in the person of Abraham G. Barnett, the court, if he had executed the release in his own name merely, without describing himself as acting in either capacity, would presume that he acted in the character which would make the release valid and effectual. *Yeaton* v. *Lynn*, 5 Pet. 224, 229.

The form in which the release was drawn up and executed does not affect the equities of the case.

It begins with the absolute and comprehensive words, "I hereby release from any and all lien by reason of this mortgage." Then follow a description of the land released, by range, township, section and quarter section, and as that day conveyed by Rudisill to Burgess, Zollinger and Kamm; and the final clause, "Witness my hand and seal as such executor, January 23, 1875." No executor had been previously named in the release, or in the mortgage, on the margin of the record of which the release was made. The release is signed "Abraham G. Barnett, executor of the estate of John H. Barnett, deceased."

When a person having title in property in different capacities, executes a deed in one capacity only, and holds the consideration received for the benefit of those entitled to it, a court of equity, at least, will be slow to hold the deed invalid for want of a more complete and formal execution.

In *Corser* v. *Cartwright*, L. R. 7 H. L. 731, a man who was one of two executors of his father, and also the residuary devisee of his lands, charged with the payment of his debts, made a mortgage of the lands, reciting that he was entitled to them in fee, and not describing himself as executor. Lord Romilly, M. R., held that this mortgage was not an exercise of the power vested in the executors for paying the testator's debts, but was only a mortgage of the beneficial interest of the devisee, and therefore ineffectual against the testator's general creditors. But his decree was reversed by the Lords Justices in Chancery, and their decree was affirmed by the

House of Lords upon the motion of Lord Chancellor Cairns, who said: "What I find is this, that the estates with which your lordships have to deal are clearly devised to, and the legal estate vested in, the residuary devisee, who was also one of the executors. I find him selling or mortgaging, and I find him, beyond all doubt, able to sell and able to give to a mortgagee a good title to the legal estate. I find that that legal estate is in his hands, and therefore any money that is produced by the sale or mortgage of that legal estate, is subject to and chargeable with the payment of debts and legacies; and that therefore the money coming into his hands must be money which ought to be applied to the payment of debts and legacies. But then I find that he himself is an executor of the testator; that he himself is the person who ought to hold assets impressed with the liability to satisfy debts and legacies. I find, therefore, that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore, on the one hand, the mortgagees have got the legal estate; and on the other hand, they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That being so, it appears to me that their title is entire and complete." L. R. 7 H. L. 740.

In *West of England Bank* v. *Murch*, 23 Ch. D. 138, that decision was followed, and applied to this state of facts: One of two brothers, partners in business, died, leaving a will, by which he directed his debts to be paid, and devised his real eatate in trust with power of sale, and appointed his widow executrix and trustee. The widow and the surviving brother sold and conveyed real estate of which the two brothers had been tenants in common, and which was in fact partnership property, by deeds reciting that the brother in his own right, and the widow as trustee under the will, were seised of it in fee as tenants in common, but not stating that she was executrix, or that the property was partnership property. This conveyance was held to be valid, Lord Justice Fry saying: "It is plain that as executrix she could sell the whole of the

partnership property." "Then it is said that if she had power so to do, yet, by omitting to state in the deeds by which she conveyed the freehold property that she was acting as executrix, she precluded herself from asserting that she was acting in that character. In my judgment, she did not. It must be borne in mind that, as executrix, hers clearly was the hand to receive the purchase moneys, and therefore those moneys came to the right hand, the hand of the person whose duty it was duly to apply the assets in satisfaction of the creditors of the deceased as well as of the beneficiaries under his will. Moreover, whether she was acting as trustee or as executrix, she was under an obligation to do the best she could for the estate. Her fiduciary character was substantially the same, whether she was acting as executrix or as trustee. I think, therefore, that I should be straining at a gnat, if I were to hold that the mere fact, that she spoke of herself in the instruments as trustee and not as executrix, was enough to prevent the validity of a transaction which, in her character of executrix, I hold that she had the power of carrying into effect." "The legal estate passed from her, because she held it as trustee, and the money reached the hands of the person who was bound to distribute it among the persons entitled to it. I therefore overrule this objection." 23 Ch. D. 151–153.

In the present case, the legal title, indeed, in the bond and mortgage of Rudisill was in Abraham G. Barnett as executor, and could not, at law, be released by him in any other capacity. But the legal title in the debt, for which the bond and mortgage stood as security, and to which in equity they were incident, was in him as surviving creditor. In equity, therefore, he had the right, as surviving creditor, to release the mortgage, in whole or in part; and any consideration for such a release, whether received by him as executor or as surviving creditor, would enure to the benefit of himself, and of the estate of his testator, in equal moieties.

If he had received payment of the debt, and given a receipt for it as executor, he would have held the money, half as executor, and half to his own use, just as he would have held it if he had receipted for it in his own name only; and it cannot

be doubted that the addition "as executor" in the receipt would not have prevented the payment from extinguishing the debt, and consequently the mortgage by which it was secured.

The release which Abraham G. Barnett did execute was of part of the land mortgaged, and in consideration of receiving a mortgage of other land, the parties to the release and to the new mortgage acting in good faith, and with no intent to defraud devisees or other persons interested. The body of the release contains apt words of release by him (without stating in what capacity) of the land described "from any and all lien by reason of this mortgage;" and he is described as executor in the *testimonium* clause and the signature only. Although he is described as executor in the new mortgage also, a court of equity certainly could not hold that, mortgage to convey any interest to him, as executor or otherwise, if the release for which it was the consideration was void.

Abraham G. Barnett was the person authorized to make the release, and the consideration for the release came into his hands, for the benefit of the persons entitled to it. The interests of no one were affected by the question in which of his two characters he executed the release, and received the new mortgage. Whether he acted as executor or as surviving creditor, the fruits of the transaction belonged, in equity, one half to himself and one half to the estate of John H. Barnett.

If the whole debt had belonged to him alone, the description of himself as executor in the release could not have prevented its operating upon his interest in the debt, and in the mortgage by which that debt was secured. As the survivor of two joint creditors, he had the same power (independently of any authority as executor) to release the debt and the mortgage, as if he had been the sole creditor. The release, therefore, notwithstanding the superfluous description of the releasor as executor, was, by reason of his being surviving creditor, binding upon the interests of the representatives of the deceased creditor, as well as upon his own; and upon this ground the

Decree is affirmed.

Syllabus.

WILLIAMS *v.* CONGER.

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

No. 105. Argued December 16, 19, 20, 1887. — Decided April 2, 1888.

If the removal of a public record from its place of deposit is not prohibited by reason of public policy, it constitutes, when legitimately removed, the best evidence of its contents and of its authenticity.

An original muniment of title produced from the public archives in which it is required by law to be deposited, certified by the public officer who has custody of it, and identified by him as a witness, is sufficiently authenticated to authorize it to be offered in evidence.

A charge in an action to try title to real estate which instructed the jury that if they believe that a paper offered in evidence containing a signature of a party under whom both parties' claim was as old as its date imported, and that it had been preserved in the public archives as the initial paper in the grant, they might give to these circumstances the weight of direct testimony to the genuineness of the signature, and if the other proof did not in their judgment overbear its weight, might find the signature to be proved, neither takes from the jury the determination of the weight of evidence, nor submits to it a question that should be decided by the court.

Papers not otherwise competent cannot be introduced in evidence for the mere purpose of enabling a jury to institute a comparison of handwriting; but where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison.

When the plaintiff and the defendant both claim title under the same original application, and one introduces it in evidence and establishes its identity, the other is estopped from denying the genuineness of the signature to it of the party under whom both claim.

One claiming under a deed forty years old, through several mense conveyances, may offer the deed in evidence as an ancient deed, though never seen by any but the first grantee to whom it was given.

A power of attorney authorized the donee to take possession of real estate by himself or by a person in his confidence, to cultivate it, to sell it, to exchange it or to alienate it. He indorsed it to A by a writing stating: "I transfer all my powers in favor of A, in order that in my name and as my attorney he may take possession," &c. *Held*, that the indorsement only gave A power to take possession, but no power to sell.

A cause was tried before a jury in a state court, and being taken to the highest court of the State that court ordered a new trial, deciding that a

certain document was admissible in evidence as an ancient deed. After the cause was remanded to the trial court it was removed to the Circuit Court of the United States. *Held*, that its decision on that question was binding on the courts of the United States.

In the courts of the United States it is competent for the court to give to the jury its opinion upon the weight of evidence, leaving the jury to determine upon the testimony.

In Texas in the year 1833, a power of attorney to take possession of and convey real estate which was not acknowledged, witnessed, certified to, written on sealed paper, nor proved before a notary was nevertheless a valid instrument, those formalities merely affecting the mode of authenticating it.

The English rule as to the requisites of a power to execute sealed instruments was not in force in Texas when the transactions here in controversy took place.

A copy made in 1837 of a lost certified copy of a power of attorney is admissible in evidence to show that the original power, found and produced in court, was an ancient instrument.

A recital in an ancient power of attorney that the donor is a citizen raises a presumption of the truth of that fact which can be overthrown only by positive proof.

Trespass to try title. Judgment for defendants and judgment on the verdict. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. Eugene Williams for plaintiff in error.

Mr. E. H. Graham for defendants in error.

Mr. Justice Bradley delivered the opinion of the court.

This is an action of trespass to try title, brought by the appellant to recover from the appellees the possession of eleven leagues of land, situated in McLennan and Bosque counties, in Texas, on the west bank of the river Brazos, and granted by the government of Coahuila and Texas in December, 1828, to one Miguel Rabago. The defendants pleaded not guilty, the statute of limitations and laches. The action was commenced on the 11th of September, 1873, in the District Court of McLennan County, Texas, and was tried in that court in the year 1876, and a verdict was rendered and judgment given for the defendants. The case was then appealed

to the Supreme Court of Texas, and at the Austin Term of 1878 the judgment was reversed for an error in the charge on the question of laches, and the cause was remanded for a new trial. 49 Texas, 582. It was then removed to the Circuit Court of the United States for the Northern District of Texas, and was tried in that court in April Term, 1884. Both parties claim title under Rabago; the plaintiff, by derivation from his heirs at law (he having died in 1848), and the defendants through an alleged conveyance made by Rabago, in his lifetime, by an attorney in fact, one Victor Blanco. No question is made, therefore, as to the validity of Rabago's title. The principal controversy at the trial arose in relation to the admission in evidence of two papers offered by the defendants, namely, first, the protocol, or first original, of the application of Rabago for the grant, and of the concession made thereon, produced from the archives in the office of the Secretary of State of Coahuila at Saltillo; secondly, the alleged original power of attorney from Rabago to Blanco, by virtue of which the latter executed a conveyance of the land in the name of Rabago, under which the defendants claim title. The latter was admitted as an ancient document in case of insufficient proof of Rabago's signature, but the jury were permitted to compare the signature with that purporting to be Rabago's affixed to the protocol of the application for the grant. Several bills of exception were taken by the plaintiff to the rulings and charge of the court, a verdict was rendered for the defendants, and judgment was entered thereon, to reverse which the present writ of error was brought.

The following are copies of the documents referred to. The translation of the alleged protocol of Rabago's application, and of the concession made thereon, is in the words following, to wit:

"[Seal of Coahuila and Texas.]

"Petition of Don Miguel Rabago for the purchase of eleven leagues of land in the department of Bexar. December 1st, 1828.

"3d seal. Two reals. Issued by the State of Coahuila and Texas for the years 1828 and 1829.

"Most Excellent Sir: The citizen Miguel Rabago, resident of the valley of Santa Rosa, with due respect represents to you that needing land for agricultural and raising of stock, he begs you that, by virtue of your authority, you will be pleased to sell him eleven leagues of land on the margins of the Trinity river, in the department of Bexar, or in the section which shall appear to me to be most convenient and best adapted to my interests, being all together or in different localities, offering to settle and cultivate said lands within the time prescribed by the colonization laws of the state of the 24th of March, 1825. Also, that you will be pleased to grant me the time designated by the said law to pay the dues on the said land. I ask your excellency that you will be pleased to refer my petition, for which I will be thankful.

"Leona Vicario, 28th of November, 1828.

"(Signed) MIGUEL RABAGO."

"Leona Vicario, 2d of Dec'r, 1828.

"Conformable to article 24 of the colonization laws of the 24th of March, 1825, I sell to the petitioner the eleven leagues of land he asks for of the vacant lands in the department of Texas, in the part he may point out, or in the locality most suitable to him. The commissioner whom the government will appoint will place him in possession of said leagues, and will extend the necessary titles, previously classifying the class and quality of said lands as a guide of the amount to be paid to satisfy the government dues, for which payment I grant him the time designated by the 22d article of said colonization law. A copy of the petition and decree will be given to the party intended, for his observance and the subsequent effects.

"(Signed) VIESCA,
SANTIAGO DEL VALLE."

This protocol or second original was authenticated by a certificate annexed thereto, by the Secretary of State of Coahuila, the translation of which is in the words following, to wit:

"The citizen, Licentiate José Ma. Musquiz, Secretary of the Government of Coahuila de Zaragoza, certifies that the annexed document is the original which exists in the archives of the Government of Coahuila relative to the concession of eleven [leagues] of land made to Don Miguel Rabago, in the department of Bexar, on the 2d of December, 1828. And at the request of the applicant this document is given, with the obligation of returning it when the suit in which it is to be used shall be terminated.

"Saltillo, April 6th, 1881.

"[SEAL.] (Signed) JOSÉ MA. MUSQUIZ, *Sect'y.*"

The translation of the alleged original power of attorney from Rabago to Blanco is in the words following, to wit:

"MONCLOVA, 8*th June*, 1832.

"Señor Don Victor Blanco:

"My esteemed Uncle and Sir: With this I hand you the testimonio of eleven leagues of land which his Excellency the Governor of the State granted to me a sale of, in the department of Texas, in order that you may have the goodness to do whatever should be in your power, so that possession may be taken of them by yourself or by a person of your confidence, giving to you the most ample power so that you may cultivate them, may sell them, may exchange or alienate to your entire satisfaction, because for everything I authorize you, and I will stand and I will pass in all time for that which you should do; and should this my letter power not be sufficient, I will grant judicially as soon as you please, and notify me that you require it and you excusing this trouble. I place myself at your disposal as your most affectionate nephew and servant, who attentively kisses your hands.

"(Signed) MIGUEL RABAGO (rubric)."

(Indorsement.)

"I transfer all my powers in favor of Señor Don Samuel Williams, postmaster of the town of San Felipe de Austin, in order that in my name and as my attorney he may take possession of the eleven leagues expressed in this.

"(Signed) VICTOR BLANCO (rubric).

"Monclova, 3d April, 1833."

It appeared on the trial that the extension of final title to Rabago was made on the 13th of January, 1834, on the application of Samuel M. Williams, as attorney for Rabago; but no power of attorney authorizing him to make the application was produced or proved by the plaintiff, whose title depended on the extension thus obtained. The paper above copied, however, purporting to be a power of attorney from Rabago to Blanco, and propounded by the defendants, if their witnesses were to be believed, was found among the old papers of Williams in the custody of his son, and had on it an indorsement by Blanco transferring to Williams all the powers conferred upon him so far as to enable him (Williams) to take possession of the eleven leagues of land.

The defendants claimed that after the title was thus extended, to wit, on the 25th of May, 1836, Victor Blanco, under and by virtue of the power of attorney referred to, sold the land in question, in the city of Mexico, to one Guillermo Laguerenne by an act of sale passed before one Bonilla, a notary public; and that Laguerenne, on the 10th of January, 1837, in the city of Mexico, executed before one Madriago, a notary public, a power of attorney to Francisco Priolland, of New Orleans, authorizing him to sell all and any real estate belonging to Laguerenne, and that the latter, in pursuance of said power, did sell the said eleven leagues on the 15th of February, 1837, to one George L. Hammekin, by act of sale passed before one Caire, a notary public of New Orleans. It was admitted that the defendants had a regular chain of title from Hammekin.

The course of the trial was as follows: The plaintiff first gave in evidence a duly certified translation of the title of

Rabago, from the records of the general land office of Texas, consisting of —

1. A testimonio of Rabago's application for the grant, dated November 28th, 1828; and of the concession made thereon, dated December 2d, 1828.

[The above testimonio was dated December 2d, 1828, and signed by the Government Secretary.]

2. The extension of title, comprising the application for extension by S. M. Williams, as attorney of Rabago, dated December 3d, 1833; the approval of the empresarios (of whom Williams was one); the order of survey; the field notes of the survey, &c.; concluding with a formal patent. This expediente was indorsed as filed in the Land Office June 7th, 1875.

The plaintiff then proved the death of Rabago, and deduction of title from Rabago's heirs to himself, and rested.

The defendants preparatory to offering their documentary evidence of title, including, amongst other things, 1st, the said protocol, or first original of Rabago's application for the grant, with his signature thereto, and the original concession made to him thereon; 2d, the original power of attorney, above mentioned, from Rabago to Blanco; 3d, the act of sale from Rabago, by his attorney Blanco, to Laguerenne; 4th, Laguerenne's power to Priolland; 5th, Priolland's act of sale to Hammekin; — submitted the following evidence, to wit: The depositions taken at Saltillo, Mexico, in August, 1881, of José M. Musquiz, Secretary of State of Coahuila, and *ex officio* custodian of the archives relating to land grants in Texas; and of Estaban Portilla, keeper in charge of said archives, who identified the paper produced by the defendants purporting to be such protocol, or first original, of Rabago's application, found (as they testify) among the said archives in the proper office in Saltillo, and which by the law of the state might be allowed to go out of the office by the permission of the governor. Also, the depositions of Ex-Governor E. M. Pease, of Austin, Texas, and of Andrew Neill, a notary public of the same place, who testified that they were familiar with the signatures of Viesca and Del Valle by having often seen

them as affixed to the public archives, laws and records of Coahuila and Texas, deposited in the public offices of the State of Texas, and believed their signatures to the purported original concession, attached to said application, to be their genuine handwriting. The defendants also gave in evidence the testimony of John Willett, to the effect that he procured the said protocol in Saltillo, for the use of the counsel of the defendants, by the courtesy of the governor of Coahuila, and of the secretary, Musquiz, upon giving his bonds for its return. It was also in evidence that Rabago was in Saltillo (which is the same as Leona Vicario) in person when the original concession was granted, and brought the testimonio home with him, and the interpreter testified that the application and concession in the certified copy put in evidence by the plaintiff is a good translation of the document produced by the defendants.

The defendants then gave in evidence the testimony of William H. Williams, son of Samuel M. Williams, born in 1833, and of M. E. Klieberg, of Galveston, tending to prove that the said paper, purporting to be the original power of attorney from Rabago to Blanco, of which a copy has been given, was found in 1876 by said Klieberg after a search therefor at the request of said William H. Williams in behalf of General Thomas Harrison, one of the defendants, in an old leather trunk that had belonged to said Samuel M. Williams, of whose papers said William H. Williams was custodian, and which trunk contained old miscellaneous papers of said Samuel relating to occurrences before the year 1836, and had always been in said William's possession since his father's death in 1858; that the paper in question was an old looking paper; that the trunk contained several letters and documents signed by Victor Blanco; and that said paper, with said letters and documents, were delivered to General Harrison.

The defendants also gave in evidence the testimony of George L. Hammekin, taken before a notary in November 1876, who stated that he purchased the land in controversy about forty years before, in the city of New Orleans, from Francisco Priolland, acting as attorney for Guillérmo La

guerenne; and had in his possession for a long time a paper purporting to be a copy of a power of attorney from Miguel Rabago to Victor Blanco, and had it then (whilst testifying). That it was dated Monclova, 8th June, 1832; first saw it in 1837 or 1838; that Laguerenne was a Frenchman or an American; that the land was sold to him May 25th, 1836, and by him to witness in February, 1837. [The copy referred to by the witness was annexed to his deposition, and exactly corresponded with the paper propounded by the defendants as the original. It had annexed to it a certificate, of which the following is a translation, to wit:]

"I, the undersigned notary, do certify that the foregoing copy is, to the letter, the same as the original power that Don Victor Blanco has presented to me, and the same that I had before me when making out the bill of sale, that on the 25th day of May, 1836, made by virtue of it to Don Guillermo Laguerenne of eleven sitios of land situated in the department of Texas, on the west side of the Brazos River, above the road that leads from the town of Nacogdoches to Bejar, as it appears in the public records in my charge. And so that this be of value wherever required, and at the request of the party interested, I issue duplicates of the present in Mexico, the 17th day of March, 1837, being witnesses Dn. Rafael de Revilla, Dn. Teofilo Carreno, and Dn. Felipe de Revilla Olivares, of this community.

"(Signed) Miguel Diez De Bonilla,
"*Notary Public.*"

The defendants also gave in evidence the further testimony of said Hammekin, taken by deposition on the 26th of March, 1880, wherein he says: "I have had the following title papers of the Rabago grant in my possession: 1st. Testimonio, or second original issued in name of Miguel Rabago. 2. A letter of attorney from Miguel Rabago to Victor Blanco. 3. Sale by Victor Blanco as attorney for said Rabago to said Laguerenne. 4. Power of attorney from said Laguerenne to Francis Priolland. 5. Sale by said Priolland to myself.

"I received the above-entitled papers from Francis Priolland in New Orleans at the time I made the purchase. I delivered them to my agent, Robert Rose, and have not seen them since. I saw to-day the original power of attorney from Rabago to Blanco. I have seen Blanco's signature frequently before and after I left Mexico. I know Victor Blanco's signature because I have seen it on many papers having no reference to the Rabago grant. It appears on the said original power of attorney, subscribed to the transfer made to Samuel May Williams. I believe the transfer is in Blanco's handwriting, and I know the signature is his. I had a copy of said power certified before and by Mig'l Diez de Bonilla in the city of Mexico. I also had a copy of this copy." The witness stated that this last copy was delivered by him to General Harrison; and that the original testimonio of title was deposited by him in the general land office at Houston in 1873. [These papers were offered in evidence by the defendants, the said copy of the power being shown to be an exact copy or counterfeit of the purported original power.] The witness further stated that he and his vendees had exercised acts of ownership on this eleven league grant and claimed it certainly since May, 1838; and stated the manner in which such acts of ownership had been exercised.

Hammekin further testified, in another deposition, that the original act of sale from Rabago by Victor Blanco to Laguerenne, dated May 25th, 1836, which was given to the witness by Priolland when he purchased the land in 1837, was executed before Miguel Diez de Bonilla, a notary public in the city of Mexico; that he knew the signature of said officer, and recognized his signature to said act of sale as his genuine signature, because he had often employed Bonilla during his (witness's) residence in Mexico from 1831 to 1836; that he delivered it to Robert Rose, his attorney and agent, in 1850, and had not seen it since. He also stated that he had, then, in his possession, 1st, a legal copy of the original testimonio of title to Rabago, followed by a petition to Judge Alltors by Guillérmo Laguerenne for the same, and a certificate signed by Miguel Diez de Bonilla, and the certificate of the Ameri-

can consul; 2d, a simple copy of the sale from Rabago by Blanco to Laguerenne, followed by a copy of the receipt of the treasurer of the custom house of Mexico, for the alcabala from said Laguerenne. These papers were attached to the deposition. The certificates are dated in the year 1836. To show the loss of the paper given by Hammekin to his agent, Robert Rose, the defendants produced as a witness John N. Rose, who testified that Robert Rose was his brother, was a lawyer, and died in Washington city in May, 1871, and that he (John) was Robert's administrator, and had charge of all his papers, and had several times searched for, and failed to find, the following papers, viz.: 1st, the deed from Rabago, by his attorney Blanco, to Laguerenne; 2d, the power of attorney from Rabago to Blanco, dated the 8th of June, 1832; 3d, the power of attorney from Laguerenne to Priolland, executed in Mexico, January 10th, 1837.

The defendants also gave in evidence the testimony of several witnesses, tending to prove that they and those from whom they derived title had constantly exercised acts of ownership over the land in question from the time of the origin of their title, by paying the taxes, filing the muniments of title, surveying the tract into parcels, selling to settlers, leasing to tenants, compromising with persons who got unauthorized possession of portions of the land, etc., and that, by these means, the tract had become largely settled, and many valuable improvements had been erected thereon.

E. D. Conger testified on the stand: That he is one of the defendants in this case, and was one of the purchasers from Gen. Harrison; that before they purchased they had the title examined by competent attorneys, and bought on the faith of their opinion as to the title; that they never heard of any adverse claim until the institution of this suit; that the land bought by the Congers was the remnant of the grant after the best parts of it had been sold off; that they have paid taxes on the land regularly since they have purchased it; that there were about one hundred settlements on the eleven leagues when they purchased, but none on the part they purchased.

The defendants also introduced in evidence:

1st. A certificate from the comptroller of the State, showing that Robert Rose as agent for G. L. Hammekin, rendered for taxes for the years 1854 to 1859, both inclusive, 48,700 acres of the M. Rabago grant in McLennan County, and that the records do not show that there were any other assessments made for those years.

2d. An original lease from A. M. Hughes to William Graham to the Neville league on said grant, dated May 24th, 1854. It recites that Hughes is acting for Robert Rose, the agent for Mr. Goodrich, who claims the Rabago eleven leagues of land. Also, a transfer from said Graham to David E. London of this lease, dated October 17th, 1854.

3d. A power of attorney from George L. Hammekin to Robert Rose, dated May 24th, 1855, recorded in the records of McLennan County, April 28th, 1857. It is a general power to prosecute, sue for, recover, and establish his claim to lands situated in different parts of Texas. To compromise with settlers, and sell.

4th. Docket of the District Court of McLennan County, showing the suits about the land before the war, styled *Hammekin* v. *Graham* and *Hammekin* v. *Bell.*

The original act of sale from Rabago, by Blanco, to Laguerenne, purchased by the defendants as after mentioned, recites that the sale was made under a "letter power," which the officer saw, read, and returned to the party, Blanco. It was in evidence that Rabago was a citizen of the State of Coahuila, and that he and his family lived there all their lives. The original testimonio of the title, dated January 13th, 1834, which Hammekin testified was delivered to him by Priolland when he bought in 1837, was also put in evidence by the defendants.

Other evidence referred to in the charge of the court need not be adverted to here.

After the introduction of the foregoing evidence, the defendants offered in evidence, as a part of their title, the said protocol, or first original of Rabago's application for the said eleven league grant, and of the concession made thereon, dated, respectively, the 28th of November and the 2d of

December, 1828. The plaintiff objected to its admission on the following grounds:

1st. That it is irrelevant and forms no part of the defendants' title.

2d. The paper, if genuine, is an archive of a foreign government, and from public policy cannot be introduced in our courts, but only a lawfully certified and examined copy can be introduced.

3d. The custodian shows that he holds it by virtue of a foreign law which is not properly proven.

4th. But if the paper be admitted, then it is objected to for purposes of comparison of handwriting, for which object alone it is introduced. Because —

First. It is not such a paper as was required to be signed by Rabago, and no presumption can arise that it was so signed by reason of its being an archive or ancient document.

Second. There is no evidence of the handwriting being that of Rabago.

Third. It is not admitted nor proven to be the genuine handwriting of Rabago.

Fourth. The instrument with which it is to be compared is not so old but that living witnesses to the questioned signature can be and are actually introduced.

The court overruled these objections and permitted the paper to go to the jury for all purposes, subject to be controlled by his charge as to its being a standard of comparison for the handwriting of Miguel Rabago. To this ruling the plaintiff excepted.

The plaintiff then offered evidence to rebut that adduced by the defendants, as to the genuineness of the alleged protocol, to wit: the testimony of Antonio Garcia Corillo and Ramon L. Flores, the purport of which was, that Flores, then chief clerk of the Department of State, at the request of Corillo, had searched the archives in 1874 for everything relating to the Rabago grant, and had not found the document now produced by the defendants. The court still adhered to its ruling to admit the document in evidence.

This raises the first question in the cause, namely, whether

the protocol, or first original of the application and concession, belonging to the public archives of the State of Coahuila, at Saltillo, is admissible as evidence. The court below decided that it was, and we have difficulty in seeing any reason why it should not be. It is true that the testimonio given out to the interested party is a second original, and is treated as an original, and may be admitted in evidence as such; but it does not take away from the validity and faith of the first original. The latter may always be resorted to for the purpose of correcting any errors in the testimonio. It is true, it may be deemed a matter of public policy in some states to prohibit public records from being removed from their places of deposit; but if their removal is allowed, or in any legitimate way effected, they certainly constitute the best evidence of their contents and authenticity. No public policy could have been contravened, in the present case, but that of the State of Coahuila, or the Republic of Mexico. If the authorities of Coahuila allowed the removal of the protocol in question, we do not see what objection could be made by the courts of Texas, or of the United States. On general grounds, there is no valid objection to its admissibility. Though by the practice of the courts a certified or sworn copy of a record of another court may suffice it is not unusual for the record itself to be brought in. In Taylor on Evidence, § 1377, it is said: "The general records of the realm, which are placed under the custody of the Master of the Rolls, may be proved by copies purporting to be verified by the deputy-keeper of the records, or one of the assistant record-keepers, and to be sealed and stamped with the seal of the record office; and in cases of importance before the House of Lords or elsewhere, permission will be given to one of the assistant keepers to produce the original record." In § 1378, it is also said: "The records of the superior courts may either be proved by the mere production of the originals, or, — as this course would be highly inconvenient to the public if generally adopted, since it might lead to mutilation or loss of valuable documents, — they may be proved by means of *copies*. Of these, there are four kinds; viz., exemplifications under the Great Seal; exemplifi-

cations under the seal of the particular court where the record remains; office copies; and examined copies." This shows that originals are admissible as evidence, if properly authenticated. We do not see how it could well be more satisfactorily authenticated than it was, namely, by the certificate annexed to it by the Secretary of State of Coahuila, and by the actual identification of it, made by the said secretary and his keeper of records when examined as witnesses in the cause. The objection that it was irrelevant is certainly untenable. It was one of the links in the defendants' chain of title. They were not bound to rest on the *testimonio* of the same document introduced in evidence by the plaintiff, nor on that introduced by themselves. They were entitled, if they chose, to put in the very original itself, even if it were cumulative evidence. As to the uses to which it might be applied, being admissible as evidence, it might go before the jury, and be used, under the charge of the court, for all legitimate purposes in the cause. It was certainly available as a link in the defendants' chain of title, if for nothing more.

The defendants contended that the signature purporting to be that of Rabago, appended to the application, might be examined by the jury as a standard of comparison of Rabago's handwriting, on the question whether the signature purporting to be his on the other paper, namely, the power of attorney from Rabago to Victor Blanco, was genuine or not. This was resisted by the plaintiff on the grounds stated above; and, before the cause went to the jury, the plaintiff requested the court to charge that, at the date of the signature to the application, the law did not require it to be signed by Rabago; and that it should only be considered as one of the links in the chain of defendants' title, and not for the purpose of comparison of handwriting; and that the jury should not consider such signature as the signature of Rabago for that purpose. The court refused to give this instruction, and the plaintiff excepted; and the court then charged the jury on this point as follows, to wit:

"The defendants have also offered a paper which purports to be the original application of Miguel Rabago for this conces-

sion, which purports to be signed by said Rabago in person — that is, by himself, and have offered proof to the effect that this paper came from the office of the archives at Saltillo, which is the proper custody for said original application and decree, and to the effect that the signatures of Governor Viesca and of the secretary are genuine, with proof as to the circumstances of the finding said paper, and manner [of] keeping said archives, and if you believe from the proof that said paper so offered by the defendants is as old as its date imports, that it has been preserved in the archives as the initial paper connected with this grant, you may give these circumstances the weight of direct testimony to the genuineness of said signature, and if the other proof in the case does not in your judgment overbear this weight you may find the signature to this original application to be the proved signature of Miguel Rabago, and use it as a standard of comparison to aid you in determining the genuineness of the signature to the writing purporting to be a letter power from said Rabago to Victor Blanco."

To which charge of the court the plaintiff's counsel objected and excepted for the following reasons:

1st. The charge is upon the weight of evidence.

2d. It submits to the jury a question which should be decided by the court.

3d. It submits to the jury a paper for the comparison of handwriting which is neither proven nor admitted to be genuine, nor to be signed by the genuine signature of Miguel Rabago.

The first and second reasons are certainly not well assigned. The charge does not take from the jury the determination of the weight of the evidence; nor does it submit to the jury a question of law determinable only by the court. Whether the signature appended to the application, purporting to be Rabago's, if the jury believed it to be his, might legally be used by them as a standard of comparison to aid them in determining the genuineness of the signature to the writing purporting to be a letter power from Rabago to Blanco, is the important question arising upon the charge.

Opinion of the Court.

It is well settled that a witness who only knows a person's handwriting from seeing it in papers produced on the trial, and proved or admitted to be his, will not be allowed, from such knowledge, to testify to that person's handwriting, unless the witness be an expert, and the writing in question is of such antiquity that witnesses acquainted with the person's handwriting cannot be had. (Greenl. on Ev. § 578.) It is also the result of the weight of authority that papers cannot be introduced in a cause for the mere purpose of enabling the jury to institute a comparison of handwriting, said papers not being competent for any other purpose. (Greenl. on Ev. §§ 579, 581.) But where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. *Griffith* v. *Williams*, 1 Crompton & Jervis, 47; *Doe dem. Perry* v. *Newton*, 5 Ad. & El. 514; *Van Wyck* v. *McIntosh*, 4 Kernan (14 N. Y.) 439; *Miles* v. *Loomis*, 75 N. Y. 288; *Medway* v. *United States*, 6 Ct. Cl. 421; *McAllister* v. *McAllister*, 7 B. Mon. 269; 1 Phil. on Ev. 4th Am. Ed. 615; Greenl. Ev. § 578. The history of this last rule is well stated in *Medway* v. *United States*, *qua supra*. In *Griffith* v. *Williams* it was stated by the court that "where two documents are in evidence, it is competent for the court or jury to compare them. The rule as to the comparison of handwriting applies to witnesses who can only compare a writing to which they are examined with the character of the handwriting impressed upon their own minds; but that rule does not apply to the court or jury, who may compare the two documents when they are properly in evidence." In *Doe* v. *Newton*, Lord Denman said: "There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can under circumstances which cannot be helped." The other judges expressed

substantially the same view. "The true rule on this subject," said Justice Johnson, in *Van Wyck* v. *McIntosh*, (4 Kernan 439, 442,) "is that laid down in *Doe* v. *Newton*, that where different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other instruments or signatures cannot be introduced for that purpose." See Amer. note to *Griffith* v. *Williams*, 1 Cr. & Jerv. 47, Phil. Ed.

This rule is not contravened by the decisions of the Supreme Court of Texas or of this court. The leading case in Texas on comparison of handwriting is *Hanley* v. *Gandy*, 28 Texas, 211, which only decides that other papers, not connected with the cause, cannot be introduced for the mere purpose of instituting a comparison of handwriting. No case decides that a signature to be proven cannot be compared by the jury with other papers or signatures of the party, properly in evidence in the cause. *Strother* v. *Lucas*, 6 Pet. 763, the leading case in this court, relates to the competency of a witness to testify as to the genuineness of a signature without having any knowledge of the party's handwriting; and the court held that such evidence was not admissible. The case of *Moore* v. *The United States*, 91 U. S. 270, affirms the rule in question in cases where the paper used as a standard of comparison is admitted to be in the handwriting of the party, or where he is estopped from denying it to be so; it does not disaffirm the rule as applied to cases where the standard is clearly proved to be in such handwriting. In that case the paper referred to as the standard of comparison was the claimant's power of attorney given to his attorney in fact, by virtue of which the latter presented his case to the Court of Claims. It was held that he was estopped from denying that the signature to the power was in his handwriting. The present case is quite similar to that. The plaintiff himself claims title under the very application of Rabago, the signature to which is claimed to be a proper standard of comparison of Rabago's handwriting. Is he not estopped from denying it to be Rabago's hand? His counsel say that

at that period of time the application did not require the party's signature. Even if this be so, still it is proved that Rabago was at Saltillo at the time the application was made, and it purports to be signed by him, and not by any person for him; and, if the document is the real protocol of the application as presented, it is to be presumed, at least until the contrary is shown, that the signature which it bears is the real signature of Rabago. Whether the document is or is not the real protocol of the application as presented, was fairly left to the jury under the circumstances and evidence of the case — which, we may add, were so strong and convincing that the jury would not have been justified in finding in the negative. The evidence, indeed, was such as abundantly to satisfy the condition, that the paper referred to as a standard of comparison must be clearly proved to be genuine. We think that the charge of the court was right.

The defendants next offered in evidence, as an ancient instrument, the alleged original power of attorney from Rabago to Victor Blanco, found by the witness Klieberg in the old trunk, at Galveston, a copy of which, with the indorsements thereon, has been already given. The plaintiff objected to its admission for the following reasons, to wit:

First. Having been in the trunk since March, 1836, it could not have been the instrument by virtue of which title passed from Rabago in the city of Mexico, by deed from Blanco to Laguerenne on the 25th of May, 1836.

Second. The recitals in the deed contradict the evidence of Williams and Klieberg, under whose testimony it is introduced.

Third. It cannot be introduced as an ancient instrument, because, —

1st. No possession was ever held under it, it not coming to the possession of the defendants for forty years after its execution.

2d. It is suspicious on its face by reason of not being acknowledged, certified to, witnessed, nor written on sealed paper.

3d. It does not come from the proper custody.

Fourth. It is not such an instrument as would have passed title to land in 1832 or in 1836.

1st. It is not acknowledged, witnessed, certified to, nor written on sealed paper.

2d. No summons was served upon the grantor to appear before an official for the purpose of rendering it an authentic or judicial act.

Fifth. The power to Blanco, if any, could not pass an equitable title, if any, which could not be cognizable in a court of law.

Sixth. It is not made part of the Laguerenne deed.

Seventh. If it conveyed any power, it was divested out of and from Blanco by the indorsement and delivery to Samuel May Williams in 1833.

Eighth. It appears to have been executed, if at all, before six years from the issuance of the concession, and does not bind the attorney nor his vendees to cultivate the land.

Ninth. If genuine, it was revoked by the war of 1835, the revolution between Texas and Mexico, and the constitution of March 17th, 1836.

Tenth. It cannot act as power to make a parol or verbal sale, because no possession was taken under it within a reasonable time.

These objections were overruled, the paper admitted in evidence, and the plaintiff excepted; this being the fourth exception taken at the trial.

The objections made against the admission of the paper seem to be either entirely unfounded, or trivial in their character. It is not testified by William H. Williams that it had been in the black trunk ever since March, 1836; he could not know such a fact, for he was only born in 1833. He only says that it was probably placed in the trunk by his mother at the time of the "runaway scrape" (which took place on the advance of Santa Anna in March, 1836); that from his mother's statements, she had his father's papers with her at that time, and that she kept them until her death, and the witness has kept them from that time until now; that the trunk was either in his father's or mother's possession, until it came into his; that his earliest recollection of it was in 1840, at their house in Galveston, where it remained until 1859; but that it was tradition-

ally known to witness to have been with the family at San Philipe de Austin and at Quintana, and afterwards at Galveston; that from 1836 to 1838 his father and mother lived at Quintana, at the mouth of the Brazos River.

There is nothing in this testimony inconsistent with the fact that Blanco may have transmitted the paper to Samuel M. Williams after the execution of the deed to Laguerenne in Mexico in May, 1837. As it was Williams's authority for taking possession of the property, and not recited in the final title papers, he may have wished it returned to him.

There is nothing in the recitals of the deed to Laguerenne repugnant to the above hypothesis. That deed (which will be more particularly mentioned hereafter) begins as follows: "Before me, notary public and witnesses, Don Victor Blanco, in name of Don Miguel Rabago, in virtue of letter power which has conferred on him for various purposes, among which is comprised the faculty that he can sell and may sell the lands which he has in Texas, which he showed to me, which I have seen, read, and returned to the party, and to it in his possession I refer, — said: That the aforesaid Don Miguel Rabago possesses," etc. [then proceeding in the usual form of an act of sale]. There is no recital here at all inconsistent with the testimony of Williams or of Klieberg; and, as the notary certifies that the power was exhibited to him, Blanco had no occasion to retain it in his possession. Besides, he was a near relative and friend of Rabago, and did not require it.

The other reasons given for objecting to the admission of the power are equally untenable. It is said that no possession was ever held under it, it not coming into the defendants' possession for forty years after its execution. This is not true. The possession of the defendants and of those whose title they hold was always under and by virtue of the instrument. If property passes through a dozen hands in the course of forty years, each keeping in his own possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given. The

paper is said to be suspicious on its face, for want of acknowledgment, etc., and that no summons was served on the grantor to appear before an official to render it an authentic or judicial act. It is enough to say that none of these things affect the validity of the instrument; and the circumstances of the case and of the time are sufficient (if any reason is necessary) to account for the absence of these formalities. Besides, they relate more especially to the effect of the instrument than to its admissibility as an ancient document; and in that regard will be examined under the seventh exception, hereafter considered. We see nothing in the other objections to call for remark, except the one that supposes the power was divested out of Blanco by the indorsement and delivery to Samuel M. Williams. This is not so. The indorsement merely gives Williams power to "take possession of the eleven leagues." The power to sell was not transferred. This very fact suggests the reason why the power was returned by Williams to Blanco after the possessory title had been completed. Blanco would want it for the purpose of enabling him to make a sale. The more we consider the circumstances, the more clear it appears that the evidence is entirely harmonious, and consistent with itself. We think that the paper was properly admissible as an ancient writing. It is unnecessary to dilate on the subject of ancient documents in general, and when they are admissible. We are of the opinion that all the conditions of admissibility were satisfied in this case.

But there is another reason why it is proper that we should so hold. The case was once before the Supreme Court of Texas on an appeal taken to set aside the verdict rendered on a former trial, and that court held, under the same evidence used at the trial in the Circuit Court, that the document was admissible in evidence as an ancient one. If the action had originally been brought in the Circuit Court upon proper jurisdictional grounds, and had been tried as it was in the state court, and if, on a writ of error from this court, we had decided as the Supreme Court of Texas did, — we should have felt bound by our first decision. We would not have allowed it to be questioned. *Clark* v. *Keith*, 106 U. S. 464. The

present case is in exactly the same category. The removal of the cause from the state court does not put us in the position of a court of review over the Supreme Court of Texas. When it acted, it was the highest court that could act in the cause, and stood in precisely the same position that we stand now. Its action must be accepted by us as that of a court having plenary and final jurisdiction.

By the fifth exception, objection is made to that portion of the judge's charge in which he says: "By the law in force at the time this letter power of attorney purports to have been transferred to Samuel May Williams (April 3d, 1833), authorizing him to solicit title to and take possession of said eleven leagues, and at the time said Blanco made his deed to Laguerenne, Blanco could have procured, if he desired, and retained in his possession a legal copy of the power of attorney, which would have all the force and effect of the original; and although the original might at the time be in Samuel May Williams's trunk, in Texas, Blanco's conveyance to Laguerenne would not on that account be without authority if the said paper in Williams's trunk was a genuine paper giving him such power. Such power, if conferred, was conferred on the one named, and remained with him, whether evidenced by the original writing or such copy."

It is objected that there is no evidence that any attempt was ever made by Blanco to obtain such a copy; and that none could have been obtained, because the original had never been an archive of any office. This same objection was before the Supreme Court of Texas. That court seems to have adopted the hypothesis that Williams never returned the power to Blanco, and that the latter, therefore, did not return it to Williams after making use of it in the sale to Laguerenne. The court says: "Where should we have expected to find the instrument? Certainly we would infer that it should have been placed by the commissioner to whom it was presented either with the papers pertaining to the title which he issued for the land, or have been returned to the party by whom it was presented to him. But as the title shows that it was not incorporated into it, as is most usual when the power is an au-

thentic act, we should expect to find it in the custody of Williams, in whom the title and possession of it purports on its face to be vested; or, if not, that he would have transmitted it to his principal, Blanco. But as the latter appears to have taken the precaution to have another power of like effect from Rabago, or to have secured an official copy of this one before remitting it to Williams, there was no necessity for its being returned to him." Certainly there is nothing unreasonable or improbable in the hypothesis that the paper should have been executed in duplicate, in view of the fact that the possessory title to the land had yet to be obtained, and some person in Texas would have to be authorized to attend to it. We think, therefore, that the judge was justified in making the charge he did, and that the jury could not have been misled by it. The fact that Blanco had the original, or a copy, in Mexico on the 25th of May, 1836, does not detract from the force of the presumptions in favor of the power found in the trunk.

The sixth exception was taken to that portion of the charge which related to the evidence proper to be taken into consideration on the question of the genuineness of the power of attorney and its effect. The portion of the charge referred to is as follows, to wit:

"The defendants introduced testimony tending to show that as early as 1838 Hammekin had placed in his possession the deed from Blanco to Laguerenne, referring to such a power of attorney; that he insisted on having an authenticated copy of said power furnished him; that very soon thereafter he received said copy of said power, which he placed (with other title papers) in the hands of his agent, retaining a copy made by said Hammekin, which copy has been given you, declared by the interpreter to be identical (with immaterial exceptions) in terms with the letter power offered by defendants; that Hammekin had placed the testimonio in the land office as required by law of persons having such evidence of title to land in Texas; that said Hammekin paid the government dues on said grant, had paid taxes, had sent agents on the land as early as the growing settlement of the country so far freed this section of the country from the hostile Indians, as permitted its occupancy, and

the assertion of ownership by assuming actual control of it, and that Hammekin and those to whom he conveyed and the defendants claiming under them had continued to assert ownership to these lands under said power of attorney, and if, in your judgment, said proof establishes such facts, and the proof as to the age and custody of the said letter power satisfies you that said paper is as old as its date imports, and has been in the custody that said evidence indicates, you may consider this proof equal to the direct testimony of at least one witness to the signature of Miguel Rabago; and unless in your judgment the evidence of plaintiff's witnesses and all the circumstances of these parties and these transactions as shown by all the testimony proves that Miguel Rabago did not sign said letter power, you will find said letter power to be genuine, and return your verdict for the defendants."

To this extract from the charge the plaintiff's counsel objected —

1st. Because it is a charge upon the weight of evidence.

2d. It is in itself an incorrect statement of law.

The plaintiff's counsel seem to overlook the language of the charge. The court did not say that such and such facts were proved, but that the defendants introduced testimony tending to show such facts; and left the testimony with the jury. Besides, we have repeatedly held that the court may give to the jury its opinion on the weight of evidence. We see no error whatever in the charge.

The seventh exception was taken to a portion of the charge which instructed the jury that if the papers and documents relied on by the defendants, and constituting their chain of title, were genuine, they conclusively show that Rabago parted with his title in his lifetime, and no right to it could pass to his heirs by descent, and that the defendants by reason of their right thus acquired would be entitled to a verdict. The ground assigned for this exception was that the letter power of attorney was not such an instrument as could convey land in Texas at that time, because it was not an authentic instrument, being neither acknowledged, witnessed, certified to, nor written on sealed paper, nor proved before a notary;

and no summons was even served on Rabago to appear before an official for the purpose of rendering it an authentic or judicial act. We apprehend that the want of the formalities referred to merely affects the mode of authenticating the instrument. If it is passed before a notary public and witnesses, and is certified as a *testimonio*, it is called an authentic instrument and proves itself. If not thus authenticated, it must be proved to have been executed by the party to be charged with it. *Watrous* v. *McGrew*, 16 Texas, 506, 509, 513; *Andrews* v. *Marshall*, 26 Texas, 212; *Jones* v. *Montes*, 15 Texas, 351, 352; *Chambers* v. *Fisk*, 22 Texas, 504; *Gonzales* v. *Ross*, 120 U. S. 605, 624; *Hanrick* v. *Barton*, 16 Wall. 166, 171, 172. The appellant relies upon a passage in Escriche (*verbo* Poder) where he says that a power of attorney is to be made before a notary public, and to have certain formalities described. But he there refers to the technical power called, in the Spanish law, *poder*, or *procuracion*, having much the same meaning as our term "power of attorney," which indicates a power or authority under seal. But the technical *poder* is not the only form by which authority may be given to act for another. A technical power, executed with all the solemnities, is but one form of a mandate (*mandato*, *mandamiento*). Under the word *mandato*, the same Escriche says: "Mandate. A consensual contract, by which one of the parties confides the carrying on or execution of one or more matters of business to the other who takes it in his charge. . . . Mandate has also the name of procuration, and the mandatary that of procurator; but the word mandate is more general and comprehends every power given to another in whatsoever mode it be, whilst procuration supposes a power given by writing." Again: "The mandate may be contracted between persons present, or absent, by words, by messengers, by public writing or private writing, and even by letter, as likewise by acts; *e.g.*, if a person, being present, allows another to transact his business, &c." See farther to the same effect, Azo and Manuel's Institutes, Book II, Tit. XII; Tapia's Febrero Novisimo, Book II, Tit. IV, c. 13, 14; Partida V, Tit. XII, L. 24.

In the present case the parties were not in the same place; Rabago resided in the State of Coahuila, and Blanco in the city of Mexico; so that the making of the power in the form of a letter was the very form allowed by the laws in such a case. As before said, the only difference it made was in the proof necessary to authenticate the instrument in legal proceedings.

As to the objection that this form was not sufficient to authorize an act of sale, but that it required a power executed under the same solemnities as the act of sale itself, we know of no such rule in the Spanish or Mexican law. The English rule as to the requisites of a power to execute sealed instruments has no application to the case.

The eighth exception related to the admission in evidence of Hammekin's copy of the power of attorney. He testified that when he purchased the land from Laguerenne, through Priolland, the latter had no copy of the power from Rabago to Blanco, and he (Hammekin) made it a condition that a copy should be furnished to him; and that soon after he received a certified copy, which he delivered to his agent, Rose, with the other papers, and with them has been lost. He testified, however, that he took an exact copy of this certified copy before giving the latter to Rose, and had it yet; and it was in evidence in the case and was found to be an exact copy of the power found in the old trunk, with the exception of a date being written in words at length in place of figures, and an abbreviation being written in full words. This copy made by Hammekin himself (called the "Hammekin copy") is the paper whose admission in evidence was objected to. The plain answer to the objection is, that it was not offered nor admitted as a muniment of title, but merely to show the fact that there was such a paper in existence in 1837 as that found in the trunk, which fact had a legitimate bearing on the question whether the latter was an ancient instrument. For this purpose, it was certainly admissible.

The ninth exception related to the admission in evidence of a copy of the deed, or act of sale, executed by Victor Blanco, as attorney for Rabago, to Laguerenne, dated May 25th, 1836;

and of a copy of the power of attorney given by Laguerenne to Priolland to sell his real estate. The copies offered in evidence by the defendants were certified copies. That of the deed of May 25th, 1836, was taken in the city of Mexico from the original protocol of the deed in the notarial archives, or records, of the deceased notary, Miguel Diez de Bonilla, before whom the deed purported to be executed. It appeared by the testimony of one Crescencio Landgrave, a notary public of the city of Mexico, that these archives, with those of other deceased notaries, had been collected and placed in the public archives of the city of Mexico, under the charge of different notaries. Landgrave testified that he had general charge of said archives, and the particular charge of those of Bonilla, whom he knew, and with whom he was intimate; and that he knew Bonilla's signature appended to the different documents in the archives, and, in fact, received them from his own hands in his (Bonilla's) lifetime. He further testified that the protocol of the deed from Rabago, through Blanco, to Laguerenne, was among the archives of Bonilla, and that he, as the custodian thereof, made an official and duly certified copy of said deed (which was the copy offered in evidence); the certificate annexed to the copy being in the words following, to wit:

"I certify and give faith that the preceding copy is faithful and exact to the letter of the original document which exists on folio 37 to folio 40 of the protocol of my deceased companion, Don Miguel Diez de Bonilla, which I have under my custody in the archives of the city which is under my charge, from whence the present was taken in order to deliver it to the consul of the United States of the North, in Mexico, by virtue of judicial mandate, this 15th December, 1874, in presence of Don Miguel Moral and Don Manuel Correo, of this vicinity. (Between Parenthesis:) All not valid.

"[L. S.] (Signed) CRESCEN. LANDGRAVE."

The official authority of Landgrave is authenticated by the certificates of three other notaries, of the Governor of the Federal District, of the chief official of the Department of Foreign

Affairs, and of the United States consul, each certifying to the authority of the preceding.

Landgrave further testified that his brother in office, notary public Antonio Ferreira, had charge of the records of the deceased notary Francisco Madriago, before whom the power of attorney from Laguerenne to Priolland, before referred to, purports to have been executed.

A certified copy of this power of attorney, certified by Ferreira, and authenticated in the same manner as the deed to Laguerenne, was the copy offered in evidence by the defendants, the power being dated January 10th, 1837, and its protocol being among the archives of the deceased notary Francisco de Madriago. This power of attorney authorized said Priolland to sell and dispose of all and any real estate belonging to Laguerenne wherever situated.

It is unnecessary to examine in detail the reasons assigned by the plaintiff for objecting to the admission of these papers in evidence. We think that they were properly and sufficiently authenticated, and that the judge committed no error in admitting them.

The only other exception related to the citizenship of Laguerenne. The plaintiff alleged that it was not shown that he was entitled to convey land in Texas in May, 1837, but that he was disabled to do so by reason of his being a citizen of France, and an alien to the government of Texas. The only direct statement as to his citizenship is that contained in the said power of attorney which he executed, and which begins as follows: "In the city of Mexico, on the 10th day of January, 1837, before me [Madriago], a notary public, and witnesses, personally appeared Don Guillermo Laguerenne, a citizen, and of the commerce of this place, in whom I have faith and know," &c. There is no testimony in the case sufficient to overthrow the presumption arising from this recital. Hammekin says that he does not recollect whether he was an American or a Frenchman; that in May, 1836, he was established as a merchant in the city of Mexico; that he had a brother in Philadelphia much older than himself, who was a merchant in that city for many years. This is all the evidence

on the subject. It must be received, therefore, that he was a citizen of Mexico. As to citizens of Mexico, it is well settled that they never lost the right of disposing of their Texas lands by the division of the empire. *Airhart* v. *Masseiu*, 98 U. S. 491, 493, 497.

Having considered all the material questions raised by the plaintiff in error, and being of opinion that he has not succeeded in showing any error in the judgment of the court below, the same is

Affirmed.

WASHINGTON ICE CO. *v.* WEBSTER.

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

No. 150. Argued January 30, 31, 1888. — Decided April 2, 1888.

In Maine, the plaintiff in a replevin suit for ice, gave a bond, with sureties, to the defendant, in the penalty of $30,000, conditioned to prosecute the suit to final judgment, and pay such damages and costs as the defendant should recover against them, "and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment." The ice was stated in the bond to be of the value of $15,000. In the suit there was a judgment for a return of the ice to the defendant, and for an amount of damages ascertained by the jury by allowing interest from the time the ice was taken, on a sum found to have been its value where and when it was taken, and also allowing the expenses of the defendant in preparing to remove the ice. The damages were paid but the ice was not returned. In a suit on the bond, *Held*,

(1) The plaintiff in that suit was entitled to recover what the jury in the replevin suit had found to have been the value of the ice where and when it was taken, with interest thereon from the date of the verdict in the replevin suit;

(2) It was not competent for the obligors in the bond to show that the ice was of less value than the amount stated in the writ of replevin and the bond; but it was competent for the obligee to show that such value was greater;

(3) The finding of the jury in the replevin suit as to the value of the ice where and when it was taken, was competent and conclusive evidence, as against the obligors, of such value.

DEBT upon a replevin bond. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Albert P. Gould for plaintiffs in error.

Mr. Benjamin F. Butler for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 12th of August, 1870, the Washington Ice Company, a New York corporation, procured from the Supreme Judicial Court of the State of Maine a writ of replevin, directed to the sheriff of the county of Lincoln, in that State, commanding him to replevy "a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain ice-houses situate in the town of Boothbay, in the county of Lincoln and State aforesaid, and owned or occupied by Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, belonging to the Washington Ice Company, . . . now taken and detained by Nathaniel Webster, . . . and them deliver unto the said The Washington Ice Company," and summon the defendant to appear before the court within and for the county of Lincoln on the fourth Tuesday of October, 1870, to answer unto the plaintiff in a plea of replevin, for that the defendant, on the 1st of August, 1870, at said Boothbay, unlawfully took the goods of the plaintiff as aforesaid and them unlawfully detained; "provided they, the said plaintiffs, shall give bond to the said defendant, with sufficient sureties, in the sum of thirty thousand dollars, being twice the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said defendant shall recover against them; and also to return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment."

The sheriff made a return to the writ, dated August 13th, 1870, as follows: "By virtue of this writ I have taken the ice

within named, as the property of the within-named Washington Ice Company, and, on the nineteenth day of August, A.D. 1870, I delivered said ice to Hiram Perkins, whom the Washington Ice Co. designated as their agent to receive said ice; and, on the nineteenth day, I summoned the within-named Nathaniel Webster, by reading this writ in his presence and hearing, for his appearance at court — the quantity replevied, by actual weight, being about twenty-five hundred tons."

Webster pleaded the general issue to the writ, at October Term, 1871, and filed a brief statement and special matter in defence, setting forth, that, at the time of the alleged taking, as stated in the writ, the ice named therein was not the property of the plaintiff, nor had the plaintiff any right to the possession thereof, but it was the property of the defendant and one Babson, and was rightfully in the possession of the defendant, and was wrongfully taken from his possession by the plaintiff; and prayed judgment for the return of the ice in like good order and condition as when it was taken from the possession of the defendant, and for damages for such taking and detention, and for costs.

The case came on for trial before a jury, and evidence was put in; but the case was taken from the jury and submitted to the full court, on the report of the evidence by the judge, and transferred to the Supreme Judicial Court for the Middle District. It was there heard, and is reported as *Washington Ice Co.* v. *Webster*, 62 Maine, 341.

It is there stated, that the case came before the full court under an agreement that, if the action was maintainable, it was to stand for trial, but otherwise a nonsuit was to be entered. On June 26, 1874, the order of the full court was received, in these words: "The nonsuit to stand, judgment for return of the goods replevied, damages to the time of taking to be assessed at *nisi prius*, if the defendant so elect, or he may, if he prefer, resort to his remedy on the bond." The case was then continued to October Term, 1874, when the defendant elected to have his damages assessed by a jury. The case was then continued to April Term, 1875, when leave was granted to the officer who served the writ, to amend his

return thereon in accordance with the facts; and thereupon he made the following as his amended return, which was allowed by the court, such amended return bearing date August 13, 1870: "By virtue of this writ, having first taken a bond as prescribed by law, I have this day replevied all the ice by me found in the ice-houses within mentioned, all of which said ice I caused to be weighed on delivery at the wharf in said Boothbay, about three miles from said ice-houses, being the nearest place thereto where ice could be shipped — twenty-two hundred and ninety-seven tons and nineteen hundred and twenty-one pounds of which was thus weighed on successive days, portions of it on each week day between the twenty-third day of August, 1870, and the sixteenth day of September, 1870, and thirty-three tons and nineteen hundred and thirty pounds thereof was thus weighed on three several days between the twenty-sixth day of September, 1870, and the twenty-sixth day of October, 1870, the whole of said ice thus taken by me weighing twenty-three hundred and thirty-one tons and eighteen hundred and fifty-one pounds, and, on the nineteenth day of said August, 1870, I delivered all the said ice at said ice-houses to the plaintiff, reserving to myself authority to weigh the same; and, on the nineteenth day of said August I summoned the within-named Nathaniel Webster to appear at court, as within directed, by reading this writ aloud in his presence and hearing."

The action of replevin was tried by a jury, and the presiding judge submitted to them to find, in addition to their verdict, answers to two questions; and the jury, on the 14th of May, 1875, returned the following verdict: "The jury find that the defendant was damaged by reason of the taking of the property replevied in the suit, and assess damages for the defendant in the sum of six thousand five hundred and fifty-five dollars." They also returned answers as follows to the questions submitted to them: "First. What was the value of the ice replevied, where it was situated, at the time it was taken in this suit? Answer. Twenty thousand and sixty-nine dollars and thirty-three cents. Second. What damage did the defendant sustain by reason of the taking of the ice in

replevin, on account of the preparations he had to make to remove it? Answer. Eight hundred and thirty-five dollars and twenty-five cents." The plaintiff filed exceptions to the rulings of the judge in matters of law, and also moved to set aside the verdict. The evidence was reported to the full court, and the case was transferred to the Supreme Judicial Court for the Middle District, where it was heard, and is reported as *Washington Ice Co.* v. *Webster*, 68 Maine, 449. The decision of the court was, that the motion and exceptions should be overruled. Thereupon, a judgment was rendered by the lower court, on the 4th of May, 1878, that the property replevied be returned and restored to Webster irrepleviable, and that he recover against the Washington Ice Company $7723.98, damages for the taking and detaining of the property replevied, being the amount of the verdict, with interest thereon to the date of the judgment, and also $477.67, costs of suit.

On the 31st of July, 1878, a writ of return was issued on the judgment. It recited that the Washington Ice Company had replevied the 2331 tons and 1851 pounds of ice, of the value of $20,069.33, and set forth the terms of the judgment for the return, and for the recovery of the $7723.98 damages for the taking and the $477.67 costs, and commanded the sheriff that he forthwith return and restore the said property to Webster, and collect the said sums of money from the Washington Ice Company, with interest from the 4th of May, 1878. On the 19th of August, 1878, a demand was duly made upon the Washington Ice Company, for the return of the ice mentioned in the writ of restitution.

On the 17th of September, 1878, the Washington Ice Company paid to Webster $8379.36 in full for such damages and costs, and interest. The receipt given by Webster for the amount contained this clause: "This receipt not to affect any further claim of the within-named Webster for the ice named in said writ, or for any further damages or costs that may be recovered or recoverable by said Webster."

Before delivering the ice to the plaintiff in the original writ of replevin, the sheriff, as commanded by the writ, and as

stated by him in the amended return, exacted a bond in the penalty of $30,000, dated August 12, 1870, executed by the Washington Ice Company, as principal, and Josiah H. Drummond and William E. Gould, to Webster, the condition of which was as follows: "The condition of the above obligation is such, that, whereas the said The Washington Ice Company have this day commenced against the said Nathaniel Webster an action of replevin for a certain lot of ice, being about thirty-eight hundred tons of ice, now lying and being in certain ice-houses situate in the town of Boothbay, in the county of Lincoln, and State of Maine, owned or occupied by Nathaniel Webster, of Gloucester, in the county of Essex and Commonwealth of Massachusetts, of the value of fifteen thousand dollars, which they say the said Nathaniel Webster has unlawfully taken: Now, therefore, if the said The Washington Ice Company shall prosecute the said replevin to final judgment, and pay such damages and costs as the said Nathaniel Webster shall recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment, then the said obligation to be void; otherwise, to remain in full force."

On the 13th of February, 1879, Webster brought the present action of debt, in the Circuit Court of the United States for the District of Maine, against the Washington Ice Company and Drummond and Gould, founded on the said bond. The defendants appeared, and by their plea prayed oyer of the bond and its condition, and set forth the condition, and pleaded that they had kept all the conditions of the bond except the following, namely, "and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment;" that, as to that condition, they had not kept it; that final judgment had been rendered against them in the replevin suit mentioned in the condition, for a return of the goods and chattels replevied therein; that they had not returned the same to the plaintiff according to the requirement of said condition; and that they, therefore, submitted to the judg

ment of the court and prayed that they might be heard by the court in equity in the assessment of the damages for the breach of the last mentioned condition. On the 12th of October, 1880, the defendants filed an offer to be defaulted, and that judgment might be rendered against them for $16,000 and legal costs, and execution might issue against them for the same. That offer was declined by the plaintiff on the 1st of November, 1880. At September Term, 1882, the case was tried before the Circuit Court on the filing of a written stipulation waiving a jury. At the conclusion of the trial, the court directed a judgment for Webster against the defendants to be entered, for $28,990.14, and costs, which was done. To review that judgment, the defendants have brought this writ of error.

There is a bill of exceptions, upon which various questions are raised by the plaintiffs in error. At the trial, the plaintiff introduced in evidence the original writ of replevin in the suit in the state court, the return and the amended return, the pleadings in that suit, the record of the judgment and of the proceedings of the court therein, and the two orders of the full court. The defendants objected to the admission of the following question to the jury and their answer thereto, recited in the record of the proceedings in the replevin suit, namely: "What was the value of the ice replevied, where it was situated at the time it was taken in this suit? Answer. Twenty thousand and sixty-nine dollars and thirty-three cents." The court overruled the objection and admitted the question and answer, and the defendants excepted.

The plaintiff then introduced in evidence the writ of return, and the fact of the making upon the defendants of the demand for the return of the ice replevied, and the receipt given by him to the Washington Ice Company for the damages, costs, and interest awarded by the judgment of May 4, 1878. He also introduced in evidence the bond sued upon.

The bill of exceptions then proceeds as follows: "The plaintiff thereupon contended, that the defendants were estopped to deny that the goods replevied were at least of the value set forth in the writ of replevin and in the replevin

bond, (being the bond in suit,) at whatever time that value is to be assessed, but that the plaintiff was not precluded from showing that they were of greater value.

"The defendants claimed that they were not thus estopped or precluded, and offered evidence to show that the value of the ice replevied was less than ten thousand dollars, at whatever time such value is to be assessed, and submitted to the court the following prayer for a ruling on this subject, viz.: That the defendants are not estopped to prove that the value of the goods replieved was less than fifteen thousand dollars by reason of the insertion of that sum in the replevin writ and bond as the value of the goods which the officer in that writ was commanded to replevy.

"The court rejected the evidence offered, and overruled this prayer of the defendants, and ruled that the defendants are estopped as is contended by the plaintiff, and that the plaintiff is not precluded from showing that the value of the goods replevied was more than fifteen thousand dollars. To which rejection of evidence and ruling the defendants then excepted.

"The defendants contended that the statement of the officer who served the replevin writ, in his returns thereon, of the quantity of goods actually taken by him on the writ of replevin, is competent and conclusive evidence of that quantity, in the trial of this action upon the replevin bond, and submitted to the court a prayer for a ruling to that effect.

"The plaintiff contended that the statement of the officer, in his return, of the quantity of ice replevied, being indefinite in the first return, and in the amended return being of weights taken at a different place from that at which the ice was replevied, and at subsequent times from that of the taking, was not evidence of the quantity of the ice replevied.

"The court overruled the said prayer of the defendants in this respect, and ruled that neither of the returns was conclusive evidence of the quantity taken by the officer upon the replevin writ. To which rulings the defendants then excepted.

"It was admitted by the plaintiff that the damages which were assessed in the action of replevin, for the taking and detention by the plaintiff in that action, of the property

replevied therein, with the interest thereon, and the costs recovered in that action, with interest thereon, have been fully paid, and that the judgment in that action, awarding to the defendant in the same the sum of seven thousand seven hundred and twenty-three dollars and ninety-eight cents damages, and his costs of suit taxed at four hundred and seventy-seven dollars and sixty-seven cents, has been fully satisfied.

"Thereupon the defendants contended, that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like description, character, and intrinsic value, at the date of the judgment in the action of replevin, and of the order therein that the property replevied be returned and restored to the said Nathaniel Webster, with interest thereon; and they offered evidence to prove, that the value of ice of like description, character, intrinsic value, and quantity as that replevied, at the place where the ice was replevied, and also at the place where the demand upon the writ of return was made, was less than ten thousand dollars at that time. The court rejected the evidence offered, and overruled this prayer of defendants. To which rejection of evidence and ruling defendants then excepted.

"The defendants thereupon offered evidence to prove that the value of the ice replevied was less than ten thousand dollars at the time the demand was made upon the defendant, The Washington Ice Company, upon the writ of return issued pursuant to the judgment, in the action of replevin, for a return of the goods replevied, viz., August 19th, A.D. 1878, and presented a prayer to the court for a ruling that the damages which the plaintiff is entitled to recover in this action are the value of the goods replevied, or of goods of like quantity, description, character, and intrinsic value as those replevied, at the date of said demand. But the court rejected the evidence offered, overruled this prayer of the defendants, and ruled that the plaintiff in this action is entitled to recover the value of the ice replevied at the time it was taken by the officer upon the replevin writ. To which rejection of evidence and rulings the defendants then excepted.

"The plaintiff contended that the finding of the value of

the ice replevied, by the jury which assessed the damages for taking the ice upon the replevin writ, against the plaintiff in that suit, in answer to the question submitted to them in that trial, 'What was the value of the ice replevied, where it was situated, at the time it was taken in this suit?' as appears in the record of the proceedings in the action of replevin, is evidence in this action upon the bond, and is conclusive against the defendants of the value of the ice, in determining the amount which the plaintiff is entitled to recover in this action, and moved the court for an entry of judgment against the defendants, for the sum found by the jury in answer to that question, viz., the sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of that finding, and that execution issue for such sum.

"The defendants resisted this motion, and contended that the value of the ice replevied was not a legal issue in the replevin action, and that they were not precluded from showing that the value of the ice was less than the sum thus found; and that said question and answer were not evidence to be taken into consideration in determining the amount which the plaintiff is entitled to recover in this action upon the bond; and they further contended, that, if the finding of value in the action of replevin furnished the rule of damages to be assessed in this action, interest thereon should be cast only from the date of the demand upon the writ of return, and not from the date of that finding by the jury.

"The court overruled the defendants' position, sustained the motion of the plaintiff, and ruled that the finding of value by the jury in the action of replevin was conclusive against the defendants, and ordered judgment to be entered for the sum of twenty-eight thousand nine hundred and ninety dollars and fourteen cents damages, and that execution issue for that sum, that being the amount of the said sum of twenty thousand and sixty-nine dollars and thirty-three cents, with interest thereon from the date of said finding, May 14, 1875. To which rulings of the court, order, and decision, and entry of judgment for damages, and each and every of them, defendants then excepted."

The positions of the parties as thus set forth in the bill of exceptions are those taken by them on the argument before this court. The material question in the case is, what damages the defendant shall pay for the failure to return the 2331 tons and 1851 pounds of ice to the plaintiff, after judgment for its return was rendered. The jury in the replevin suit assessed the damages of Webster at the sum of $6555. They also found the value of the ice replevied, where it was situated at the time it was taken in the replevin suit, to have been $20,069.33. The ice was taken, under the writ of replevin, on the 13th of August, 1870. The verdict of the jury was rendered on the 14th of May, 1875. The interest on $20,069.33, at the rate of 6 per cent per annum, from August 13, 1870, to May 14, 1875, a period of four years and nine months, was $5719.75. Add to that the sum of $835.25, found by the jury to be the damage sustained by Webster by reason of the taking of the ice in replevin, on account of the preparations he had to make to remove it, and it makes a total of $6555, which was the exact amount assessed by the jury as damages by reason of the taking of the property replevied. Thus, in the judgment in the replevin suit, Webster recovered, as damages, in addition to the $835.25, interest at the rate of 6 per cent per annum on $20,069.33, the value of the ice, where it was situated, at the time it was taken, from August 13, 1870, to May 14, 1875; and, in the present suit, he has recovered on the bond the sum of $20,069.33, as the value of the ice, where it was situated, at the time it was taken, and interest on that sum, at the rate of 6 per cent per annum, from May 14, 1875, to the date of the verdict of the jury in the present suit, such interest amounting to $8920.81. Therefore, in the two suits, taken together, Webster has recovered, as the value of his ice unlawfully taken from him by the writ of replevin on the 13th of August, 1870, its value as it was situated at that time, $20,069.33, and interest thereon from that date, at 6 per cent. per annum, to the date of the verdict of the jury in the present suit on the bond. This is equal and exact justice, and no more, so far as he is concerned. So far as the principal and the sureties in the bond are concerned, they obligated themselves

that the principal should return and restore the goods taken on the writ of replevin, "in like good order and condition as when taken." The article taken was ice, a perishable commodity. None of that taken on the 13th of August, 1870, can be supposed to have been in existence when the judgment of May 4, 1878, for its return, was rendered, or when the writ of return of July 31, 1878, was issued, or when the demand of August 19, 1878, for the return, was made. The same quantity of ice which was taken on the writ was, by the bond, to be returned, in like good order and condition as when taken. If a part of it had been returned in like good order and condition, and the rest of it had not been returned at all, or returned not in such like good order and condition, the obligors in the bond would have been liable for the value, at the time when taken, of what was not returned, and for the depreciation in value of what was not returned in like good order and condition. In no other manner could the condition of the bond have been satisfied, and the defendant in the writ of replevin have been made whole, according to the intent and purpose of the writ and of the bond, and of the statute of Maine, under which the bond was given. The writ and the bond were in the form prescribed by statute.

The principal argument on the part of the defendants in the present suit is, that in the statute of Maine, Rev. Stat. 1857 and 1871, c. 96, § 11, which provides, that, in a replevin suit, "if it appears that the defendant is entitled to a return of the goods, he shall have judgment and a writ of return accordingly, with damages for the taking and costs," the words "damages for the taking" mean all damages resulting from the taking and detention of the goods; that, if the defendant in replevin recovers judgment for a return of the goods replevied, he may, at his election, have the damages which he has sustained by reason of the taking and detention of them, to the time of such judgment, assessed in the replevin suit, or he may recover those damages in a suit on the bond, but cannot have both; that, if he elects, as he did in the present case, to have his damages assessed in the replevin suit, he cannot, in a subsequent suit on the bond, founded on a failure to return the

goods, recover any damages which accrued prior to the judgment in the replevin suit, and, therefore, cannot recover for any depreciation in the value of the goods which occurred between the time of the taking and the date of the judgment of return; that any damages collectible for such depreciation must, if the defendant makes the election referred to, be assessed in the replevin suit, as an item of damages resulting from the detention of the goods; and that, as the plaintiff in this suit failed to have such damages assessed in the replevin suit, he cannot recover them in the present suit.

This point seems to us, at best, to be altogether technical, and not to be founded on any sound principle. By the terms of the bond, it was made enforceable against the principal and sureties if the principal should not pay such damages and costs as Webster should recover against it, and should not also return and restore the goods replevied in like good order and condition as when taken. Under the condition of the bond, the sureties were liable to pay the damages recovered against the principal by the judgment of May 4, 1878, in case the principal had not paid them, as it did. By the judgment in the present suit, they are only made liable according to their obligation, that their principal shall return and restore the goods in like good order and condition as when taken. Such we consider to have been the effect of the rulings of the state court in the replevin suit, in 62 and 68 Maine.

In the case in 62 Maine, the court, commenting upon the above recited provision of the Revised Statutes of 1871, c. 96, § 11, says, (p. 361:) "When the defendant makes a good title to the goods replevied, he is entitled to damages for the interruption of his possession, the loss of the use of the goods from the time of their replevin till their restoration, and for their deterioration." It also says, (p. 362:) "The damages are to be assessed to the time of the verdict for the defendant, upon the principles adopted in trover, save that the value of the property is not to be included therein." It also says, (p. 363:) "It seems, therefore, fully settled that in a replevin suit, when damages are not assessed at *nisi prius*, or where a nonsuit is entered, the defendant, when the property replevied is not returned,

may recover all damages sustained, in a suit upon the replevin bond." It also says, (p. 363,) that the plaintiff "is bound by his replevin bond to restore the goods in like good order and condition as when taken. He is responsible, if judgment is against him, for the damaged or deteriorated condition of the goods when restored." Again, it says, (p. 364:) "When goods not held under legal process are replevied, and after entry of the action the plaintiff becomes nonsuit and a return is ordered, but the goods replevied are not forthcoming on demand, the defendant, in a suit on the bond, is entitled to recover, as damages, the value of the goods when taken, and interest thereon from the service of the writ to the time of the rendition of judgment." Again, (p. 364:) "If the market value of the goods replevied shall be less at the time of the demand on the writ of return, than when the goods are taken, the loss must fall on the plaintiff, by whose wrongful act the defendant is deprived of his property. Besides, the plaintiff, having possession, might have sold them, which the defendant could not do."

It is contended for the defendants, that, in this suit on the replevin bond, Webster is entitled to recover, as damages, only the value of the goods replevied, on the 19th of August, 1878, the date of the demand on the writ of return, with interest thereon; and some expressions of the court in the decision in 62 Maine, supposed to tend in that direction, are referred to. But they are wholly inconsistent with the other expressions of the court, above quoted, and contrary to reason and justice, in their application to the present case, and also to authority.

One of the expressions thus relied on by the defendants is this, (p. 363:) "The damages being assessed to the time of the verdict, if the goods replevied are not forthcoming on demand on the writ of return, the defendant, in a suit by him on the replevin bond, will be entitled to recover, as damages, the value of the goods replevied at the date of the demand on the writ of return, with interest thereon, the damages and costs assessed in the replevin suit, and interest. *Swift* v. *Barnes*, 16 Pick. 194." But a reference to the case of *Swift* v. *Barnes* shows that the remark of the court had reference to a case where the value of the property replevied had risen,

at the time of the demand on the writ of return, beyond what it was at the time it was taken. The Massachusetts statute and practice in regard to replevin are the same as in Maine. The principle declared in *Swift* v. *Barnes* was, that the successful defendant in replevin was entitled to a full indemnity; that the plaintiff in replevin, who caused the property to be valued, might well be bound by the valuation, when it was made to appear that the action was groundless; that it by no means followed that the other party, who had no agency in the valuation, was also to be bound; that the plaintiffs in the suit on the bond were entitled to a full indemnity for the damages sustained by the non-performance of the condition of the bond, and that could not be obtained unless they should be allowed to recover the actual value of the property replevied at the time when it ought to have been restored on the writ of restitution; and that, in the case then before the court, that was the true measure of damages.

In *Parker* v. *Simonds*, 8 Met. 205, it is said that the property in *Swift* v. *Barnes* had risen in value after it was replevied; and, in *Parker* v. *Simonds*, as some of the property had been sold at the time of the demand, and some was deteriorated and depreciated in value by use, the court said that the value at the time of the demand would not be the measure of damages without a proper allowance for the depreciation.

The rule in Massachusetts seems well settled. In *Leighton* v. *Brown*, 98 Mass. 515, which was a suit on a replevin bond, the value of the property, at the time of the demand for its return, was greater than the penal sum of the bond, but though the obligors contended that the proper measure of damages was its appraised value or its value at the time it was replevied, the court said: "The appraisal made in the replevin suit is conclusive against the party by whom it was made. *Parker* v. *Simonds*, 8 Met. 205. But it is not admissible in evidence against the present plaintiff, who, as defendant in the replevin action, had no agency in procuring this valuation. *Kafer* v. *Harlow*, 5 Allen, 348. In the present case, the value was greater at the date of the final judgment ordering a re-

turn than at the date of the appraisal. The value at the date of a demand for the restoration of the property in compliance with the order of return is the measure of damages for which the plaintiff contends, and to which, in the opinion of the court, he is entitled. *Swift* v. *Barnes*, 16 Pick. 194."

In *Tuck* v. *Moses*, 58 Maine, 461, the market value of the replevied property had increased from the time it was replevied to the time of the judgment for a return, and it was held, in a suit on the bond, that the defendants were liable for the value of the property at the date of the judgment for a return, with interest at six per cent from the date of that judgment to the date of the judgment on the bond.

It is, therefore, manifest that the court, in its opinion in 62 Maine, did not mean that the time of the demand on the writ of return was to be taken as the time for fixing the value of the property in any other case than one where there had been an increase in the value from the time of the taking, to the benefit of which increase the defendant in the replevin suit was entitled.

We see nothing inconsistent with these views in *Stevens* v. *Tuite*, 104 Mass. 328. In that case the defendant in a replevin suit had a judgment therein for a return, and for damages assessed by computing interest on the appraised value of the goods replevied, from the date of the writ of replevin to the date of the judgment; and, in a subsequent suit on the bond, he sought to recover, not only the value of the property, with interest from the date of the demand under the judgment, but damages for inconvenience and loss resulting from the interruption of the possession of the property, which was the machinery of a manufactory, and damages for the expense, trouble, and delay attending the restoration of the establishment to its original condition. It was held that these damages were included in the damages recoverable in the replevin suit. The case was a peculiar one, and the defendant in the replevin suit did not, as in the present case, ask merely for an allowance, as damages, of a continuation of the interest on the value of the property when taken, from the time of the verdict in the replevin suit to the time of the verdict in the

suit on the bond; and the court did not pass on that question.

The decisions in Maine support the views taken by the Circuit Court. In *Smith* v. *Dillingham*, 33 Maine, 384, in a suit on a replevin bond, the value of the property replevied, as valued in the writ, was allowed, with interest from the date of the bond. The interest was objected to. No damages had been assessed in the replevin suit. The court said: "If damages for the taking had been assessed, as the statute provides, up to the time when the nonsuit was ordered, the estimate of damages in this suit for the detention would have commenced at that period. But the record shows that no such assessment was made. The wrong done to the plaintiffs consists in the taking of their property, and in the delay of making compensation for it. There is nothing in the statute which precludes the allowance of interest on the value of the property from the time when it was taken." It certainly can make no difference in principle that part of such interest is allowed in the replevin suit and part in the suit on the bond, so long as there is no duplication.

In *Thomas* v. *Spofford*, 46 Maine, 408, the case of *Smith* v. *Dillingham* is cited by the court as authority for the proposition, that in a suit on the replevin bond the plaintiff may recover damages for detention, although they were not assessed in the judgment in the replevin suit.

The opinion of the court in 68 Maine contains nothing to support the views of the defendants. In that opinion it is said, (p. 459:) "When this cause was first tried, the presiding justice was of opinion that the action was not maintainable, and that the defendant's claim for damages for the plaintiffs' unlawful taking could only be determined in a suit upon the replevin bond. By agreement of parties, the case was withdrawn from the jury, to be reported to the full court. If the action could not be maintained upon the evidence offered and introduced by the plaintiffs, a non-suit was to be entered. If the action could be maintained, it was to stand for trial; and the court were also authorized to pass upon the several propositions in respect to damages, made by the defendant's counsel.

Upon a full hearing of the questions of law raised upon the report, it was determined that the action was not maintainable; and a non-suit in pursuance of the agreement of the parties was ordered. It was further decided that the defendant had a right to have his damages assessed. 62 Maine, 341."

The trial court had instructed the jury as to damages as follows, (p. 452:) "The defendant is entitled to the value of that ice, at the time it was taken, and where it was situated, for any lawful use to which it could be put. If it was valuable to use there, he is entitled to its value for use. If it was valuable for sale, he is entitled to its value for sale. If it was valuable to send to market, he is entitled to whatever value it bore at the time and place for any market, not what it might bring at another market, — I don't mean that — but its value at Boothbay, on August 13, 1870, for any purpose to which it might be put." On this the Supreme Judicial Court remarked, (p. 461:) "To these instructions there can be no reasonable objections urged. The value at the time and place of taking is the rule."

The contention of the defendants that, on the recovery of the judgment in replevin, the plaintiff in replevin was only bound to restore the goods or to pay their money value at that time, and that the liability for the breach of the replevin bond would be discharged if the plaintiff in replevin paid such sum of money as would enable the defendant then to go into the market and buy goods of like description and value, is not sound. Ice is a peculiar article of property. The ice in question was taken in August, 1870, at a time of year when, as we all know, ice has a larger value than at some other times of the year. The defendant in the replevin suit was entitled to the value of that ice as of that time, and of the place where it was taken, as stated in the case in 68 Maine, for any lawful use to which it could be put. It was also said by the court in that case, (p. 462:) "As the taking by the plaintiffs was wrongful, the defendant is entitled to full indemnity. The measure of damages is the actual value of the property to the plaintiffs as an article of merchandise or sale." Under these views, the defendant would not necessarily be made whole by

a sum of money sufficient to enable him to purchase in the market a like quantity of ice, eight years after it was taken.

It is also contended for the defendants in this suit, that the Circuit Court erred in rejecting the evidence offered by them to show that the value of the ice replevied was less than $10,000, at whatever time such value was to be assessed, and in ruling that the plaintiff was not precluded from showing that the value of the goods replevied was more than the $15,000 named in the replevin writ and the bond.

We do not think the court erred in rejecting the evidence so offered by the defendants. The writ of replevin stated that the quantity of ice was "about thirty-eight hundred tons," "of the value of fifteen thousand dollars." The bond of the 12th of August, 1870, recited that the action was for "about thirty-eight hundred tons of ice," "of the value of fifteen thousand dollars." The first return of the sheriff, dated August 13, 1870, specified the quantity of ice as "about twenty-five hundred tons." The amended return specified the quantity as being 2331 tons and 1851 pounds. The jury, in the trial of the replevin suit, found that the value of the ice replevied, where it was situated, at the time it was taken, was $20,069.33. The condition of the bond must be held to mean, that the quantity of goods replevied was to be restored, leaving it to be ascertained what that quantity was. It must be assumed, in the absence of evidence to the contrary, that the quantity taken by the jury as the basis of the value they found, was the quantity named in the amended return of the sheriff. The sureties in the bond were, by its terms, so connected with the replevin suit, that they are bound by the adjudications necessarily made in it. The jury could not have found any basis for the calculation of the interest as damages, unless they had found, as they did, the value of the ice, where it was situated, at the time it was taken. The sureties are bound by that finding.

There was, therefore, no error in excluding the evidence so offered by the defendants, or in permitting the plaintiff to show, as he did conclusively, by the record in the replevin suit, that the value of the ice, where it was situated, at the

time it was taken, was greater than the $15,000 named in the writ of replevin and the bond.

This is in accordance with the decisions in the Supreme Judicial Court of Maine. In *Thomas* v. *Spofford*, 46 Maine, 408, the court below had ruled that the plaintiff in the suit on the replevin bond was estopped from showing that the property was of greater value than that stated in the writ of restitution, which was the value stated in the writ of replevin, the bond being for double that value, but the Supreme Judicial Court said: "The defendant in replevin is not concluded by the value of the property named in the bond or the writ. If he was to be thus estopped from denying that value, he would be at the mercy of his opponent, whose interest it always is to fix as low a value as possible. . . . It seems clear, on the authorities and fair reason, that the defendant in replevin is not concluded or estopped by the sum named in the bond as the actual value." To the same effect is *Miller* v. *Moses*, 56 Maine, 128, 141. In *Tuck* v. *Moses*, 58 Maine, 461, 477, it is held that the plaintiff in replevin is bound by the value which he puts upon the property in his writ, but that with the defendant in replevin it is otherwise, and, as he has no hand in fixing the value in the writ, he is not estopped from showing it to be greater than is there stated.

The defendants submitted to the court a prayer for a ruling that the statement of the sheriff, in his return, of the quantity of ice actually taken by him on the writ of replevin was competent and conclusive evidence of that quantity, in the trial of the suit on the replevin bond. The bill of exceptions states that the court overruled such prayer, and ruled that neither one of the returns was conclusive evidence of the quantity taken by the officer upon the replevin writ, and that the defendants excepted to such rulings. No practical question arises upon this exception, for it does not appear by the bill of exceptions that either side offered any evidence for the purpose of showing that the quantity of ice replevied varied from the quantity stated in the amended return. The evidence offered to be given by the defendants to prove that the value of the ice replevied was less than $10,000 at whatever time such value

was to be assessed, was not an offer to prove that the quantity of ice replevied varied from that stated in the amended return; and the plaintiff, neither offering nor giving any evidence that such quantity varied from that stated in the amended return, relied upon the finding of the jury in the replevin suit as to the value of the ice replevied.

The defendants complain of the admission in evidence of the answer of the jury in the replevin suit as to the value of the ice replevied, where it was situated, at the time it was taken, and also of the ruling of the court that such answer was evidence in this suit, and conclusive against the defendants, of the value of the ice, in determining the amount which the plaintiff is entitled to recover in this suit. It is contended for the defendants, that it was discretionary in the jury, in the trial of the replevin suit, to answer the question referred to, and that it was no part of the legal issue in that trial. But, as has been shown, the rule adopted in that trial, for finding the damages, was to assess the interest on what was found to have been the value of the ice at the time and place of taking, and that such value was an indispensable element in arriving at a verdict. Such value was found by the jury, in finding the verdict, and, a judgment having been entered thereon, the fact so found is conclusive, not only upon the parties to the replevin suit, but upon those who became sureties by the bond, to abide its event. The sureties became bound by the result of the replevin suit by virtue of their agreement contained in the bond.

In *Drummond* v. *Ex'rs of Prestman*, 12 Wheat. 515, the record of a judgment confessed by a principal to a creditor for a debt due was held to be admissible in evidence to charge a surety who had guaranteed the debt to the creditor. In *Stovall* v. *Banks*, 10 Wall. 583, it was held that the sureties in the bond of an administrator were bound by a decree against the administrator, made in a suit to which they were not parties, finding assets in his hands which he had not paid over.

The sureties in the replevin bond were represented in the replevin suit by the plaintiff therein, and were identified with it in interest, and claimed in privity with it, so as to be con-

cluded by the proceedings in that suit. 1 Greenl. Ev. § 523. The question of the value of the ice at the time it was taken in replevin was essential to the finding of the verdict in the replevin suit; and in such case, it is not necessary to the conclusiveness of the former judgment that there should have been a formal issue in the prior suit as to such question. 1 Greenl. Ev. § 534.

On the whole case, we are of opinion that there is no error in the record, and that the judgment must be affirmed, and it is so ordered.

Affirmed.

YALE LOCK MANUFACTURING COMPANY *v.* JAMES.

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

No. 162. Argued February 3, 6, 1888. — Decided April 9, 1888.

A patent granted in 1871, for an improvement in post-office boxes was reissued in 1872, and again in 1877, and again in 1879. The original patent limited the invention to a metallic frontage made continuous by connecting the adjoining frames to each other, and not merely to the woodwork. There was no mistake, and the original patent was not defective or insufficient, in either the descriptive portion or the claims. In the progress of the first reissue through the Patent Office, the applicant, on its requirement, struck out of the proposed specification everything which suggested any other mode of fastening than one by which the frames were to be fastened to each other: *Held*, that the first reissue could not have been construed as claiming any other mode of fastening; that therefore the third reissue could not be construed as claiming any other mode of fastening; and that, as the defendant's structures would not have infringed any claim of the original patent, they could not be held to infringe any claim of the third reissue.

In equity, to restrain infringement of letters patent. Decree dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. Frederic H. Betts for appellant, on the question of the law as to reissues, made the following points in his brief:

We understand that this court has construed the provisions of law regulating reissues, as follows:

(1) That the patentee can reissue in case it shall appear that "the original patent embodied as the invention *intended to be secured* by it what the claims of the reissue are intended to cover." *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87, 89: or he may reissue "*to meet a possible construction of the original*, whereby the patentee would be precluded from a use of his process where it was evidently intended to be applied." *Eames* v. *Andrews*, 122 U. S. 40, 63: or to remove "ambiguity or obscurity." *Campbell* v. *James*, 104 U. S. 356, 370.

We understand that this means that the original patent must show the invention claimed in the reissue, and, in it or in the papers accompanying it, must indicate that the inventor *intended* and *attempted* to secure, as his own, and did not *abandon* the invention claimed in the reissue.

We do *not* understand that it must appear that the invention claimed in the reissue was *actually* in fact *secured* by the claims of the original patent, if those claims be critically construed.

On the contrary, we understand that the inoperativeness of the original patent may consist in the *failure* of the original claims, when construed critically, to claim that which is seen to be the real invention.

(2) That the patentee may not only (if his original "intention" or "attempt" be found to exist) introduce amendments to the specification, but also, *if he applies in due season for a correction, enlarge* his claim, and claim something beyond what the critical construction of his original claim would give him.

Thus, in *Lockwood* v. *Morey*, 8 Wall. 230 (cited with approval, 122 U. S. 63), where the inventor had been induced to *limit* his original claim by the mistake of the Commissioner of Patents, he was allowed to remove the limitations by reissue.

Thus, in *Campbell* v. *James*, 104 U. S. 356, 371, when this court said, "of course, if by inadvertence, accident or mistake, incorrectly committed, the claim does not *fully assert* or de-

fine the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued, *may be granted.*"

Thus, in *Miller* v. *Brass Co.*, 104 U. S. 350:

"If a patentee who has no corrections to suggest in his specification except to make his *claim broader and more comprehensive* uses due diligence in returning to the Patent Office, and says, 'I omitted this,' or 'my solicitor did not understand that,' his application may be entertained, and on a proper showing, correction *may be made.* But it must be remembered that the claim of a specific device or combination and an omission to claim other devices or combinations apparent on the face of the patent, are, in law, a dedication to the public of that which is not claimed. . . . The legal effect of the patent cannot be revoked *unless the patentee surrenders it and proves that the specification was framed by real inadvertence, accident or mistake* without any fraudulent or deceptive intention on his part; and this should be done with due diligence and speed. . . . Nothing but a clear mistake, or inadvertence, and a speedy application for its correction is admissible when it is sought *merely to enlarge* the claim."

Thus in *Mahn* v. *Harwood*, 112 U. S. 354, 363:

"If a patentee has *not claimed as much as he is entitled to*, he is bound to discover the fact in a reasonable time, *or* he loses all right to a reissue."

And again:

"As we have already stated, no invariable rule can be laid down as to what is reasonable time within which the patentee should seek for the correction of a claim *which he considers too narrow.* In *Miller* v. *Brass Co.*, by analogy to the law of public use before an application for a patent, we suggested that a delay of two years in applying for such correction should be construed equally favorable to the public. But this was a mere suggestion, by the way, and was not intended to lay down any general rule. Nevertheless, the analogy is an apposite one, and we think that excuse for any longer delay than that should be made manifest by the special circumstances of the case."

(3) That the finding of the Commissioner of Patents upon the question of fact whether the original defect arose by inadvertence, accident or mistake, is a conclusive one, unless the *possibility* of the existence of any such inadvertence, accident or mistake is found to be excluded by an examination of the original papers.

Thus in *Mahn* v. *Harwood*, p. 358.

"It was not intended then (*i.e.* in *Miller* v. *Brass Co.*) and is not now to question the conclusiveness in suits for infringements of patents, of the decisions of the Commissioner on questions of fact necessary to be decided before issuing such patent, except as the statute gives specific defences in that regard."

And again: p. 360.

"Conceding that it is for the Commissioner of Patents to determine whether the insertion of *too narrow a claim* arose from *inadvertence, accident or mistake*, unless when the matter is manifest from the record," yet that it was for the court to decide the question of *diligence*.

(4) That on the question of due diligence in applying for a reissue, such diligence is *prima facie* proved, if the application is *within two years*.

Thus in *Mahn* v. *Harwood*, p. 363.

"We think that excuse for *any longer delay than that* should be made manifest by the special circumstances of the case."

And in *Wollensak* v. *Reiher*, 115 U. S. 96, 100, this Court said that a delay of *more than* two years in applying for a reissue with broader claims made the action "*prima facie* unlawful."

May it not be said that if the *delay* was *less* than two years that the action is *prima facie lawful?*

We shall endeavor to show that the present case falls within the provision of the law as above construed.

In other words, we shall show that, taking the whole history of the original specification together, it would be plain to one skilled in the art (and it is to those only that the specification is addressed), what the real invention of Yale was, and that that real invention is the one described in the second claim of reissue 8783.

That the second claim of the original patent is either for that very invention (the first one is broader) or, if upon a critical construction it should be held that it was confined by its phraseology to certain details of minor importance, yet that it was, at least, so uncertain and ambiguous, and therefore "inoperative," that the ambiguities and uncertainties and limitations could be removed by reissue (especially by one applied for within seven months thereafter), and the claim could be and was restated so as to conform to what could be seen to be the real invention.

Mr. Solicitor General for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit of equity, brought by the Yale Lock Manufacturing Company, a Connecticut corporation, against Thomas L. James, to recover for the alleged infringement of reissued letters-patent No. 8783, granted to the plaintiff, as assignee of S. N. Brooks, administrator of L. Yale, Jr., deceased, July 1, 1879, for an "improvement in post-office boxes," on an application for a reissue filed May 23, 1879, (the original patent, No. 119,212, having been granted to Silas N. Brooks, administrator of Yale, September 19, 1871, on an application filed September 30, 1868; and having been reissued to said Brooks, as administrator, July 9, 1872, as No. 4963, on an application for reissue filed May 7, 1872; and having been again reissued to said Brooks, as administrator, April 24, 1877, as No. 7625, on an application for reissue filed April 19, 1875). The Circuit Court dismissed the bill, and the plaintiff has appealed from its decree.

Among other defences, the answer sets up that each of the three reissues was not for the same invention as the original patent, but contained material new matter, and was therefore invalid.

Reissue No. 8783 was the subject of a suit in equity, brought in the Circuit Court of the United States for the District of Connecticut, by the present plaintiff, against the Scovill

Manufacturing Company, in which Judge Shipman, in June, 1880, gave a decree for the plaintiff as to the first and second claims of the patent. 18 Blatchford, 248.

The original patent contained the following description of the invention: "This invention relates to an improvement in *the construction of* the fronts of post-office boxes, and consists in making said fronts, including the doors and box frames, of metal, *and in securing the frames to the wooden pigeon holes by rivets connecting the frames with each other at top, bottom, and sides.* The body of *these* boxes is to be made of wood, in the usual manner, *namely*, a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes, and is connected with the other frames above, below, and on each side of it in such manner that the frames make a continuous frontage, no part of which can be removed (from the outside) without pulling down other parts *and breaking the wood-work, so that a surreptitious removal of the front of any box, in order to get possession of its contents, is practically impossible.* Each frame, made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside of the wood-work. The sides of the frame *b b*, enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals; and each frame has attached to it one leaf of two or more hinges, *c c*. The door *is of iron*, solid *at top*, where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. I prefer to locate rods *f f* behind the plate, to prevent the introduction of a hand if the glass be broken, *and so to form* the door that, when shut, it enters within the frame, (*see g g*,) so that it cannot be lifted from its hinges. When the frames are all in place, each frame is riveted through the wood-work to its four neighbors, (see *h h*, Fig. 2,) and *thus* a continuous *iron* frontage *is formed. Each* door has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more partic-

ularly set forth in *my application for a patent therefor, made equal date with this.*"

That patent had two claims, as follows: "1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames, and the wood-work entering between the said frames, the combination being substantially as described. 2. *The above, in combination with the flanges, making part of the frames and protecting and inclosing the exterior of the wood-work, substantially as set forth.*"

The first reissue, No. 4963, contained the following description of the invention: "This invention relates to an improvement in the fronts of post-office boxes, and consists in making said fronts, including the doors and box frames, of metal, *said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed.* The body of *the* boxes is to be made of wood in the usual manner, viz., a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes, and is connected with the other frames above, below, and on each side of it in such manner that the frames *will* make a continuous frontage, no part of which can be removed from the outside without pulling down other parts. Each frame, made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside *or edges* of the wood-work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals; and each frame has attached to it one leaf of two or more hinges, *c c*. The door *may be of any desirable metal*, solid where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. I prefer to locate rods *f f* behind the plate, to prevent the introduction of a hand if the glass be broken. The door *is so constructed* that, when shut, it enters within the frame, so that it cannot be lifted from its hinges. When the frames are all in place, each frame is riveted through the wood-work to its four

neighbors, (see *h h*, Fig. 2,) and *in this way forms* a continuous *metal* frontage. *The* door *for each frame* has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in *letters-patent granted to me on the 24th day of October, 1871, and numbered 120,177.*"

That reissue contained two claims, as follows: "1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames, and the wood-work entering between the said frames, the combination being substantially as described. 2. *The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and inclose wholly or in part the front edges of said pigeon holes.*"

In order to a comparison of the specification and claims of the first reissue with the specification and claims of the original patent, the parts of each which are not found in the other are above put in italics.

The specification and claims of reissue No. 8783 are as follows: "This invention consists in an improvement in the construction of post-office boxes, and its chief feature is the combination of a tier of pigeon holes made of wood with a continuous frontage of metal, such frontage consisting of doors and their frames, which latter cover the ends of the boards which form the pigeon holes. A series of wooden pigeon holes, open at the rear, and covered at the front, or on the outside by a permanent glass front, is very old, and such a series was used for post-office boxes, and in hotels as a receptacle for keys, cards, letters, &c. There has also been in use a series of wooden pigeon holes, each provided at one end with a door, as described in the patent granted to Jacob Beidler, May 28, 1866; but in this patent the door is described as hinged to the wood, and the construction is consequently insecure, as an ordinary pocket knife or small chisel will, even in inexperienced hands, suffice to cut away the wood or pry off the door, so that the boxes may be entered. Pigeon holes

made of iron or other metal are difficult to construct and very costly; but such pigeon holes, each provided with an ordinary metal door, would be sufficiently secure. Such a degree of security at a comparatively low cost is attained by covering the front of a series of wooden pigeon holes with a continuous metallic frontage, that is, a frontage which presents a continuous surface of metal, or, in other words, a surface which covers the ends of the wooden pigeon holes in such manner that those portions of the wood to which the metallic frames are attached cannot be attacked when the doors making part of the frontage are closed. In constructing Yale's invention the body of the boxes or the series of pigeon holes is to be made of wood in any usual manner, and the fronts thereof, viz. the doors and their frames, are to be made of iron or other suitable metal. Each door frame is of such size that it aids in covering the ends of the wooden partitions that form the pigeon holes to which it is applied, and these frames (see Fig. 1) are of such size and shape, that, where a series of them are combined with a series of pigeon holes, they cover the whole of the ends of the wood. Each door frame is a plate of metal, *a a*, which, when in place, overlaps a part of the ends of the wood-work surrounding the pigeon hole, the outside of the frame inclosing a greater area than the orifice of the pigeon hole, and each frame has an ear, *b b*, which enters the pigeon hole; but this ear may be either continuous or notched out at intervals. The door is of iron or other metal, solid at top and having an opening, *e*, below, in which a plate of glass is secured, and is hinged to the frame as at *c c*. It is preferable to locate rods *f f* behind the plate, so as to prevent the introduction of a hand if the glass be broken, and so to form and hinge the door that, when shut, it enters within the frame, so that it cannot be lifted from its hinges when shut. When the frames are all in place, each frame is riveted or bolted to the wood-work, to fasten it thereto, and is also riveted or bolted to its four neighbors, to secure the frames to each other. (See *h h*, Fig. 2.) Thus each frame is secured to the wood-work, so that it cannot be removed till the rivet or the wood-work is cut away or broken. When all the frames are in place, a continu-

ous metallic frontage protecting the wood-work is presented upon the outside of the series of boxes, that is, the side where the public can approach the boxes. Each door has a lock attached to it, the bolt of which is actuated through the intervention of an arm, *k*, in the manner and for the purposes set forth in a patent granted for the invention of Linus Yale, Jr., on the 24th day of October, 1871, No. 120,177. An iron door in an iron frame is not claimed as of Yale's invention, as such doors have been used in safe vaults and for furnaces.

"What is claimed as the invention of said Linus Yale, Jr., deceased, is, 1. The combination, substantially as specified, of a series of metallic door frames and doors with a series of wooden pigeon holes, whereby a series of post-office boxes with a continuous metallic frontage is formed. 2. The combination, substantially as described, of a series of wooden pigeon holes with a series of metallic door frames and doors, and with rivets or bolts which attach the frames to the wood-work, whereby a continuous metallic frontage secured to the wood-work of pigeon holes is obtained. 3. The combination, substantially as described, of a series of wooden pigeon holes with a series of metallic door frames and doors, and with rivets or bolts which attach the frames both to the wood-work and to each other, the combination being substantially such as described. 4. The combination of a metallic door with a glass panel and with a frame to which the door is hinged, said frame being so constructed as to cover a part of the ends of the wooden partitions forming pigeon holes, and being applied thereto, the combination being substantially as specified. 5. The combination of a post-office box or pigeon hole, open at the rear, with a metallic frame and door to protect the front end of it."

Claims 4 and 5 were disclaimed by the plaintiff November 29th, 1880.

Claim 1 of the first reissue was the same as claim 1 of the original patent, while claim 2 of the first reissue was in these words: "2. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and inclose wholly or in part the front edges of said pigeon holes."

Opinion of the Court.

In the opinion of the Circuit Court in the present case, 22 Blatchford, 294, Judge Shipman says: "The defendant, as postmaster in the city of New York, and not otherwise, used in the post office, provided and equipped for him by the United States government, wooden post-office boxes, with metallic fronts and doors and open at the rear. They were manufactured by the Johnson Rotary Lock Company. The doors and door frames made a continuous metallic frontage. The door frames were secured to each other and to the wood-work as follows: At about the middle of each vertical edge of each door frame there was a triangular hole, which, with the corresponding hole in the adjoining door frame, made a rectangular hole, through which the metal fastening bolt, completely filling such hole, was passed, the heads of such bolts overlapping the contiguous edges of adjoining metallic fronts, and the bolt itself passing through the wooden partition between the adjoining pigeon holes, and being secured at the back thereof, within the post-office room, by a nut screwed upon the end of the bolt. There were other boxes constructed substantially as above described, excepting that the metal front of each pigeon hole was fastened to the wood-work by means of flanges and screws, but the screws which attached the frames to the wood-work did not attach the frames to each other. Neither series of boxes would have infringed either claim of the original patent. Each series infringes the 1st and 2d claims of the present reissue, unless these claims are to receive a construction which shall compel the metallic frontage to be made continuous by rivets, bolts, or fastenings which shall attach the frames both to the wood-work and to each adjoining frame. The plaintiff insists that these claims should not receive such a construction, because it has been found that the invention of the specification of the reissue, although a broader one than was described in the original patent, is the invention which the history of the art and the patent show should have been described, and because the first reissue was promptly applied for, and, as issued, included in its second claim, in the view of the plaintiff, the same invention which is described in the 1st and 2d claims of the reissue. The defendant

says, among other things, that, since the case of *Miller* v. *Brass Co.*, 104 U. S. 350, and *James* v. *Campbell*, 104 U. S. 356, it has been settled by the Supreme Court, that the Commissioner of Patents, in allowing the 1st and 2d claims, exceeded his jurisdiction, because the invention which was first applied for and was 'complete in itself,' was clearly, specifically, and fully described in the original specification and in the claim, and an expanded claim would necessarily include an invention which was not sought to be described in the original patent; and, furthermore, that there could have been no inadvertence or mistake, because the original patent and the accompanying documents show that the patentee 'did not intend it' (the patent) 'to embrace any such broad invention' as was described in the reissue. The defendant also says, that the patentee, in his application for the first reissue, ineffectually endeavored to alter the description of the invention, so as to omit the fastening of the door frames to each other as a necessary integral part of the invention, and that the second claim of the first reissue cannot fairly be construed to permit such omission, and, therefore, that the patentee is estopped from insisting upon a broad construction of the 1st and 2d claims of the present reissue, and that these claims are objectionable on account of the laches of the patentee. The 'file wrapper and contents' of the first reissue were not a part of the record in the Scovill case."

In order to show the changes made in the specification and claims of the first reissue, as they passed through the Patent Office, the specification and claims of that reissue as granted, and the specification and claims of the same as applied for, are here placed in parallel columns, the parts of the latter which are not contained in the former being in italics and brackets, and being numbered severally from 1 to 8:

As Applied For.	*As Granted.*
"This invention relates to an improvement in the fronts of post-office boxes, and consists in making said fronts,	"This invention relates to an improvement in the fronts of post-office boxes, and consists in making said fronts,

including the doors and box frames, of metal, said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed [[1] *and in securing said frames to said pigeon holes by rivets or screws*]. The body of the boxes is to be made of wood in the usual manner, viz., a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes and is [[2] *may be*] connected with the other frames above, below, and on each side of it in such manner that the frames will make a continuous frontage, no part of which can be removed from the outside without pulling down other parts, [[3] *or the several frames may be secured or otherwise fastened directly to the wooden pigeon holes, each one independent of the other, if desired.*] Each frame made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside or

including the doors and box frames, of metal, said box frames being constructed so as to overlap and cover, in whole or in part, the front edges of the wooden pigeon holes to which they are affixed. The body of the boxes is to be made of wood in the usual manner, viz., a series of pigeon holes, but the front of the box and the door frame are made of iron or other suitable metal. Each door frame or box front is so made that it aids in covering the edge of the wooden partition or pigeon holes, and is connected with the other frames above, below, and on each side of it in such manner that the frames will make a continuous frontage, no part of which can be removed from the outside without pulling down other parts. Each frame made, as before stated, of metal, has all around it a flange, *a a*, which protects the outside or edges of the wood-work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals, and each frame has attached to it one leaf of two or more hinges, *c c*. The door

edges of the wood-work. The sides of the frame *b b* enter and fit closely against the wood forming the pigeon holes, and may be continuous or notched out at intervals, and each frame has attached to it one leaf of two or more hinges, *c c*. The door may be of any desirable metal, solid where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. [[4] *Cast with the door and over the opening e for glass may be a network or ornamental open work, admitting light, and at the same time preventing the introduction of a hand if the glass be broken, or rods f f may be located behind the plate for the same purpose.*] The door is so constructed, that, when shut, it enters within the frame, [[5] *see g g,*] so that it cannot be lifted from its hinges. When the frames are all in place, each frame [[6] *may be*] is riveted through the wood-work to its four neighbors, (see *h h*, Fig. 2,) and in this way form a continuous metal frontage, [[7] *or each separate frame may be screwed or otherwise fastened to the wood-work inde-*

may be of any desirable metal, solid where the lock *d* is attached, and having an opening, *e*, below, in which a plate of glass is secured. I prefer to locate rods *f f* behind the plate, to prevent the introduction of a hand if the glass be broken. The door is so constructed, that, when shut, it enters within the frame, so that it cannot be lifted from its hinges. When the frames are all in place, each frame is riveted through the wood-work to its four neighbors, (see *h h*, Fig. 2,) and in this way forms a continuous metal frontage. The door for each frame has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together, and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in letters-patent granted to me on the 24th day of October, 1871, and numbered 120,177.

pendent of its neighboring frames.] The door for each frame has a small spring bolt, *i*, and a lock, *d*, attached to it, the two operating together, and forming, in the hands of the postmaster, a perfect safeguard against all entrance to the box by means of the key, as is more particularly set forth in letters-patent granted to me on the 24th day of October, 1871, and numbered 120,177.

"What I claim as the invention of the said Linus Yale, Jr., deceased, is, First. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames and the wood-work entering between the said frames, the combination being substantially as described. Second. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and enclose, wholly or in part, the front edges of said pigeon holes. [[8] Third. *The combination of several metallic box frames with each other and with pigeon holes, said box frames being secured to*

"What I claim as the invention of the said Linus Yale, Jr., deceased, is, 1. The combination of several box frames with each other and with pigeon holes, as described, by means of rivets passing through the frames and the wood-work entering between the said frames, the combination being substantially as described. 2. The combination of two or more metallic frames and doors and locks with pigeon holes, said frames having flanges, which protect and enclose, wholly or in part, the front edges of said pigeon holes."

said pigeon holes independently of each other, by means of screws or other similar fastening, as described.]"

On the 8th of May, 1872, the Patent Office examiner called the attention of the applicant to the fact that the following matters in the new specification were not warranted by the original patent, namely: the words "or screws," in the part marked "1," the words "may be," in the parts marked "2" and "6," the parts marked "3," "4," and "7," and the third claim being the part marked "8."

On the 9th of May, 1872, the applicant appealed to the Commissioner of Patents in person, because the examiner had refused to examine the case on its merits, in view of the introduction of such new matter; but, on the next day, the applicant virtually withdrew his appeal, by amending his application as follows: He erased part "1;" he erased the words "may be," in parts "2" and "6," and substituted in each case the word "is;" he erased parts "3" and "4" and substituted for the latter the words, "I prefer to locate rods *f f* behind the plate to prevent the introduction of a hand if the glass be broken." He also erased part "7," and claim 3, part "8," and submitted the case for further action.

The application was then reconsidered, and twice rejected, and from the second rejection the applicant appealed to the examiners-in-chief, who reversed the decision of the examiner, and the reissue was granted, July 9, 1872.

In view of these facts, Judge Shipman, in his decision in the present case, said: "It is unquestionable that the patentee, when he made his original application, intended to say that his invention did not consist simply in making, by his combination of metallic doors, door frames, and wooden boxes, a continuous metallic frontage, but that it also consisted in the way in which the frontage was made continuous, viz. by the connection of the adjoining frames with each other. His definite and exact specification shows that he supposed that his patentable invention was thus limited. He described with precision and clearness, that his metallic frontage was to be

so constructed that the frames were to be fastened to each other at top, bottom, and sides, and not merely to the wood-work. 'A specific invention, complete in itself,' was described, 'fully and clearly, without ambiguity or obscurity.' Under the definitions which are given in the decisions which have been referred to, and in *Manufacturing Co.* v. *Ladd*, 102 U. S. 408, of the inadvertence, accident, or mistake which permits a reissue, when a patent is said to be inoperative on account of a defect or insufficiency in the specification, which arose through such inadvertence or mistake, and also of the nature of the defectiveness or insufficiency which is meant by the statute, there was no mistake, although the patentee might have fallen into an error of judgment, or into an erroneous conclusion of fact; and, furthermore, the original patent, according to the definitions contained in the recent, and, perhaps, in the earlier cases, was not defective nor insufficient, either in its descriptive portion or in its claims. The second claim of the first reissue, construed in the light of the contemporaneous facts which are shown in the 'file wrapper and contents,' cannot be fairly construed to mean a metallic frontage irrespective of the fastening of the frames to each other through the wood-work. Were this claim to be construed without study of the history of the application as it made its way through the Patent Office, and of the amendments which it was compelled to undergo, it would probably receive the construction which naturally belongs to the first claim of the present reissue. But the patentee abandoned, under pressure from the Patent Office, the clauses in the application which made the fastening of the frames to each other to be optional, and abandoned also a proposed third claim, which described the box frames as secured to the pigeon holes 'independently of each other, by means of screws or other similar fastening.' In view of the fact that the Patent Office excluded from the descriptive part of the specification suggestions of any other method of fastening than that by which the frames were to be fastened to each other, it would be singular if the intent of the Office was to include in the second claim such other method of construction. If this claim has properly, and the

applicant knew that it was intended to have, a narrow construction — and of this knowledge I think there can be little doubt — the plaintiff would not insist that the 1st and 2d claims of the present reissue ought, in view of the decision in *Miller* v. *Brass Co.*, *supra* to be so construed as to be any broader than the 3d claim, which requires the combination of door frames, doors, and pigeon holes to be by means of rivets or bolts which attach the frames both to the wood-work and to each other."

It was held that there was no infringement, and, on that ground, the bill was dismissed.

We concur in these views of the Circuit Court, and in the result which it reached. In view of the numerous recent decisions of this court on the subject of reissued patents, it would serve no good purpose to expand or amplify the views so well expressed by the judge at circuit. They are supported by the decisions in *Miller* v. *Brass Co.*, 104 U. S. 350; *Mahn* v. *Harwood*, 112 U. S. 354; *Parker & Whipple Co.* v. *Yale Clock Co.*, 123 U. S. 87; *Matthews* v. *Iron Clad Mfg. Co.*, 123 U. S. 347.

Our conclusion makes it unnecessary to consider the defence raised in the answer, and urged in argument, that the post-office boxes used by the defendant were used by him as postmaster of the United States at the city of New York; that the boxes were the property of the United States and were rented by it to sundry persons; that the rent was a part of the postal revenue of the United States and was not a source of personal emolument to the defendant; that it was not within the power of the defendant to remove or alter the boxes; and that the use of such boxes at the post office, while the defendant was postmaster, was not an infringement of the patent by him and did not make him liable to this suit.

Decree affirmed.

Syllabus.

BOWMAN v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 798. Submitted January 10, 1887. — Decided March 19, 1888.

The question whether, when Congress fails to provide a regulation by law as to any particular subject of commerce among the States it is conclusive of its intention that that subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the States, is one to be determined from the circumstances of each case as it arises.

So far as the will of Congress respecting commerce among the States by means of railroads can be determined from its enactment of the provisions of law found in Rev. Stat. § 5258, and Rev. Stat. c. 6, Title 48, §§ 4252–4289, they are indications of an intention that such transportation of commodities between the States shall be free except when restricted by Congress, or by a State with the express permission of Congress.

A State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained.

Section 1553 of the Code of the State of Iowa, as amended by c. 143 of the acts of the 20th General Assembly in 1886, (forbidding common-carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county,) although adopted without a purpose of affecting interstate commerce, but as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the State, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the States, affecting interstate commerce in an essential and vital part, and, not being sanctioned by the authority, express or implied, of Congress, is repugnant to the Constitution of the United States.

Whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates, *quære*.

Statement of the Case.

THIS action was begun in the Circuit Court of the United States for the Northern District of Illinois, June 15, 1886, on which day the plaintiffs filed their declaration, as follows:

"George A. Bowman, a citizen of the state of Nebraska, and Fred. W. Bowman, a citizen of the State of Iowa, co-partners doing business under the name, firm and style of Bowman Bros., at the city of Marshalltown, State of Iowa, plaintiffs in this suit, by Blum & Blum, their attorneys, complain of the Chicago and Northwestern Railway Company, a citizen of the northern district of the State of Illinois, having its principal office at the city of Chicago, in said State, defendant in this suit, of a plea of trespass on the case.

"For that whereas the defendant, on May 20th, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railway, and was a common carrier of goods and chattels thereon for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

"That said defendant was at said time and is now a corporation existing under and by virtue of the laws of the State of Illinois, and that it was and is the duty of said defendant to carry from and to all stations upon its line of railway all freight tendered it for shipment.

"That upon May 20th, 1886, the plaintiffs offered to said defendant for shipment over its line of railway, and directed to themselves at Marshalltown, Iowa, five thousand barrels of beer, which they had procured in the city of Chicago, to be shipped from said city to the city of Marshalltown, in the State of Iowa, which is a station lying and being on said defendant's line of railroad between said cities of Chicago and Council Bluffs, but the defendant then and there refused to receive said beer, or any part thereof, for shipment, to the damage of the plaintiffs of ten thousand dollars, and therefore they bring their suit, &c.

"And for that the plaintiffs, neither of whom is a hotel-keeper, a keeper of a saloon, eating house, grocery, or confectionery, on the 7th day of July, 1884, and upon several occasions thereafter, presented to the board of supervisors of

Marshall County, Iowa, a certificate signed by a majority of the legal electors of Marshalltown, Marshall County, Iowa, which stated that said Fred. W. Bowman is a citizen of said county; that both of said plaintiffs possess a good moral character, and that they (said electors) believe said plaintiffs to be proper persons, and each of them to be a proper person, to buy and sell intoxicating liquors for the purposes named in section 1526 of the Iowa Code; that at said time and upon several occasions thereafter they and each of them, the said plaintiffs, filed a bond in the sum of three thousand dollars with two sureties, which bond was approved by the auditor of said county, as is provided by section 1528 of the Code of Iowa; that thereupon said board of supervisors refused to grant such permission to either of said plaintiffs, or to them jointly.

"And for that whereas the defendant, on May 20th, 1886, and for a long time previous thereto and thereafter, was possessed of and using and operating a certain railroad and was a common carrier of goods and chattels thereon for hire, to wit, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa.

"That said defendant is a corporation existing under and by virtue of the laws of the State of Illinois; that it was the duty of the said defendant to carry from and to all stations upon its line of railway all freight that might be intrusted to it, and that it was the duty of said defendant to transport from said city of Chicago to said city of Marshalltown the five thousand barrels of beer hereinbefore and hereinafter mentioned, which plaintiffs requested it so to transport; that in the commencement of May, 1886, the plaintiffs purchased, at the city of Chicago, five thousand barrels of beer, at $6.50 per barrel, which beer they intended to send to Marshalltown, Iowa, at which place and vicinity they could have sold said beer at eight dollars per barrel, as the defendant was then and there informed; that on May 20th, 1886, said plaintiffs offered for shipment to said defendant railway company said five thousand barrels of beer, directed to said plaintiffs at the city of Marshalltown, in the State of Iowa, and requested said de-

fendant to ship said beer over its road, with which request the defendant refused to comply, and declined to ship or receive said beer or any part thereof for shipment as aforesaid, the said defendant, by its duly authorized agent, then and there stating that the said defendant company declined to receive said goods for shipment and would continue to decline to receive said goods or any goods of like character for shipment into the State of Iowa; that on said day, to wit, May 20th, 1886, and for a long time theretofore and since, the plaintiffs were unable to purchase beer in the State of Iowa; that said plaintiffs, at said time, could procure no other means of transportation for said beer than said defendant, and that, by reason of the defendant's refusal to transport said beer, plaintiffs were compelled to sell said beer in the city of Chicago at $6.50 per barrel.

"That by reason of said refusal of said defendant to ship said beer plaintiffs have been damaged in the sum of ten thousand dollars, and therefore they bring their suit, &c."

To this declaration the defendant filed the following plea:

"Now comes the said defendant, by W. C. Goudy, its attorney, and defends the wrong and injury, when, &c., and says *actio non*, &c., because it says that the beer in said five thousand barrels in the plaintiffs' declaration and in each count thereof mentioned was, at the several times in said declaration mentioned, and still is, intoxicating liquor, within the meaning of the statute of Iowa hereinafter set forth; that the city of Marshalltown in said declaration mentioned is within the limits of the State of Iowa: that the said city of Chicago in the said declaration mentioned is in the State of Illinois; that the said beer in said declaration mentioned was offered to this defendant to be transported from the State of Illinois to the State of Iowa.

"That heretofore, to wit, on the 5th day of April, A.D. 1886, the General Assembly of the State of Iowa passed an act entitled 'An act amendatory of chapter 143 of the acts of the twentieth General Assembly relating to intoxicating liquors and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and

abatement of nuisances,' which act is chapter 66 of the laws of Iowa, passed at the twenty-first General Assembly of said State, and which is printed and published in the laws of Iowa for the year 1886, at page 81; to which act this defendant hereby refers and makes the same a part of this plea.

"That in and by the tenth section of said act it was and is provided as follows, to wit:

"'That section 1553 of the Code, as amended and substituted by chapter 143 of the acts of the twentieth General Assembly, be, and the same is hereby, repealed, and the following enacted in lieu thereof:

"'Sec. 1553. If any express company, railway company, or any agent or person in the employ of any express company or of any common carrier, or any person in the employ of any common carrier, or if any person, knowingly bring within this State for any other person or persons or corporation, or shall knowingly transport or convey between points or from one place to another within this State for any other person or persons or corporation, any intoxicating liquors without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of one hundred dollars for each offence, and pay costs of prosecution, and the costs shall include a reasonable attorney fee, to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail until such fine and costs of prosecution are paid. The offence herein defined shall be held to be complete, and shall be held to have been committed in any county of the State through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from

Counsel for Plaintiffs in Error.

place to place or delivered. It shall be the duty of the several county auditors of this State to issue the certificate herein contemplated to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires, as shown by the county records.'

"And the defendant avers that at the several times mentioned in said declaration, and each of them, the aforesaid section was the law of the State of Iowa in full force and wholly unrepealed, and that the said plaintiffs did not at any time furnish this defendant with a certificate from and under the seal of the county auditor of the county of Marshall, the same being the county in which said city of Marshalltown is located, and the county to which said beer was offered to be transported, certifying that the person for or to whom the said beer was to be transported was authorized to sell intoxicating liquors in said county of Marshall, nor was this defendant furnished with any such certificate by any person whatsoever.

"And the defendant avers that it could not receive said beer for transportation in the manner named and specified in the plaintiffs' declaration without violating the law of the State of Iowa above specified, and without subjecting itself to the penalties provided in said act, and that this defendant assigned, at the time the said beer was offered to it for transportation as aforesaid, as a reason why it could not receive the same, the aforesaid statute of Iowa, which prohibited this defendant from receiving said beer to be transported into the State of Iowa or from transporting the said beer into the State of Iowa.

"And this the said defendant is ready to verify. Wherefore it prays judgment, &c."

To this plea the plaintiffs filed a general demurrer, and for cause of demurrer assigned that the statute of Iowa referred to and set out in the plea was unconstitutional and void. The demurrer was overruled, and judgment entered thereon against the plaintiffs, to reverse which this writ of error is prosecuted.

Mr. Louis J. Blum and *Mr. Edgar C. Blum* for plaintiffs in error.

Argument for Defendant in Error.

Mr. A. J. Baker, Attorney General of the State of Iowa, for defendant in error.

I. While it is conceded that Congress has the exclusive power to regulate commerce among the States, it is equally true that the several States have the sole power to enact police regulations, and in the exercise of such power may do many things which more or less affect the transportation of persons and freight between the States. *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Gibbons* v. *Ogden*, 9 Wheat. 1; *New York* v. *Miln*, 11 Pet. 102; *Osborne* v. *Mobile*, 16 Wall. 479; *Sherlock* v. *Alling*, 93 U. S. 99.

II. The police powers comprehend all those general powers of internal regulation necessary to secure peace, good order, health, comfort, morals, and quiet of all persons, and the protection of all property in the State. Congress cannot legislate on the internal police of a State, the power of a State over its police regulations being supreme. *New Orleans Water Works Co.* v. *St. Tammany Water Works Co.*, 14 Fed. Rep. 194, 202; *Ex parte Schrader*, 33 Cal. 279; *Munn* v. *Illinois*, 94 U. S. 197; *Toledo &c. Railway* v. *Jacksonville*, 67 Illinois, 37; *Davis* v. *Central Railroad*, 17 Georgia, 323; *Bartemeyer* v. *Iowa*, 18 Wall. 113.

The statute of Nevada imposing a tax upon merchandise brought into the State held constitutional. *In re Rudolph*, 2 Fed. Rep. 66.

Tax imposed on sales of merchandise in Alabama held constitutional. The court says: "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by citizens of Alabama or other States, and whether the goods sold are the product of that State or some other. There is no attempt to discriminate injuriously against the products of other States, or the rights of their citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama." *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, 8 Wall. 148.

Argument for Defendant in Error.

The law of New York requiring a report as to passengers brought into the State is a police regulation. *New York* v. *Miln*, 11 Pet. 102.

Statutes like the statute of Iowa now under consideration are police regulations established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances, and are constitutional. Cooley Const. Lim. 581; *Commonwealth* v. *Kendall*, 12 Cushing, 414; *Commonwealth* v. *Clapp*, 5 Gray, 97; *Commonwealth* v. *Howe*, 13 Gray, 26; *Our House* v. *State*, 4 Greene (Iowa), 172; *Zumhoff* v. *State*, 4 Greene (Iowa), 526; *State* v. *Donehey*, 8 Iowa, 396; *State* v. *Wheeler*, 25 Conn. 290; *Reynolds* v. *Geary*, 26 Conn. 179; *Oviatt* v. *Pond*, 29 Conn. 479; *People* v. *Gallagher*, 4 Mich. 244; *Gill* v. *Parker*, 31 Vt. 610; *Meshmeier* v. *State*, 11 Indiana, 482; *Vanderbilt* v. *Adams*, 7 Cowen, 349.

It has been expressly decided by this court that as a measure of police regulation looking to the preservation of public morals a state law prohibiting the manufacture and sale of intoxicating liquor is not repugnant to any clause of the Constitution of the United States. *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Mass.*, 97 U. S. 25; *Foster* v. *Kansas*, 112 U. S. 201.

This law has been decided to be constitutional, in its main provisions at least, by the Supreme Court of Iowa. *Littleton* v. *Fritz*, 22 N. W. Rep. 641.

It is a well settled rule, that courts will not declare legislative enactments void by reason of their repugnance to constitutions, state or federal, except when the judicial mind is clearly convinced of such repugnancy.

The legislature cannot part with any of the police powers of the State which are matters that affect the public peace, public health, public morals and public convenience. *Farmers' Loan and Trust Co.* v. *Stone*, 20 Fed. Rep. 270; *Allerton* v. *City of Chicago*, 6 Fed. Rep. 555; *In re Wong Yung Quy*, 2 Fed. Rep. 624; *Beer Co.* v. *Massachusetts*, *supra*.

It is well settled now that the States have the power to prohibit the sale of intoxicating liquors within the borders of the State. This prohibition must necessarily be a restriction upon

the importation of such liquors from other States, and if the prohibition was made for the purpose only of preventing such importation, it would be void, but when made for the protection of morals, public health and good order, it is clearly within the power of the State.

The right to prohibit the bringing of certain articles into the State because such importation endangers the public safety, is not affected by the fact that the articles so prohibited may be articles of property and of value as property. When the public safety demands it the State has the right to prohibit the bringing of articles or property within the limits of the State, or to impose conditions or restrictions upon such importation for the protection of the public health, morality and good order. This right has always been exercised by the States without question. Certain articles of property deemed prejudicial to the morals of the people have been excluded by the laws of the States.

Revised Statutes of Illinois, c. 38, § 379, excludes certain books, pamphlets, engravings, models, casts, lithographs, photographs, etc.

See § 9289 Howell, Annotated Stat. Mich., p. 2248; § 4022, Statutes of Iowa; § 4590 General Statutes of Wisconsin: § 12, c. 100, General Statutes of Minnesota.

In nearly every State restrictions are laid upon the importation of certain articles for the protection of the public health. Dynamite can be brought into Michigan and many other States only when packed and marked in a certain manner involving large expense.

Mr. James E. Munroe and *Mr. W. C. Goudy* also filed a brief for defendants in error.

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

It is not denied that the declaration sets out a good cause of action. It alleges that the defendant was possessed of and operated a certain railway, by means of which it became and

was a common carrier of goods and chattels thereon for hire, from the city of Chicago, in the State of Illinois, to the city of Council Bluffs, in the State of Iowa, and that, as such, it was its duty to carry from and to all stations upon its line of railway all goods and merchandise that might be intrusted to it for that purpose. This general duty was imposed upon it by the common law as adopted and prevailing in the States of Illinois and Iowa. The single question, therefore, presented upon the record is, whether the statute of the State of Iowa, set out in the plea, constitutes a defence to the action.

The section of the statute referred to, being § 1553 of the Iowa Code as amended by the act of April 5, 1886, forbids any common carrier to bring within the State of Iowa, for any person or persons or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell intoxicating liquors in such county.

This statutory provision does not stand alone, and must be considered with reference to the system of legislation of which it forms a part. The act of April 5, 1886, in which it is contained, relates to the sale of intoxicating liquors within the State of Iowa, and is amendatory of chapter 143 of the acts of the twentieth General Assembly of that State "relating to intoxicating liquors and providing for the more effectual suppression of the illegal sale and transportation of intoxicating liquors and abatement of nuisances." The original § 1553 of the Iowa Code contains a similar provision in respect to common carriers. By § 1523 of the Code, the manufacture and sale of intoxicating liquors, except as thereinafter provided, is made unlawful, and the keeping of intoxicating liquor with intent to sell the same within the State, contrary to the provisions of the act, is prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared to be a nuisance, to be forfeited and dealt with as

thereinafter provided. Section 1524 excepts from the operation of the law sales by the importer thereof of foreign intoxicating liquor, imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws, provided that the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities of not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only. The law also permits the manufacture in the State of liquors for the purpose of being sold, according to the provisions of the statute, to be used for mechanical, medicinal, culinary or sacramental purposes; and for these purposes only any citizen of the State, except hotelkeepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is permitted within the county of his residence to buy and sell intoxicating liquors, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted. It also declares the building or erection of whatever kind, or the ground itself in or upon which intoxicating liquor is manufactured or sold, or kept with intent to sell, contrary to law, to be a nuisance, and that it may be abated as such. The original provisions of the Code (§ 1555) excluded from the definition of intoxicating liquors, beer, cider from apples, and wine from grapes, currants and other fruits grown in the State, but by an amendment that section was made to include alcohol, ale, wine, beer, spirituous, vinous and malt liquors, and all intoxicating liquors whatever. It thus appears that the provisions of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other State for delivery at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that State with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the State as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa,

not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors.

We have had recent occasion to consider state legislation of this character in its relation to the Constitution of the United States. In the case of *Mugler* v. *Kansas*, 123 U. S. 623, 657, it was said: "That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court rendered before and since the adoption of the Fourteenth Amendment. . . . These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in so doing to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government or violate rights secured by the Constitution of the United States." In *The License Cases*, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States by reason of an alleged conflict between them and the power of Congress to regulate commerce with foreign countries and among the several States. The statutes of Massachusetts and of Rhode Island considered in those cases had reference to the sale within those States respectively of intoxicating liquor imported from foreign countries, but not sold or offered for sale within the State by the importer in original packages. The statute of New Hampshire, however, applied to intoxicating liquor imported from another State, and the decision in that case upheld its validity in reference to the disposition by sale or otherwise of the intoxicating liquor after it had been brought into the State. That judgment, therefore, closely approached the

question presented in this case. The justices all concurred in the result, but there was not a majority which agreed upon any specific ground for the conclusion, and it is necessary to compare the several opinions which were pronounced in order to extract the propositions necessarily embraced in the judgment. Chief Justice Taney was of the opinion that Congress had clearly the power to regulate such importation and sale under the grant of power to regulate commerce among the several States; "yet, as Congress has made no regulation on the subject," he said, "the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." p. 586. Mr. Justice Catron and Mr. Justice Nelson agreed with the Chief Justice that the statute of New Hampshire in question was a regulation of commerce, but lawful, because not repugnant to any actual exercise of the commercial power by Congress. Mr. Justice McLean seemed to think that the power of Congress ended with the importation, and that the sale of the article after it reached its destination was within the exclusive control of the State. He said: "If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress. . . . But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license." p. 595. Mr. Justice Daniel denied that the right of importation included the right to sell within the State, contrary to its laws. He impliedly admitted the exclusive power of Congress to regulate importation, and maintained, as equally exclusive, the right of the State to regulate the matter of sale. Mr. Justice Woodbury concurred in the same distinction. He said (p. 619): "It is manifest, also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without

license is another and entirely different." The first he thought was within the control of Congress, the latter within the exclusive jurisdiction of the State. He said: "The subject of buying and selling within a State, is one as exclusively belonging to the power of the State over its internal trade as that to regulate foreign commerce is with the general government under the broadest construction of that power. . . . The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For even under a prohibition to sell, a person could import, as he often does, for his own consumption, and that of his family and plantations; and also if a merchant extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State or abroad." He also said (p. 625): "But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either till they have entered the State, and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce." Mr. Justice Grier concurred mainly in the opinion delivered by Mr. Justice McLean, and did not consider that the question of the exclusiveness of the power of Congress to regulate commerce was necessarily connected with the decision of the point that the States had a right to prohibit the sale and consumption of an article of commerce within their limits, which they believed to be pernicious in its effects, and the cause of pauperism, disease, and crime.

From a review of all the opinions the following conclusions are to be deduced as the result of the judgment in those cases:

1. All the Justices concurred in the proposition that the statutes in question were not made void by the mere existence

of the power to regulate commerce with foreign nations and among the States delegated to Congress by the Constitution.

2. They all concurred in the proposition that there was no legislation by Congress in pursuance of that power with which these statutes were in conflict.

3. Some, including the Chief Justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive regulation of Congress, whenever it chose to exert its power, and that any statute of the State on the same subject in conflict with such positive provisions of law enacted by Congress would be void.

4. Others maintained the view that the power of Congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a State, but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the States as a part of their police power.

From this analysis it is apparent that the question presented in this case was not decided in *The License Cases*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned; and the reasoning which justified the right to prohibit sales admitted, by implication, the right to introduce intoxicating liquor, as merchandise, from foreign countries, or from other States of the Union, free from the control of the several States, and subject to the exclusive power of Congress over commerce.

It cannot be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the States. "Beyond all question, the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution when to Congress

was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. . . . Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted." *Case of the State Freight Tax*, 15 Wall. 232, 275, per Mr. Justice Strong. It was, therefore, decided in that case that a tax upon freight transported from State to State was a regulation of interstate transportation, and for that reason a regulation of commerce among the States. And this conclusion was reached notwithstanding the fact that Congress had not legislated on the subject, and notwithstanding the inference sought to be drawn from the fact, that it was thereby left open to the legislation of the several States. On that point it was said by Mr. Justice Strong, speaking for the court, as follows (p. 279): "Cases that have sustained state laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature not strictly of commercial regulations. The subjects were such as in *Gilman* v. *Philadelphia*, 3 Wall. 713, it was said, 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively.' However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature

as to require exclusive legislation by Congress. *Cooley* v. *Port Wardens*, 12 How. 299; *Crandall* v. *State of Nevada*, 6 Wall. 42. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under a load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government."

The distinction between cases in which Congress has exerted its power over commerce, and those in which it has abstained from its exercise, as bearing upon state legislation touching the subject was first plainly pointed out by Mr. Justice Curtis in the case of *Cooley* v. *Port Wardens*, 12 How. 299, and applies to commerce with foreign nations as well as to commerce among the States. In that case, speaking of commerce with foreign nations, he said (p. 319): "Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation." It was, therefore, held in that case that the laws of the several States concerning pilotage, although in their nature regulations of foreign commerce, were, in the absence of legislation on the same subject by Congress, valid exercises of power. The subject was local and not national, and was likely to be best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem appli-

cable to the local peculiarities of the ports within their limits; and to this it may be added that it was a subject imperatively demanding positive regulation. The absence of legislation on the subject, therefore, by Congress, was evidence of its opinion that the matter might be best regulated by local authority, and proof of its intention that local regulations might be made.

It may be argued, however, that, aside from such regulations as these, which are purely local, the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273.

The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the States, it may be for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign

nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective States.

We have seen that in the case of the *State Freight Tax*, 15 Wall. 232, a tax imposed by one State upon freight transported to or from another State was held to be void as a regulation of commerce among the States, on the ground that the transportation of passengers or merchandise through a State, or from one State to another, was in its nature national, so that it should be subjected to one uniform system or plan of regulation under the control of one regulating power. In that case the tax was not imposed for the purpose of regulating interstate commerce, but in order to raise a revenue, and would have been a legitimate exercise of an admitted power of the State if it had not been exerted so as to operate as a regulation of interstate commerce. Any other regulation of interstate commerce, applied as the tax was in that case, would fall equally within the rule of its decision. If the State has not power to tax freight and passengers passing through it, or to or from it, from or into another State, much less would it have the power directly to regulate such transportation, or to forbid it altogether. If in the present case the law of Iowa operated upon all merchandise sought to be brought from another State into its limits, there could be no doubt that it would be a regulation of commerce among the States and repugnant to the Constitution of the United States. In point of fact, however, it applies only to one class of articles of a particular kind, and prohibits their introduction into the State upon special grounds. It remains for us to consider whether those grounds are sufficient to justify it as an exception from the rule which would govern if they did not exist.

It may be material also to state in this connection that Congress had legislated on the general subject of interstate commerce by means of railroads prior to the date of the transaction

on which the present suit is founded. Section 5258 of the Revised Statutes provides that "every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." In the case of *Railroad Co.* v. *Richmond*, 19 Wall. 584, this section, then constituting a part of the act of Congress of June 15, 1866, was considered. Referring to this act and the act of July 25, 1866, authorizing the construction of bridges over the Mississippi River, the court say: "These acts were passed under the power vested in Congress to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were intended to reach trammels interposed by state enactments or by existing laws of Congress. . . . 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." p. 589.

Congress had also legislated on the subject of the transportation of passengers and merchandise in chapter 6, title 48 of the Revised Statutes; §§ 4252 to 4289, inclusive, having reference, however, mainly to transportation in vessels by water. But §§ 4278 and 4279 relate also to the transportation of nitro-glycerine and other similar explosive substances by land or water, and either as a matter of commerce with foreign countries or among the several States. Section 4280 provides that "the two preceding sections shall not be so construed as to prevent any State, Territory, district, city or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or

places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein."

So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by the States in particular cases by the express permission of Congress. On this point the language of this court in the case of *County of Mobile* v. *Kimball*, 102 U. S. 691, 697, is applicable. Repeating and expanding the idea expressed in the opinion in the case of *Cooley* v. *Board of Port Wardens*, 12 How. 299, this court 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 regulations, 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 discriminating in favor of its own products and against the products of 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." Also, (p. 702:) "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including

in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the State of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that State, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and obligations, in every other State into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the State of Illinois, and the breach of duty alleged against it is a violation of the law of that State in refusing to receive and transport goods which, as a common carrier, by that law, it was bound to accept and carry. It interposes as a defence a law of the State of Iowa, which forbids the delivery of such goods within that State. Has the law of Iowa any extra territorial force which does not belong to the law of the State of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall* v. *De Cuir*, 95 U. S. 485, 488, is exactly in point. It was there said: "But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from

without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more; it could prescribe rules by which the carrier must be governed within the State, in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it, Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It is impossible to justify this statute of Iowa by classifying it as an inspection law. The right of the States to pass inspection laws is expressly recognized in Art. 1, § 10, of the Constitution, in the clause declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." . . . "And all such laws shall be subject to the revision and control of the Congress." The nature and character of the inspection laws of the States, contemplated by this provision of the Constitution, were very fully exhibited in the case of *Turner* v. *Maryland*, 107 U. S. 38. "The object of inspection laws," said Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, "is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject, before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose." They are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving to the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption. They are not founded on the idea that the things, in respect to which inspection is required, are dangerous or noxious in themselves. As was said in *Turner* v. *Maryland*, 107 U. S. 38, 55: "Recognized elements of inspection laws have always been — quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds — all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements. It has never been regarded as necessary, and it is manifestly not necessary, that all of these elements should coexist in order to make a valid inspection law. Quality alone may be the subject of inspection, without other requirement, or the inspection may be made to extend to all of the above matters." It has never been regarded as within

the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse.

For similar reasons the statute of Iowa under consideration cannot be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community, or a law to prevent the introduction into the State of disease, contagious, infectious, or otherwise. Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce. They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution. Upon this point, the observations of Mr. Justice Catron in *The License Cases*, 5 How. 504, 599, are very much to the point. Speaking of the police power, as reserved to the States, and its relation to the power granted to Congress over commerce, he said: "The assumption is, that the police power was not touched by the Constitution, but left to the States, as the Constitution found it. This is admitted; and whenever a thing, from character or condition, is of a description to be regulated by that power in the State, then the regulation may be made by the State, and Congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this, whether the prohibited article belongs to, and is subject to be regulated as part of, foreign commerce, or of

commerce among the States. If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *The State of Maryland*, and *New York* v. *Miln*. What, then, is the assumption of the state court? Undoubtedly, in effect, that the State had the power to declare what should be an article of lawful commerce in the particular State; and having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of Congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities, or articles of property, which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police

power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing."

This question was considered in the case of *Railroad Co.* v. *Husen*, 95 U. S. 465, in which this court declared an act of the legislature of Missouri, which prohibited driving or conveying any Texas, Mexican, or Indian cattle into the State, between the 1st day of March and the 1st day of November of each year, to be in conflict with the constitutional provision investing Congress with power to regulate commerce among the several States, holding that such a statute was more than a quarantine regulation and not a legitimate exercise of the police power of the State. In that case it was said, (p. 472:) "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or intestate commerce. . . . The reach of the statute

was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. . . . The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope, cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The same principles were declared in *Henderson* v. *The Mayor of New York*, 92 U. S. 259, and *Chy Lung* v. *Freeman*, 92 U. S. 275. In the latter case, speaking of the right of the State to protect itself from the introduction of paupers and convicted criminals from abroad, the court said, (p. 280:) "Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." "It may also be admitted," as was said in the case of *Railroad Co.* v. *Husen*, 95 U. S. 465, 471, "that the police power of a State justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in *The Passenger Cases*, 7 How. 283, by Mr. Justice Grier, in the sacred law of self-defence. *Vide* 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive. But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national

government. . . . Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution."

It is conceded, as we have already shown, that for the purposes of its policy a State has legislative control, exclusive of Congress, within its territory, of all persons, things, and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be.

The statute of Iowa under consideration falls within this prohibition. It is not an inspection law; it is not a quarantine or sanitary law. It is essentially a regulation of commerce among the States within any definition heretofore given to that term, or which can be given; and although its motive and purpose are to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the State from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the States.

Can it be supposed that by omitting any express declarations on the subject, Congress has intended to submit to the several States the decision of the question in each locality of

what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States. "It cannot be too strongly insisted upon," said this court in *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557, 572, "that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Brown* v. *Maryland*, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce

among the States, which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State, within whose limits a part of the transportation must be done, could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In *Brown* v. *Houston*, 114 U. S. 622, 630, it was declared that the power of Congress over commerce among the States "is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction. All laws and regulations are restrictive of natural freedom to some extent, and, where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that that commerce shall be free and untrammeled; and any regulation of the subject by the States is repugnant to such freedom. This has frequently been laid down as law in the judgments of this court."

The present case is concluded, we think, by the judgment of this court in *Walling* v. *Michigan*, 116 U. S. 446. In that case an act of the legislature of the State of Michigan, which imposed a tax upon persons who, not residing or having their principal place of business within the State, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without it, but did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the State, was declared to be void on the ground that it was a regulation in restraint of commerce, repugnant to the Constitution of the United States. In that case it was said (p. 459): "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."

It would be error to lay any stress on the fact that the statute passed upon in that case made a discrimination between citizens and products of other States in favor of those of the State of Michigan, notwithstanding the intimation on that point in the foregoing extract from the opinion. This appears plainly from what was decided in the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. It was there said (p. 497): "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers — those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall. 232."

In answer to another suggestion in the opinion of the Supreme Court of Michigan, that the regulation contained in the act did not amount to a prohibition, this court said: "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."

The relation of the police powers of the State to the powers

granted to Congress by the Constitution over foreign and interstate commerce, was stated by this court in the opinion in the case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493, as follows: "It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State mingled with and forming part of the great mass of property therein. But in making such internal regulations, a state cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad or from another State, and not yet become a part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. . . . In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be sub-

ject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon this subject."

The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within this enumeration of legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other state regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be said, however, that the right of the State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the

right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportion has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extra-territorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent.

It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 12 Wheat. 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the State, we are not

now called upon to delineate. It is enough to say, that the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State.

For these reasons, we are constrained to pronounce against the validity of the section of the statute of Iowa involved in this case. The judgment of the Circuit Court of the United States for the Northern District of Illinois is therefore

Reversed, and the cause remanded, with instructions to sustain the demurrer to the plea, and to take further proceedings therein in conformity with this opinion.

Mr. Justice Field, concurring.

I concur in the judgment of the court in this case, and in the greater part of the opinion upon which it is founded.

The opinion clearly shows, as I think, that the law of Iowa prohibiting the importation into that State of intoxicating liquors is an encroachment on the power of Congress over interstate commerce. That commerce is a subject of vast extent. It embraces intercourse between citizens of different States for purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities. The power to regulate it, which is vested in Congress in the same clause with the power to regulate commerce with foreign nations, is general in its terms. And to regulate this commerce is to prescribe the conditions under which it shall be conducted; that is, how far it shall be free, and how far subject to restrictions. The defendant is a common carrier engaged in the transportation of freight by railway, not only between places in the State of Illinois, but also between places in different States. In the latter business it is, therefore, engaged in interstate commerce. Whatever is an article of commerce it may carry, subject to such regulations as may be necessary for the convenience and safety of the community through which its cars pass, and to insure safety in the carriage of the freight. The law of Iowa prescribing the condi-

tions upon which certain liquors may be imported into that State is, therefore, a regulation of interstate commerce. Such regulation, where the subject, like the transportation of goods, is national in its character, can be made only by Congress, the power which can act for the whole country. Action by the States upon such commerce is not, therefore, permissible. *Mobile* v. *Kimball*, 102 U. S. 691, 697.

What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any State. The State possesses the power to prescribe all such regulations with respect to the possession, use, and sale of property within its limits as may be necessary to protect the health, lives, and morals of its people; and that power may be applied to all kinds of property, even that which in its nature is harmless. But the power of regulation for that purpose is one thing, and the power to exclude an article from commerce by a declaration that it shall not thenceforth be the subject of use and sale, is another and very different thing. If the State could thus take an article from commerce, its power over interstate commerce would be superior to that of Congress, where the Constitution has vested it. The language of Mr. Justice Catron on this subject in *The License Cases*, quoted in the opinion of the court, is instructive. 5 How. 504, 600. Speaking of the assumption by the State of power to declare what shall and what shall not be deemed an article of commerce within its limits, and thus to permit the sale of one and prohibit the sale of the other, without reference to Congressional power of regulation, the learned justice said: "The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created, in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes

from Congress, and leaves with the States, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

In *Mugler* v. *Kansas*, recently decided, (123 U. S. 623,) this court held a statute of that State to be valid which prohibited the manufacture and sale within its limits of intoxicating liquors except for medical, scientific, or mechanical purposes, and made a violation of its provisions a misdemeanor punishable by fine or imprisonment. I agreed to so much of the opinion of the court in that case as asserted that there was nothing in the Constitution or laws of the United States which affected the validity of the statute prohibiting the sale of such liquors manufactured in the State, except under proper regulations for the protection of the health and morals of the people. But, at the same time, I stated, without expressing any opinion on the subject, that I was not prepared to say that the State could prohibit the sale of such liquors within its limits under like regulations, if Congress should authorize their importation; observing that the right to import an article of merchandise, recognized as such by the commercial world, whether the right be given by act of Congress or by treaty with a foreign nation, would seem necessarily to carry the right to sell the article when imported. Where the importation is authorized from one State to another a similar right of sale of the article imported would seem to follow. The question upon which I was then unwilling to express an opinion is presented in this case, not in a direct way, it is true,

but in such a form as, it seems to me to require consideration.

A statute of Iowa contains a prohibition, similar to that of the Kansas statute, upon the manufacture and sale of intoxicating liquors within its limits, with the additional exception of permission to use them for culinary purposes, and to sell foreign liquors imported under a law of Congress, in the original casks or packages in which they are imported. The law under consideration in this case, prohibiting the importation into Iowa of such liquors from other States, without a license for that purpose, was passed to carry out the policy of the State to suppress the sale of such liquors within its limits. And the argument is pressed with much force that if the State cannot prohibit the importation its policy to suppress the sale will be defeated, and if legislation establishing such policy is not in conflict with the Constitution of the United States, this additional measure to carry the legislation into successful operation must be permissible. The argument assumes that the right of importation carries with it the right to sell the article imported, a position hereafter considered.

The reserved powers of the States in the regulation of their internal affairs must be exercised consistently with the exercise of the powers delegated to the United States. If there be a conflict, the powers delegated must prevail, being so much authority taken from the States by the express sanction of their people; for the Constitution itself declares that laws made in pursuance of it shall be the supreme law of the land. But those powers which authorize legislation touching the health, morals, good order, and peace of their people were not delegated, and are so essential to the existence and prosperity of the States that it is not to be presumed that they will be encroached upon so as to impair their reasonable exercise.

How can these reserved powers be reconciled with the conceded power of Congress to regulate interstate commerce? As said above, the State cannot exclude an article from commerce, and consequently from importation, simply by declaring that its policy requires such exclusion; and yet its regulations respecting the possession, use, and sale of any article of com-

merce may be as minute and strict as required by the nature of the article, and the liability of injury from it, for the safety, health and morals of its people.

In the opinion of the court it is stated that the effect of the right of importation upon the asserted right, as a consequence thereof, to sell the article imported is not involved in this case, and therefore it is not necessary to express any opinion on the subject. The case, it is true, can be decided, and has been decided, without expressing an opinion on that subject; but with great deference to my associates, I must say that I think its consideration is presented, and to some extent required, to meet the argument that the right of importation, because carrying the right to sell the article imported, is inconsistent with the right of the State to prohibit the sale of the article absolutely, as held in the Kansas case. With respect to most subjects of commerce, regulations may be adopted touching their use and sale when imported, which will afford all the protection and security desired, without going to the extent of absolute prohibition. It is not found difficult, even with the most dangerous articles, to provide such minute and stringent regulations as will guard the public from all harm from them. Arsenic, dynamite powder, and nitro-glycerine are imported into every State under such restrictions, as to their transportation and sale, as to render it safe to deal in them. There may be greater difficulty in regulating the use and sale of intoxicating liquors; and I admit that whenever the use of an article cannot be regulated and controlled so as to insure the health and safety of society, it may be prohibited and the article destroyed.

That the right of importation carries with it the right to sell the article imported does not appear to me doubtful. Of course I am speaking of an article that is in a healthy condition, for when it has become putrescent or diseased it has ceased to be an article of commerce, and it may be destroyed or its use prohibited. To assert that, under the Constitution of the United States, the importation of an article of commerce cannot be prohibited by the States, and yet to hold that when imported its use and sale can be prohibited, is to declare

that the right which the Constitution gives is a barren one, to be used only so far as the burden of transportation is concerned, and to be denied so far as any benefits from such transportation are sought. The framers of the Constitution never intended that a right given should not be fully enjoyed. In *Brown* v. *Maryland*, 12 Wheat. 419, 446, Chief Justice Marshall, in delivering the opinion of the court, speaking of the commercial power of Congress, and after observing that it is co-extensive with the subject on which it acts, and cannot be stopped at the exterior boundary of a State, but must enter its interior, said: "If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; — one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . . The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable." And the Chief Justice added: "We suppose the principles laid down in this case to apply equally to importations from a sister State." p. 449.

Assuming, therefore, as correct doctrine that the right of importation carries the right to sell the article imported, the

decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the State over property created within it, and its power over property imported — its power in one case extending, for the protection of the health, morals, and safety of its people, to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the State. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled.

There is great difficulty in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. The same difficulty was experienced in *Brown* v. *Maryland*, in drawing a line between the restriction on the States to lay a duty on imports and their acknowledged power to tax persons and property. In that case the court said that the two, the power and the restriction, though distinguishable when they did not approach each other, might, like the intervening colors between white and black, approach so nearly as to perplex the understanding as colors perplex the vision, in marking the distinction between them: but as the distinction existed, it must be marked as the cases arise. And after observing that it might be premature to state any rule as being universal in its application, the court held as sufficient for that case that when the importer had so acted upon the thing imported, that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and had become subject to the taxing power of the state; but that while remaining the property of the importer, in his warehouse in the original form or package in which it was imported, a tax upon it was plainly a duty on imports.

So in the present case it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the Federal government ends and the power of the state to restrict

further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown* v. *Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the State, and not afterwards. And yet it is evident that the value of the importation will be materially affected, if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the State must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises.

In *The License Cases*, reported in 5 Howard, this court held that the States could not only regulate the sales of imported liquors, but could prohibit their sale. The judges differed in their views in some particulars, but the majority were of opinion that the States had authority to legislate upon subjects of interstate commerce until Congress had acted upon them; and as Congress had not acted, the regulation of the States was valid. The doctrine thus declared has been modified since by repeated decisions. The doctrine now firmly established is, that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the

needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled. *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319; *State Freight Tax Case*, 15 Wall. 232, 271; *Welton* v. *Missouri*, 91 U. S. 275, 282; *Railroad Co.* v. *Husen*, 95 U. S. 465, 469; *Mobile* v *Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203; *Brown* v. *Houston*, 114 U. S. 622, 631; *Walling* v. *Michigan*, 116 U. S. 446, 455; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

It is a matter of history that one of the great objects of the formation of the Constitution was to secure uniformity of commercial regulations, and thus put an end to restrictive and hostile discriminations by one State against the products of other States, and against their importation and sale. "It may be doubted," says Chief Justice Marshall, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American government took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown* v. *Maryland*, 12 Wheat. 446. To these views I may add, that if the States

have the power asserted, to exclude from importation within their limits any articles of commerce because in their judgment the articles may be injurious to their interests or policy, they may prescribe conditions upon which such importation will be admitted, and thus establish a system of duties as hostile to free commerce among the states as any that existed previous to the adoption of the Constitution.

MR. JUSTICE HARLAN, with whom concurred THE CHIEF JUSTICE, and MR. JUSTICE GRAY, dissenting.

The Chief Justice, Mr. Justice Gray, and myself are unable to assent to the opinion and judgment of the court.

The effect of the statutes of Iowa is to forbid the introduction of intoxicating liquors from other States for sale, except for medicinal, mechanical, culinary, or sacramental purposes. They may be brought in for such purposes, by any person, or carrier, for another person or corporation, if consigned to some one authorized by the laws of Iowa to buy and sell intoxicating liquors. And these statutes permit the sale of foreign intoxicating liquors, imported under the laws of the United States, provided such sale is by the importer, in the original casks or packages, and in quantities not less than those in which they are required to be imported.

It appears upon the face of the declaration that the plaintiffs — one of whom is a citizen of Iowa — made application to the board of supervisors of Marshall County, in that State, for permission, under the statute, to buy and sell in that county intoxicating liquors for medicinal, culinary, mechanical, and sacramental purposes, and that their application was rejected. They then resorted to the expedient of buying five thousand barrels of beer in Chicago, and tendering them to the railroad company for transportation to the same county, without furnishing the certificate required by the laws of Iowa. The refusal of the company to transport this beer into Iowa, in violation of her laws, is the basis of the present suit. The plaintiffs claim damages upon the ground that they could have sold this beer in that State at a price in advance of what

it cost them. As they do not allege that the beer was to be delivered in Iowa to a person authorized by her laws to sell it there, no wrong was done, of which the plaintiffs can complain, unless it be their right, not only to have their beer carried into the State, but to sell it there, in defiance of her laws.

The fundamental question, therefore, is, whether Iowa may lawfully restrict the bringing of intoxicating liquors from other States into her limits, by any person or carrier, for another person or corporation, except such as are consigned to persons authorized by her laws to buy and sell them for the special purposes indicated. In considering this question, we are not left to conjecture as to the motives prompting the enactment of these statutes; for, it is conceded, that the prohibition upon common carriers bringing intoxicating liquors from other States, except under the foregoing conditions, was adopted as subservient to the general design of protecting the health and morals and the peace and good order of the people of Iowa against the physical and moral evils resulting from the unrestricted manufacture or sale of intoxicating liquors.

In *Mugler* v. *Kansas*, 123 U. S. 623, it was adjudged that state legislation prohibiting the manufacture of intoxicating liquors, to be sold or bartered for general use as a beverage, did not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States; and that the former decisions to that effect — *License Cases*, 5 How. 504; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33; and *Foster* v. *Kansas*, 112 U. S. 201, 206 — "rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and, in so doing, to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution. The power to establish such regulations, as was said in *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, reaches everything within the territory of a State not surrendered to the national government." 123 U. S. 659. Referring to the suggestion that no government could lawfully prohibit a citizen from

manufacturing for his own use, or for export or storage, any article of food or drink, not endangering or affecting the rights of others, the court said: "But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." 123 U. S. 660, 661.

But it is contended that a statute forbidding the introduction of intoxicating liquors from other States, does infringe rights secured by the Constitution of the United States; and that view is sustained by the opinion and judgment in this case. The decision is placed upon the broad ground that intoxicating liquors are merchantable commodities, or known articles of commerce, and that, consequently, the Constitution, by the mere grant to Congress of the power to regulate commerce operates, in the absence of legislation, to establish unrestricted trade, among the States of the Union, in such commodities or articles. To this view we cannot assent. In Mugler's case the court said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil." The court also said, that "if, in the judgment of the legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if not

defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their view as to what is best and safest for the community, to disregard the legislative determination of that question. . . . Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks for general or individual use, as a beverage, are or may become hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." 123 U. S. 662, 663.

In *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 205, Chief Justice Marshall said that "inspection laws, quarantine laws, and health laws of every description" were component parts of that mass of legislation, "not surrendered to the general government," which "can be most advantageously exercised by the States themselves;" that such laws "are considered as flowing from the acknowledged power of a State to provide for the health of its citizens." To this doctrine the court has steadily adhered. In *Gilman* v. *Philadelphia*, 3 Wall. 713, 730, after observing that a state law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of goods imported from a foreign country, is void, (*Brown* v. *Maryland*, 12 Wheat. 419,) and that a state law which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a state officer on account of each passenger brought from a foreign country, is also void, (*Passenger Cases*, 7 How. 273,) the court said: "But a State, in the exercise of its police power, may forbid spirituous liquor, imported from abroad or from another State, to be sold by retail or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere for an indefinite period; and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under 'health laws,'

and, if it cannot be purged of its poison, may be committed to the flames." In *Sherlock* v. *Alling*, 93 U. S. 99, 103, it was said that "in conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." In *Railroad Co.* v. *Husen*, 95 U. S. 465, 471, the court adjudged that a statute of Missouri, prohibiting the introduction into that State of all Texas, Mexican, or Indian cattle between May 1 and November 1 of each year, whether diseased or not, and which imposed burdensome conditions upon their transportation through the State, was void because a regulation of interstate commerce. But it was distinctly declared that the delegation to Congress of the power to regulate commerce with foreign nations and among the States "was not a surrender of that which may properly be denominated police power," which included, the court said, the power, in each State, to adopt "precautionary measures against social evils"; to "prevent the spread of crime or pauperism, or disturbance of the peace"; to "exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infecticus diseases"; and to exclude "property dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases." "All these," it was said, "are in immediate connection with the protection of persons and property against noxious acts of other persons, or such use of property as is injurious to the property of others; they are self-defensive." It was only because the Missouri statute embraced cattle that were free from disease, that it was declared unconstitutional. In *Patterson* v. *Kentucky*, 97 U. S. 501, 505, the principle was affirmed that the police power of the States was not surrendered, when authority was conferred upon Congress to regulate commerce with foreign nations, and among the States.

It seems to us that the decision just rendered does not conform to the doctrines of the foregoing cases, and may impair,

if it does not destroy, the power of a State to protect her people against the injurious consequences that are admitted to flow from the general use of intoxicating liquors. It was said in *Brown* v. *State of Maryland*, 12 Wheat. 419, 439, 441: "There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. . . . When the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." Considering the question in that case, under the power of Congress to regulate commerce, the court said: "Sale is the object of importation, and is an essential ingredient in that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce." p. 447. Although there was no question in that case as to commerce among the States, the court further said: "We suppose the principles laid down in this case to apply equally to importations from a sister State." p. 449. If, therefore, as the court now decides, the Constitution gives the right to transport intoxicating liquors into Iowa from another State, and if that right carries with it, as one of its essential ingredients, authority, in the consignee, to sell or exchange such articles, after they are so brought in, and while in his possession, in the original packages, it is manifest that the regulation forbidding sales of intoxicating liquors, within the State, for other than medicinal, mechanical, culinary, or sacramental purposes, and then only under a permit from a board of supervisors, will be of little practical value. In this view, any one — even a citizen of Iowa — desiring to sell intoxicating liquors in that State, need only arrange to have them delivered to him from some point in another State, in

packages of varying sizes, as may suit customers. Or, he may erect his manufacturing establishment, or warehouse, just across the Iowa line, in some State having a different public policy, and thence, with wagons, transport liquors into Iowa, in original packages. If the State arraigns him for a violation of her laws, he may claim — and, under the principles of the present decision, it may become difficult to dispute the claim — that, although such laws were enacted solely to protect the health and morals of the people, and to promote peace and good order among them, and although they are fairly adapted to accomplish those objects, yet the Constitution of the United States, without any action upon the part of Congress, secures to him the right to bring or receive from other States intoxicating liquors in original packages, and to sell them, while held by him in such packages, to all choosing to buy them. Thus, the mere silence of Congress upon the subject of trade among the States in intoxicating liquors is made to operate as a license to persons doing business in one State to jeopard the health, morals, and good order of another State, by flooding the latter with intoxicating liquors, against the express will of her people.

It is admitted that a State may prevent the introduction within her limits of rags or other goods infected with disease, or of cattle or meat, or other provisions which, from their condition, are unfit for human use or consumption; because, it is said, such articles are not merchantable or legitimate subjects of trade and commerce. But suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health, and the public morals, what authority has Congress or the judiciary to review their judgment upon that subject, and compel them to submit to a condition of things which they regard as destructive of their happiness and the peace and good order of society? If, consistently with the Constitution of the United States, a State can protect her sound cattle by prohibiting altogether the introduction within her limits of diseased cattle, she ought not to be deemed disloyal to that Constitution when she seeks by similar legislation to protect

her people and their homes against the introduction of articles which are, in good faith, and not unreasonably, regarded by her citizens as "laden with infection" more dangerous to the public than diseased cattle, or than rags containing the germs of disease.

It is not a satisfactory answer to these suggestions, to say that if the State may thus outlaw the manufacture and sale of intoxicating liquors, as a beverage, and exclude them from her limits, she may adopt the same policy with reference to articles that confessedly have no necessary or immediate connection with the health, the morals, or the safety of the community, but are proper subjects of trade the world over. This possible abuse of legislative power was earnestly dwelt upon by the counsel in *Mugler's Case*. The same argument can be, as it often is, made in reference to powers that all concede to be vital to the public safety. But it does not disprove their existence. This court said that the judicial tribunals were not to be misled by mere pretences, and were under a solemn duty to look at the substance of things whenever it became necessary to inquire whether the legislature had transcended the limits of its authority; and that, "if, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." 123 U. S. 661. In view of these principles, the court said it was difficult to perceive any ground for the judiciary to declare that the prohibition by a State of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. *Id.* 662. In the same case the court sustained, without qualification, the authority of Kansas to declare, not only that places where such liquors were manufactured, sold, bartered, or given away, or were kept for sale, barter, or delivery, in violation of her statutes, should be deemed common nuisances, but to provide

for the forfeiture, without compensation, of the intoxicating liquors found in such places and the property used in maintaining said nuisances.

Now, can it be possible that the framers of the Constitution intended — whether Congress chose or not to act upon the subject — to withhold from a State authority to prevent the introduction into her midst of articles or commodities, the manufacture of which, within her limits, she could prohibit, without impairing the constitutional rights of her own people? If a State may declare a place where intoxicating liquors are sold for use as a beverage to be a common nuisance, subjecting the person maintaining the same to fine and imprisonment, can her people be compelled to submit to the sale of such liquors, when brought there from another State for that purpose? This court has often declared that the most important function of government was to preserve the public health, morals, and safety; that it could not divest itself of that power, nor, by contract, limit its exercise; and that even the constitutional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as the one or the other may be involved in the execution of such contracts. *Stone* v. *Mississippi*, 101 U. S. 814, 816; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 751; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *Mugler* v. *Kansas*, 123 U. S. 623, 664. Does the mere grant of the power to regulate commerce among the States invest individuals of one State with the right, even without the express sanction of Congressional legislation, to introduce among the people of another State articles which, by statute, they have declared to be deleterious to their health and dangerous to their safety? In our opinion, these questions should be answered in the negative. It is inconceivable that the well-being of any State is at the mercy of the liquor manufacturers of other States.

These views are sustained by *Walling* v. *Michigan*, 116 U. S. 446. It was there held that a statute of Michigan which imposed a tax upon persons who, not residing or having their

principal place of business in that State, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into Michigan from other States, but which did not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in that State, was a discrimination against the products of other States, and void as a regulation in restraint of commerce. In reference to the suggestion by the state court that the statute was an exercise by the legislature of the police power for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people, this court said: "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." p. 460. The clear implication from this language is that the state law would have been sustained if it had applied the same rule to the products of Michigan which it attempted to apply to the products of other States.

At the argument it was insisted that the contention of the plaintiffs was supported by *Brown* v. *Maryland*, 12 Wheat. 419, 436, where the question was whether the legislature of a State could constitutionally require an importer of foreign articles or commodities to take out a license from the State before he should be permitted to sell a bale or package so imported. The indictment in that case charged Brown with having sold one package of foreign "dry goods" without having such a license. The court held the state regulation to be repugnant to that clause of the Constitution declaring that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, as well as to that clause which clothes Congress with power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. Among other things, it said that the right to sell articles imported from foreign countries is connected with the law permitting importation, as an inseparable incident; observing, at the close of the

opinion that it supposed the principle laid down to apply equally to importations from a sister State. It is, however, clear from the whole opinion that the court in that observation had reference to commerce in articles having no connection whatever with the health, morals, or safety of the people, and that it had no purpose to withdraw or qualify the explicit declaration, in *Gibbons* v. *Ogden*, that the health laws of the States were a component part of that mass of legislation, the power to enact which remained with the States, because never surrendered to the general government. In behalf of Maryland it was insisted that the constitutional prohibition of state imposts or duties upon imports ceased the instant the goods entered the country; otherwise, it was argued, the importer "may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied." To this argument Chief Justice Marshall replied: "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly recognize the health laws of a State." This, we understand to have been a distinct readjudication that the police power, so far as it involves the public health, the public morals, or the public safety, remains with the States, and is not overridden by the National Constitution.

In *Gibbons* v. *Ogden*, it was said by counsel that the Constitution does not confer the right of intercourse between State and State, and that such right has its source in those laws whose authority is acknowledged by civilized man throughout

the world. Chief Justice Marshall said: "This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it." 9 Wheat. 211. In the same case he said that this power is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." p. 196. It may be said, generally, that free commercial intercourse exists among the several States by force of the Constitution. But as, by the express terms of that instrument, the powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people, and as, by the repeated adjudications of this court, the States have not surrendered, but have reserved, the power, to protect, by police regulations, the health, morals, and safety of their people, Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power. Even if Congress, under the power to regulate commerce, had authority to declare what shall or what shall not be subjects of commerce among the States, that power would not fairly imply authority to compel a State to admit within her limits that which, in fact is, or which, upon reasonable grounds, she may declare to be destructive of the health, morals, and peace of her people. The purpose of committing to Congress the regulation of commerce was to insure equality of commercial facilities, by preventing one State from building up her own trade at the expense of sister States. But that purpose is not defeated when a State employs appropriate means to prevent the introduction into her limits of what she lawfully forbids her own people from making. It certainly was not meant to give citizens of other States greater rights in Iowa than Iowa's own people have.

But if this be not a sound interpretation of the Constitution; if intoxicating liquors are entitled to the same protection by the National Government as ordinary merchandise entering into commerce among the States; if Congress, under the power to regulate commerce, may, in its discretion, permit or prohibit commerce among the States in intoxicating liquors; and, if, therefore, state police power, as the health,

morals, and safety of the people may be involved in its proper exercise, can be overborne by national regulations of commerce, the former decisions of this court would seem to show that such laws of the States are valid, even where they affect commercial intercourse among the States, until displaced by Federal legislation, or until they come in direct conflict with some act of Congress. Such was the doctrine announced in *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245. That case involved the validity of an act of the legislature of Delaware, authorizing a dam to be built across a navigable stream, in which the tide ebbed and flowed, and in which there was a common and public way in the nature of a highway. The court, speaking by Chief Justice Marshall, said: "The act of assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it." p. 251. The counsel having insisted that the statute came in conflict with the power of Congress to regulate commerce with foreign nations and among the several States, the court said: "If Congress had passed any act which bore on this case, any act in execution of the power to regulate commerce, the object of which was to control state legislation over small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should not feel much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with

foreign nations and among the several States; a power which has not been so exercised as to affect the question." The same principle is announced in many other cases. *Gilman* v. *Philadelphia*, 3 Wall. 713; *Escanaba Co.* v. *Chicago*, 107 U. S. 678; *Cardwell* v. *American Bridge Co.*, 113 U. S. 205; *Hamilton* v. *Vicksburg &c. Railroad*, 119 U. S. 280; *Huse* v. *Glover*, 119 U. S. 543, 546. These were all cases of the erection of bridges and other structures within the limits of States, and under their authority, across public navigable waters of the United States. They were held not to be forbidden by the Constitution, although such structures actually interfered with interstate commerce. In *Gilman* v. *Philadelphia* and *Cardwell* v. *American Bridge Co.*, the bridges were without draws, entirely preventing the passage of boats to points, in one case, where the tide ebbed and flowed, and, in both cases, to points where commerce had been previously carried on. In *Hamilton* v. *Vicksburg &c. Railroad*, the court said: "What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulation of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams. Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary. When the State provides for the form and character of the structure its directions will control, except as against the action of Congress, whether the bridge be with or without draws, and irrespective of its effect upon navigation." p. 281.

But, perhaps, the language of this court — all the judges concurring — which most directly bears upon the question before us, is found in *County of Mobile* v. *Kimball*, 102 U. S. 691, 701, reaffirming *Willson* v. *Blackbird Creek Marsh Company*. It was there said: "In *The License Cases*, (5 How. 504,) which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of Congressional legislation. Extreme

doctrines upon both sides of the question were asserted by some of the judges, but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subject thus considered." This language is peculiarly significant in view of the fact that in one of the License Cases — *Pierce* v. *New Hampshire*, 5 How. 504, 557, 578 — the question was as to the validity of an act of that State, under which Pierce was indicted, convicted, and fined, for having sold, without a local town license, a barrel of gin, which he purchased in Boston, transported to Dover, New Hampshire, and there sold in the identical cask in which it was carried to that State from Massachusetts.

In harmony with these principles the court affirmed at the present term, in *Smith* v. *State of Alabama*, 124 U. S. 465, the validity of a statute of that State, making it unlawful for a locomotive engineer, even when his train is employed in interstate commerce, to drive or operate any train of cars upon a railroad in that State, used for the transportation of persons, passengers, or freight, without first undergoing an examination by, and obtaining a license from, a board of engineers appointed by the governor of Alabama. If a train of cars passed through that State to New Orleans, the engineer, however well qualified for his station, if not licensed by that local board, was subject to be fined not less than fifty nor more than five hundred dollars, and sentenced to hard labor for the county, for not more than six months. The court held that this statute "is not, considered in its own nature, a regulation of interstate commerce"; that "it is properly an act of legislation within the scope of the admitted power reserved to the States to regulate the relative rights and duties of persons, being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property"; and that "so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and in the particulars on which it touches those transactions at all it

is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence." Until Congress, by legislation, prescribed the qualification of locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, Alabama, it was adjudged, could fix the qualifications of such engineers, even when running in that State trains employed in interstate commerce.

It would seem that if the Constitution of the United States does not, by its own force, displace or annul a state law, authorizing the construction of bridges or dams across public navigable waters of the United States, thereby wholly preventing the passage of vessels engaged in interstate commerce upon such waters, the same Constitution ought not to be held to annul or displace a law of one of the States which, by its operation, forbids the bringing within her limits, from other States, articles which that State, in the most solemn manner, has declared to be injurious to the health, morals, and safety of her people. The silence of Congress upon the subject of interstate commerce, as affected by the police laws of the States, enacted in good faith to promote the public health, the public morals, and the public safety, and to that end prohibiting the manufacture and sale, within their limits, of intoxicating liquors to be used as a beverage, ought to have, at least, as much effect as the silence of Congress in reference to physical obstructions placed, under the authority of a State, in a navigable water of the United States. The reserved power of the States to guard the health, morals, and safety of their people is more vital to the existence of society, than their power in respect to trade and commerce having no possible connection with those subjects.

For these reasons, we feel constrained to dissent from the opinion and judgment of the court.

Mr. Justice Lamar was not present at the argument of this case, and took no part in its decision.

HARTRANFT *v.* OLIVER.

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

No. 190. Argued March 22, 1888. — Decided April 9, 1888.

A vessel arrived at a port of the United States from a foreign port on the 30th of June, 1883, and was entered at the custom-house on that day. A custom-house inspector took charge of it, and the vessel remained with unbroken hatches until after the following 1st of July. *Held*, — that the goods on board, being in the custody and under the control of officers of the customs, were in "a public store," or "bonded warehouse," within the meaning of those terms as used in § 10 of the act of March 3, 1883, 22 Stat. 488, 525, and were subject to the duty imposed by the provisions of that act.

THE court stated the case as follows:

In 1883 the plaintiffs were merchants in the city of Philadelphia, and during that year they imported from Leghorn, Italy, by the bark Pellegra Madre, 155 cases of salad olive oil, and ten cases of lamp olive oil. The bark arrived at the port of Philadelphia on Saturday, the 30th of June, 1883, and was entered at the custom-house of that port between the hours of one and two in the afternoon. It was not practicable on that day after that time to remove the cases from the vessel into any public store or bonded warehouse; and the next day, July 1st, 1883, was Sunday. On the 7th of July the cases were entered in bond at the custom-house, and on the same day the plaintiffs made a withdrawal entry for the goods, and offered to pay the defendant, who was at the time collector of the port, duty thereon at the rate of 25 per cent *ad valorem*, as provided by § 6 of the act of Congress of March 3d, 1883, 22 Stat. 494, c. 121; but the defendant refused to permit the withdrawal entry, or to accept the duty at that rate, and exacted duty on the 155 cases of salad olive oil, gauging $645\frac{63}{100}$ gallons, at the rate of one dollar per gallon, and on the ten cases of lamp olive oil, gauging one hundred gallons, at the rate of

25 cents per gallon, the whole making the sum of $670.63, which was paid by the plaintiffs within ten days after liquidation of the entry, under protest, they claiming that the oil was only subject to duty at the rate of 25 per cent *ad valorem.* The difference between the amount of duties exacted and paid, and the amount which the plaintiffs claimed were leviable upon the goods was four hundred and thirty-five dollars and sixty-two cents ($435.62). From the decision of the collector the plaintiffs appealed to the Secretary of the Treasury, who approved the decision; and thereupon they brought this action in the Court of Common Pleas for the County of Philadelphia in Pennsylvania to recover the alleged excess of duties exacted. On petition of the collector the action was removed to the Circuit Court of the United States, where issue was joined, and the action tried, resulting in a special verdict, finding the several facts stated above; and also that from the time of the arrival and entry of the bark in the port of Philadelphia, June 30, 1883, until after payment of the duty exacted, July 7th, the "vessel remained with unbroken hatches, and with a custom-house inspector in charge of the same."

Upon the special verdict the court rendered judgment for the plaintiffs for the amount claimed, with interest; and to review this judgment the case is brought here on writ of error.

In his general circular to collectors of customs of May 19th, 1883, the Secretary of the Treasury, in giving construction to § 10 of the act of March 3d, 1883, said, "that all goods imported before said act takes effect, and which are entered in bond on or before that date, and for which permits to land, designating the warehouse, have been issued, and which have not then been delivered on payment of duties, are to be regarded as subject to duty under said act. This rule will prevail, whether the goods are actually within the walls of a bonded warehouse on that day, or on the dock, or on shipboard in port, or undergoing transportation in bond, either after appraisal or under the immediate transportation act."

Mr. Solicitor General for plaintiff in error.

Mr. Edward L. Perkins for defendant in error.

Opinion of the Court.

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

The duties exacted by the collector, and paid by the importers, who were plaintiffs below, were imposed by a clause in § 2504, Title 33 of the Revised Statutes, 2d ed. p. 478. As the vessel, in which they were brought, arrived at the port of Philadelphia, and was entered at the custom-house on the 30th of June, 1883, they would be deemed imported on that day, so as to be subject to the duties thus prescribed, were it not for provisions in the act of March 3, 1883, and the custody taken of the vessel and goods by an officer of the custom-house on the day of its arrival in port, and kept by him until after the first of July following. That act declared that on and after the first day of July, 1883, certain designated sections should be a substitute for Title 33 of the Revised Statutes. 22 Stat. 489, c. 121. One of these sections provides that the duties on all preparations known as "expressed oils," not specifically enumerated or provided for in the act, shall be 25 per cent *ad valorem*. Olive oils, both salad and lamp, are expressed oils within the meaning of this section, and are not specifically enumerated or provided for elsewhere in the act. Section 10 of the act declares, "that all imported goods, wares, and merchandise, which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference, between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date." 22 Stat. 525, c. 121.

The plain meaning of this section is, that, though goods are imported before the act takes effect, yet if they are kept until

after that period in a public store or bonded warehouse, that is, in the custody and under the control of officers of the customs, they shall be subjected only to the duties thereafter leviable when they are entered for consumption. If previously to such entry duties have been paid on goods imported before the act took effect, which are afterwards kept in a public store or bonded warehouse, that is, in the custody and control of officers of the government, the importer is entitled to a refund of the difference between the amount paid and the amount which would be leviable if they were imported after the act took effect. In other words, goods imported before the act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they are entered for consumption; that is, when passed over to the control of the importer or owner. The place in which the goods are thus kept is not the essential fact, but the custody of the government, and the consequent exclusion of control over them by the owner, which calls for the suspension of previous duties. There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody. But goods on board of a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are, within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the government is concerned, they are in the same position as if technically in a public store or bonded warehouse. When in either of those places, they cannot be removed without a permit from the collector. When on shipboard, in charge of a custom-house inspector, they are in the same condition, and cannot be removed without a like

permit. By statute collectors are required to put one or more inspectors on board of every vessel immediately on her coming within a collection district, and no merchandise can be unloaded or removed from the vessel without a permit in writing from the collector. Rev. Stat. §§ 2875, 2876.

The act of Congress of March 28, 1854, which is now embraced in § 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the government"; and in the construction of this clause the Treasury Department has decided that the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard, after the arrival of the ship in port. Treasury Regulations of 1857, article 438.

We are, therefore, of opinion that, within the spirit and intent of the 10th section of the act of March 3, 1883, the goods were not chargeable with duties, whilst on board the bark, in custody of an officer of the customs, at any greater rate than they would have been chargeable if in custody of such officer in a public store or bonded warehouse of the government; and that therefore duties were only leviable on the goods by the act which went into effect on the first of July, 1883. The intent of the legislature is to be followed, even if not strictly within the letter of the statute. It follows that the construction placed upon the section by the Secretary of the Treasury in his circular of May 19, 1883, to collectors of customs, is correct, so far as it recognizes as subject to duties under it goods imported before the act took effect, whether "actually within the walls of a bonded warehouse on that day, or on the dock, or on shipboard in port, or undergoing transportation in bond, either after appraisal or under the immediate transportation act"; but is incorrect so far as it limits the application of the rule to goods, imported before the act took effect, "which are entered in bond on or before that date, and for which permits to land, designating the warehouse, have been issued, and which have not then been delivered on payment of duties." If goods thus imported can be

brought within the provisions of the 10th section in any case, when not actually in a public store or bonded warehouse, they should be deemed within those provisions when, by reason of the custody of officers of the customs, it is impracticable to remove them from the vessel, whether they are at the time entered in bond or not.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS.

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

No. 1325. Argued February 15, 1888. — Decided March 19, 1888.

The privilege conferred upon telegraph companies by Rev. Stat. § 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph.

The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. § 5263, nor by the commerce clause of the Constitution.

The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust.

A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has accepted the provisions of Rev. Stat. § 5263 from operating its lines over military and post roads of the United States.

In equity. The bill was filed by the Attorney General of the Commonwealth of Massachusetts, at the relation of the

Treasurer of that State, and on behalf of the Commonwealth, in the Supreme Judicial Court of that State on the 27th April, 1886. It averred that certain proceedings had been taken in accordance with law and under the Statutes of that State, to assess taxes in that State in the year 1885 upon the capital stock of the Western Union Telegraph Company, a corporation owning, controlling, and using, under lease, or otherwise, lines of telegraph within that Commonwealth for purposes of business or profit. The provisions in the Constitution and laws of Massachusetts which were relied upon are printed in the margin.[1] The nature of the proceeding, in the valuation of the

---

[1] 1. *Extract from the Constitution of Massachusetts.*

Part 2, Ch. 1, Sect. 1, Art. 4, of the Constitution gives the Legislature power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident, and estates lying within the said Commonwealth," and also "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same."

2. *Extracts from the Public Statutes of Massachusetts.*

"CHAPTER 13, SECT. 38. Every corporation chartered by the commonwealth, or organized under the general laws, for purposes of business or profit, having a capital stock divided into shares, excepting banks whose shares are otherwise taxable under this chapter, and except those specified in sections forty-three and forty-six, shall annually, between the first and the tenth day of May, return to the tax commissioner, under the oath of its treasurer, a complete list of its shareholders, with their places of residence, the number of shares belonging to each on the first day of May, the amount of the capital stock of the corporation, its place of business, the par value and market value of the shares on said first day of May. Such return shall, in the case of stock held as collateral security, state not only the name of the person holding the same, but also the name of the pledger and his residence. The returns shall also contain a statement in detail of the works, structures, real estate and machinery owned by said corporation and subject to local taxation within the commonwealth, and of the location and value thereof. Railroad and telegraph companies shall return the whole length of their lines, and the length of so much of their lines as is without the commonwealth; other corporations required to make a return under this section shall also return the amount, value, and location of all works, structures, real estate, and machinery owned by them and subject to local taxation without the commonwealth: *provided*, that nothing herein

property of the company for the purposes of the assessment of the tax are sufficiently stated in the Report of the Examiner *infra*.

---

contained shall exempt any corporation from making all returns required by its charter.

"SECT. 39. The tax commissioner shall ascertain, from the returns or otherwise, the true market value of the shares of each corporation included in the provisions of the preceding section, and shall estimate therefrom the fair cash valuation of all of said shares constituting its capital stock on the first day of May next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this chapter. He shall also ascertain and determine the value and amount of all real estate and machinery owned by each corporation, and subject to local taxation, and of the deductions provided in the following section; and for this purpose he may take the amount or value at which such real estate and machinery are assessed at the place where the same are located as the true amount or value; but such local assessment shall not be conclusive of the true amount or value thereof.

"SECT. 40. Every corporation embraced in the provisions of section thirty-eight shall annually pay a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stock, as determined in the preceding section, after making the deductions provided for in this section, at a rate determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same current year, as returned by the assessors of the several cities and towns under section eighty-six of chapter eleven, upon the aggregate valuation of all the cities and towns for the preceding year, as returned under sections fifty-four and fifty-five of said chapter: *provided*, that in case the return from any city or town is not received prior to the twentieth day of August, the amount raised by taxation in said city or town the preceding year, as certified to the secretary of the commonwealth, may be adopted for the purpose of this determination; and *provided, further*, that the amount of tax assessed upon polls the preceding year, as certified to the secretary, may be taken as the amount of poll tax to be deducted from the whole amount to be raised by taxation, for the purpose of ascertaining the amount to be raised by taxation upon property. From the valuation, ascertained and determined as aforesaid, there shall be deducted, — *First*, in case of railroad and telegraph companies, whose lines extend beyond the limits of the commonwealth, such portion of the whole valuation of their capital stock, ascertained as aforesaid, as is proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value, as determined by the tax commissioner, of their real estate and machinery located and subject to local taxation within the commonwealth: *second*, in case of other corporations, included in section thirty-eight of this chapter, an amount equal to the value,

The bill averred that the taxes had not been paid, and were still due and owing to the Commonwealth, and prayed the

---

as determined by the tax commissioner, of their real estate and machinery, subject to local taxation, wherever situated: *provided*, that, whenever the charter of a corporation provides a different method of ascertaining the valuation of its corporate franchise for the purposes of this chapter, the same shall be ascertained in the method provided in such charter."

"SECT. 42. Every corporation or association chartered or organized elsewhere, which owns, or controls and uses, under lease or otherwise, a line of telegraph within this commonwealth, shall make all the returns prescribed in section thirty-eight to be made by telegraph companies within the commonwealth, excepting the list of its shareholders; and shall annually pay a tax at the same rate, and to be ascertained and determined in the same manner as is provided in section forty; and all telegraph lines within the commonwealth controlled and used by such corporation or association, shall, for the purposes of this chapter, be taken and considered as part of its own lines."

"SECT. 53. The tax commissioner shall, as soon as may be after the first Monday in August in each year, notify the treasurer of each corporation, company, copartnership, or association liable thereto, of the amount of its tax under sections twenty-five, forty, forty-two, forty-five, forty-seven, fifty, and fifty-two, to become due and payable to the treasurer of the commonwealth within thirty days from the date of such notice: *provided*, that it shall not be due and payable earlier than the first day of November. Such notice shall also state that within ten days after the date thereof the said corporation, company, copartnership, or association may apply for a correction of said tax, and be heard thereon before the board of appeal hereinafter established.

"SECT. 54. Any corporation, company, copartnership, or association taxable under the provisions of sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, and fifty-two, neglecting to make the returns required by this chapter, or refusing or neglecting, when required thereto, to submit to the examinations provided for therein, shall forfeit two per cent upon the par value of its capital stock; all which penalties may be recovered by an action of tort, brought in the name of the commonwealth, either in the county of Suffolk or in the county where the corporation is located. If any corporation, company, copartnership, or association fails to pay the taxes required to be paid to the treasurer of the commonwealth under the provisions of said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two, he may forthwith commence an action of contract in his own name, as treasurer, for the recovery of the same, with interest at the rate of twelve per cent per annum until the same are paid. All penalties under this section, and under sections seven, forty-seven, fifty, and fifty-two, may also be enforced, and all taxes under said sections forty, forty-two, forty-three, forty-five, forty-seven, fifty, fifty-one, and fifty-two,

court "to order and decree that said sum due for taxes as aforesaid shall be paid to said Commonwealth by the said cor-

---

may also be collected by information brought in the supreme judicial court at the relation of the treasurer of the commonwealth, and upon such information the court may issue an injunction restraining the further prosecution of the business of the corporation, company, copartnership, or association, until all such taxes due or penalties incurred shall be paid, with interest at the rate aforesaid, and costs. In any proceeding under this section the certificate of the tax commissioner or his deputy shall be competent evidence of all determinations made and notices given by him, and of all values, amounts, and other facts required to be fixed or ascertained by him under this chapter."

"SECT. 61. Any party aggrieved by the decision of the tax commissioner arising under the provisions of sections twenty-five to fifty-eight inclusive, excepting corporations named in section forty-six, may apply to the board of appeal constituted under the provisions of the following section for a correction of the same.

"SECT. 62. The treasurer and the auditor of the commonwealth, together with one member of the council to be named by the governor, shall constitute a board of appeal, to which board any party aggrieved by a decision of the tax commissioner upon any matter arising under this chapter, from his decision upon which an appeal is given, may apply within ten days after notice of such decision for a correction of the same. Upon such appeal said board shall, as soon as may be, give a hearing to such party, and shall thereupon decide the matter in question, and notify the tax commissioner and the party appealing; and such decision shall be final and conclusive as to the rights of the parties affected, although payments may have been made as required by the decision of the tax commissioner appealed from. Any over-payment of tax, determined by the decision of said board of appeal, shall be reimbursed from the treasury of the commonwealth."

"CHAPTER 109, SECTION 1. Every company incorporated for the transmission of intelligence by electricity shall possess the powers and privileges, and be subject to the duties, restrictions, and liabilities, prescribed in this chapter.

"SECT. 2. Each company may, under the provisions of the following section, construct lines of electric telegraph upon and along the highways and public roads, and across any waters within the commonwealth, by the erection of the posts, piers, abutments, and other fixtures (except bridges) necessary to sustain the wires of its lines; but shall not incommode the public use of highways or public roads, nor endanger or interrupt the navigation of any waters.

"SECT. 3. The mayor and aldermen or selectmen of a place through which the lines of a company are to pass shall give the company a writing specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may run. After the erection of

poration, with interest thereon, together with the costs of this information, and to grant unto your informant a writ of injunction, issuing out of and under the seal of this honorable court, to be directed to the said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs," and for further and other relief.

On motion of the defendant the cause was, on May 13, 1886, removed to the Circuit Court of the United States, and on the 29th day of the same May the answer of the defendant was filed in that court.

The answer set forth that the defendant was a corporation organized in the State of New York, and under the laws of that State; that it owned, controlled, and used many lines of telegraph in various parts of the United States, and in the State of Massachusetts, largely in that State over and along the post roads of the United States which had been declared to be such and over, under, and across navigable waters of the United States in or adjoining that State, and that on the 5th of June, 1867, it had accepted the provisions and obligations of the act of July 24, 1866, 14 Stat. 221, c. 230 [now Rev. Stat. § 5263];[1] that thereby it became entitled to construct and maintain its lines over the post roads and over, under, and across the navigable waters of the United States, and became bound to transmit the telegrams of the United States over its lines at rates to be fixed by the Postmaster General, and that no state legislation could prevent its occupation of post roads for that purpose; that its lines extend to and from Massachusetts to other States, and to Washington, and connect with the lines of other companies doing business

---

the lines, having first given the company or its agents opportunity to be heard, they may direct any alteration in the location or erection of the posts, piers, or abutments, and in the height of the wires. Such specifications and decisions shall be recorded in the records of the city or town."

[1] See *infra*, page 547, for this statute.

in this country and outside of the United States and beyond the seas; that while it was operating its lines in Massachusetts it was called upon to make returns of its capital stock, &c. to the tax commissioner of the State according to the provisions of §§ 38, 39, 40, 41, and 42 of c. 13 of the Public Statutes of the State, and made a return as follows:

"WESTERN UNION TELEGRAPH COMPANY.

"TREASURER'S OFFICE, NEW YORK, *June* 25, 1885.

"Hon. Daniel A. Gleason, tax commissioner of the Commonwealth of Massachusetts.

"SIR: I, Roswell H. Rochester, treasurer of the Western Union Telegraph Company, hereby return that on the first day of May, 1885, said corporation held its principal place of business at the city of New York.

"Its capital stock was	$80,000,000 00
The whole number of its shares was 800,000.	
The par value of each share was	100 00
The market value of each share was . . .	59 37½
The value of the real estate owned by the corporation without the State of Massachusetts was	3,058,933,82
The value of the real estate owned by the corporation within the State of Massachusetts was nothing.	
The total number of miles of line owned or leased was 146,052.60.	
Of which the number of miles (not on post roads of the United States and excluding 2,334.55 miles which were on post roads of the United States) within the State of Massachusetts was 498.50.	
Total property, 800,000 shares, at $59.37½ per share	47,500,000 00
This includes —	
Real estate	3,058,933 82
Two hundred and nine three-fourth shares held by this company unissued, at $59.37½	12,453 90

Stocks in other companies outside of our system, not included in above statement of miles of line	$8,773,622 70
Balance value of 146,052.60 miles of line .	35,654,989 58
Value, at same rate, of said 498.50 miles as the valuation of the corporate franchise of said company for taxation under the laws of Massachusetts	121,695 97

"This return includes the lines and property of the American Union Telegraph Company, the Franklin Telegraph Company, the Mutual Union Telegraph Company, and the Gold and Stock Telegraph Company as part of the Western Union lines.

"Respectfully yours,

R. H. ROCHESTER, *Treasurer.*"

The answer then set forth the action of the tax commissioner upon this return and respecting the valuation of the property of the company for the purposes of taxation[1]; and continued:

"And this respondent does not deny but admits that its property in said State of Massachusetts is subject to taxation the same as other property, and that it may be taxed in a proper way thereon, yet it respectfully submits and avers that this respondent does not derive its existence from the laws of said State, or derive the right to have and exercise its said franchises, rights, and privileges from said State, or hold them subject to its control, and that said franchise tax is clearly not a tax on its property in any legal sense, and cannot be held valid as such; that it is in the nature of an excise on the exercise of all the franchises, rights, and privileges enjoyed by this respondent in the conduct of its business, and a tax on its operations in such exercise; that, while it is claimed by the officers of said State and by said attorney general that the laws imposing said tax are founded on the alleged right of said State to refuse to this respondent the right or permission

[1] For these proceedings see the Report of the Examiner *infra*. pp. 539, 542.

to transact its business or exercise its functions, franchises, rights, and privileges within said State, except for such price and on such terms and conditions, including the payment of such taxes as said State may see fit to prescribe and assess, and to compel the performance of, and to exclude this respondent from such transaction or exercise if the same are not performed and obeyed;

"Yet this respondent avers that said franchise tax has not and cannot have this or any legal foundation, and that it includes and is a tax or assessment on the rights, privileges, and franchises granted and secured to this respondent by the United States by the said act of Congress, and on the use thereof by this respondent as an instrument of commerce and as a government agent for the transmission of public business by means thereof, and on its operation in said State, which said State cannot limit, control, refuse, or tax.

"That even if said tax could in any form be so properly levied and assessed on the use of such rights and privileges for other purposes, which this respondent denies, it is not only impossible in this case to indicate or designate the portion of the burden of said franchise tax on said use as an instrument of commerce and as a government agent or on any use for other purposes, but that the mode of valuation thereof specifically prescribed by said act does in terms include and designate as a subject of taxation the franchise exercised on that portion of this respondent's lines constructed, maintained, and used in the exercise and enjoyment of said rights and privileges, and that the said tax bears upon the whole machine without distinction and indistinguishably as well upon the faculty of receiving and transmitting the messages of the government of said United States as on that of receiving and transmitting messages of individuals, and as well upon the faculty of receiving and transmitting through said State messages sent and received in and for the purposes of foreign and interstate commerce, as upon that of receiving and transmitting other messages wholly within said State.

"And this respondent further avers that if said franchise tax could in form be legally so levied and assessed as to oper-

ate upon only something legally subject to taxation by said State by any mode of estimate or valuation resembling that prescribed by said laws, based upon a valuation of its shares, deducting real estate locally taxed in said State, it would be and is unjust and not proportional not to deduct from said valuation the amount of real estate owned by and subject to local taxation and actually taxed out of said State, both because the laws of said State allow such deduction from the valuation under said laws for like taxation of the franchises of other corporations organized or chartered within and doing business within and without said State, and because otherwise said State would assume and does assume in effect to tax and assess real estate situated in and subject to taxation and actually taxed by other States and jurisdictions."

The plaintiff filed a replication to this answer; whereupon the cause was referred to Francis S. Fiske, Esq., "as Examiner, to take and report the evidence of both parties therein, and such questions of law arising thereon as either party shall desire." The Examiner's report was filed May 4, 1887, as follows:

"I, Francis S. Fiske, having been appointed by the court a special examiner in the above-named case, report —

"That the information was filed in the Supreme Judicial Court of the State April 27, 1886, and removed to this court by the defendant; that the defendant is a telegraph company organized under the laws of the State of New York before the passage of the act of the Congress of the United States of July twenty-fourth, eighteen hundred and sixty-six, entitled 'An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes' (Rev. Stat. § 5263, *et seq.*), and is a corporation organized for purposes of business and profit, having a capital stock divided into shares, which filed with the Postmaster-General of the United States its written acceptance of the restrictions and obligations required by law in accordance with said act on or about the twelfth day of June, 1867, and has ever since been in existence and operation.

"That on and before and since the first day of May, 1885, it has owned, controlled, and used, under lease or otherwise, a line or lines of telegraph within said Commonwealth as part of a system of 146,052 and $\frac{60}{100}$ miles of line extending throughout the United States, part of Canada, and to Cuba and England by submarine ocean cable, connecting with lines owned and established by the government of the United States for public purposes.

"That on the sixteenth day of September, in said year 1885, after notice had been given to said Commonwealth of said filing and of other matters mentioned in the notice hereto appended, as below stated, and a return made by said company under section 42 of chapter 13 of the Public Statutes of said Commonwealth, copies of which notice and return are appended, [see pp. 536, 537, *supra*,] the tax commissioner of said Commonwealth, in the manner required by its laws, estimated the fair cash valuation of all the shares constituting the capital stock of said corporation on said first day of May at $47,500,000, and allowed as credits to said corporation out of said $47,500,000 the sum or value of $8,786,076.

For 209¾ shares held by the company unissued, at $59.37½	$12,453 90
For stock in other companies outside of its system not included in above statement of miles of line	8,773,622 70
	$8,786,076 60

"And determined the total number (or whole length) of the miles of line of said defendant to be 146,052.60 as aforesaid and 143,219.55 miles thereof, which included said cables, to be beyond the limits of said Commonwealth.

"That the rate determined under the fortieth section of said thirteenth chapter of said Public Statutes for the taxation of the corporate franchises therein mentioned was, in and for the year 1885, $14.14 for each $1000 of valuation.

"That said commissioner, being of opinion that the valuation of the corporate franchise of said defendant for taxation

by said Commonwealth was to be ascertained by deducting

from said	$47,500,000 00
The said	8,786,076 00
Thus leaving	$38,713,924 00
And then taking as the total number of said line or lines	146,052.60
And as the number thereof in said Commonwealth	2,833.05,

without regard to the question whether any thereof were or were not on post roads, declared such by law, or navigable streams or waters of the United States, considered that the valuation of the corporate franchise of said defendant subject to be taxed in said Commonwealth at said rate was $\frac{2,833.05}{140,052.60}$ of said $38,713,924, or in all ($750,952) seven hundred and fifty thousand nine hundred and fifty-two dollars, and assessed a tax thereon of ($10,618.46) ten thousand six hundred and eighteen and $\frac{46}{100}$ dollars to said company.

"That in fact more than 2334.55 miles of said line within said Commonwealth, part of said 2833.05 miles, were on, over, under, or across said post roads — that is to say, railroads or highways made by law such post roads — or such streams or waters.

"That before and during said year and since said defendant has continually transmitted over said lines on said post roads, streams, or waters between the several departments of the United States government and their officers and agents or as provided by § 221 of the Revised Statutes of the United States, at rates fixed by the Postmaster-General, as required by said act of Congress or title LXV of said section, telegraphic communications and messages for the government of the United States, including those for the signal service relating to the weather, storms, etc., and also commercial and business messages for purposes of foreign and interstate commerce from and to, into, through, and over and between said State of Massachusetts and all the other States and Territories of the United States, the city of Washington and the District of Columbia, and to and from foreign countries by ocean sub-

marine cables both for said government and for many private individuals and corporations resident and located as well out of as in said State.

"That it is impossible for said company to determine what portion of any sums received by it was received for services performed in said State in the transmission through the same or any part thereof of messages or communications received or delivered out of it or not on lines over said post roads, streams, or waters, but that the largest part, or approximately seventy per cent, of said sums was for messages received or delivered out of said State.

"That said defendant, on said first day of May, 1885, owned a large amount of real estate located and subject to local taxation out of said State of Massachusetts, on which there was assessed and paid by it a large amount (over $48,000) of taxes, besides other taxes.

"That the amount or value of said real estate was not clearly shown, but it was shown that the cost of land and buildings thereon owned by the defendant and of buildings so owned on land not so owned out of said State was over $3,000,000; and it was agreed by the said parties that if it appeared and became material upon any final decision in this case to fix the amount or value of said real estate, or the taxes thereon, or the amount received for any class of messages, and it was not agreed upon by them, the same should be determined on further hearing by the examiner.

"That no deduction or allowance was made in assessing said tax or in ascertaining the valuation of said franchise for taxation as aforesaid on account of said real estate, land, or buildings, or the taxes paid thereon, or for anything not above specifically stated.

"That notice was duly given to said defendant of said tax, and demand made therefor as required by said chapter, but said defendant protested against said assessment and tax and declined to pay the same; whereupon this information was filed."

The cause was heard on these pleadings and upon the report of the Examiner, and the court on the 28th November, 1887, made a final decree therein:

Argument for Plaintiff in Error.

"That the facts set forth in the examiner's report filed in this cause are true.

"That on those facts the method of valuation, assessment, and taxation provided by the laws of Massachusetts upon the franchise of the defendant corporation is not, as was claimed and contended by said defendant, illegal and unconstitutional under the constitution and laws either of the State of Massachusetts or the United States — that is to say, either under the Constitution of the United States, Article I, section 8; Article III, section 2; Article VI; Amendments V and XIV; Revised Statutes of the United States, sections 5263, 5264, 5265, 5266, 5267, 5268, 5269, including a revision and consolidation of the act of July 24, 1866, chapter 230, accepted by the defendant before the revision of section 221; or under the constitution of said State, part I, art. X; part II, chapter I, section IV; or chapter 13 of its Public Statutes, but was and is in conformity with and authorized by said constitutions and laws, and that therefore the sum claimed by the plaintiff to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon, and that an injunction shall be issued out of and under the seal of this court, directed to said corporation and its officers, agents, and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth as aforesaid for taxes as aforesaid shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant as aforesaid within thirty days from the entry hereof."

From this decree the defendant appealed.

Mr. George S. Hale, (with whom were *Mr. Charles W. Wells* and *Mr. Willard Brown* on the brief).

I. Telegraph companies, which have accepted the act of Congress, are, as to government business, government agencies, and so far as a state tax on a company is on, or affects, the means employed by the government of the United States to exercise its constitutional powers, it is void. *Western Union*

Citations for Defendant in Error.

Telegraph Co. v. *Texas*, 105 U. S. 460; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Union Pacific Railroad* v. *Peniston*, 18 Wall. 5; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Bank of Commerce* v. *New York*, 2 Black, 620; *Weston* v. *Charleston*, 2 Pet. 449; *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Mayor* v. *Charlton*, 36 Georgia, 460; *Wabash &c. Railway Co.* v. *Illinois*, 118 U. S. 557; *Fargo* v. *Michigan*, 121 U. S. 230; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Manufacturers' Ins. Co.* v. *Loud*, 99 Mass. 146; *Hamilton Manufacturing Co.* v. *Massachusetts*, 6 Wall. 632; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *People's Five Cent Savings Bank*, 5 Allen, 428; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Attorney General* v. *Bay State Mining Co.*, 99 Mass. 148; *Gleason* v. *McKay*, 134 Mass. 419; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *People* v. *Weaver*, 100 U. S. 539; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489.

II. The omission to deduct from the total valuation the real estate located and subject to local taxation in other States, renders the tax excessive and invalid. *The Delaware Railroad Tax*, 18 Wall. 206; *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Libby* v. *Burnham*, 15 Mass. 144; *Stetson* v. *Kempton* 13 Mass. 272.

Mr. Andrew J. Waterman, Attorney General of the Commonwealth of Massachusetts, and *Mr. Henry C. Bliss*, Assistant Attorney General of that State, cited: *Portland Bank* v. *Apthorp*, 12 Mass. 252; *Commonwealth* v. *Savings Bank*, 5 Allen, 428; *Commonwealth* v. *Hamilton Manuf. Co.*, 12 Allen, 298, 305, 309; *Queen* v. *Arnaud*, 9 Q. B. 806, 817; *Utica* v. *Churchill*, 33 N. Y. 161, 237; *Van Allen* v. *Assessors*, 3 Wall. 573; *Attorney General* v. *Bay State Mining Co.*, 99 Mass. 148; *Bank of Commerce* v. *New York*, 2 Black, 620, 630; *Delaware Railroad Tax Case*, 18 Wall. 206, 225; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293; *Wabash &c. Railroad* v. *Illinois*, 118 U. S. 557, 594; *Sherlock*

v. Alling, 93 U. S. 99; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington &c. Railroad* v. *Iowa*, 94 U. S. 155; *Paul* v. *Virginia*, 8 Wall. 168; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 209; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 34; *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493, 495; *Woodruff* v. *Parham*, 8 Wall. 123; *Manufacturers' Ins. Co.* v. *Loud*, 99 Mass. 146; *Oliver* v. *Washington Mills*, 11 Allen, 268, 279; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632, 639; *Dickey* v. *Turnpike Road Co.*, 7 Dana, 113; *Thomson* v. *Pacific Railroad Company*, 9 Wall. 579, 590; *Fargo* v. *Michigan*, 121 U. S. 230; *Cooley* v. *Philadelphia*, 12 How. 299; *Ex parte McNeil*, 13 Wall. 236; *Osborne* v. *Mobile*, 16 Wall. 479, 481; *McCulloch* v. *Maryland*, 4 Wheat. 316, 429; *Dwight* v. *Boston*, 12 Allen, 316; *S. C.* 90 Am. Dec. 149; *Railroad Company* v. *Fuller*, 17 Wall. 560, 568.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The action was commenced in the Supreme Judicial Court of Massachusetts, sitting in equity, by an information on behalf of the Commonwealth, by its Attorney General, at the relation of the treasurer thereof, Alanson W. Beard. It was afterwards removed, upon motion of the defendant, the Western Union Telegraph Company, into the Circuit Court of the United States. The object of the information was to enforce the collection of a tax levied by the proper authorities of the State upon the telegraph company, and to enjoin it from the further operation of its telegraph lines within the territorial limits of the Commonwealth until that tax was paid.

The defendant company is a corporation organized under the laws of the State of New York, having its capital stock divided into shares. The tax assessed by the treasurer of the Commonwealth of Massachusetts was based upon an estimate of $750,952 as the taxable value of the shares of the corporation apportioned to that State, the rate of taxation having

been determined for that year, 1885, at $14.14 for and upon each $1000 of valuation. The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was $47,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving $38,713,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the States and Territories of this country was 146,052.60, of which 143,219.55 were without the limits of the Commonwealth of Massachusetts, leaving 2833.05 miles within its boundaries. Taking these figures, the treasurer of the State assessed the value of that portion of the capital stock of this company which, under this calculation, would fall within the Commonwealth of Massachusetts, at the sum of $750,952. The amount thus arrived at, at the rate of $14.14 upon each $1000 of valuation, produced the sum of $10,618.46 as the amount of the tax claimed to be due and payable to the treasurer of said Commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same.

The answer of the defendant corporation set up that of its 2833.05 miles of line within the State of Massachusetts more than 2334.55 miles were over, under, or across post-roads, made such by the United States, leaving only 498.50 miles not over or along such post-roads, on which the company offered to pay the proportion of the tax assessed according to mileage by the state authorities.

The main ground on which the telegraph company resisted the payment of the tax alleged to be due, and on which probably the case was removed from the state court into the Circuit Court of the United States, is that it is a violation of the rights conferred on the company by the act of July 24, 1866, now Title LXV, §§ 5263 to 5269 of the Revised Statutes. The defendant alleges that it had accepted the provisions of that law, and filed a notification of such acceptance with the Postmaster General of the United States June 8, 1867. The argument is, therefore, that by virtue of § 5263 the company has a

right to exercise its functions of telegraphing over so much of its lines as is connected with the military and post-roads of the United States which have been declared to be such by law without being subject to taxation therefor by the state authorities. That section reads as follows:

"SEC. 5263. Any telegraph company now organized, or which may hereafter be organized under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads."

It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post-roads, without liability to taxation by the State. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a State, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein.

The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the func-

tion of telegraphing from the State of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the State under which it is organized. But the privilege of running the lines of its wires "through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States, . . . and over, under, or across the navigable streams or waters of the United States," is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation.

While the State could not interfere by any specific statute to prevent a corporation from placing its lines along these post-roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support.

In the case of *Telegraph Company* v. *Texas*, 105 U. S. 460, this question was very fully considered, and while a tax imposed upon every telegram passing over its lines, whether entirely within the State or coming from without its limits, or going from the State out of it, was held to be void so far as related to messages passing through more than one State, as an interference with or a regulation of commerce and with the act of Congress we have just been considering, it was distinctly pointed out that if it could be ascertained what tele-

grams were confined wholly within the State a tax on those might be imposed by it.

In that case the Chief Justice, delivering the opinion of the court, said:

"The Western Union Telegraph Company having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business. The precise question now presented is whether the power to tax its occupation can be exercised by placing a specific tax on each message sent out of the State, or sent by public officers on the business of the United States." pp. 464, 465.

This authority of the government gives to this telegraph company, as well as to all others of a similar character who accept its provisions, the right to run their lines over the roads and bridges which have been declared to be post-roads of the United States. If the principle now contended for be sound every railroad in the country should be exempt from taxation because they have all been declared to be post-roads; and the same reasoning would apply with equal force to every bridge and navigable stream throughout the land. And if they were not exempt from the burden of taxation simply because they were post-roads, they would be so relieved whenever a telegraph company chose to make use of one of these roads or bridges along or over which to run its lines. It was to provide against the recognition of such a principle that this court, in the case above cited, while holding that telegrams themselves coming from without a State or sent out of it as a part of their conveyance could not be taxed by the State specifically, nevertheless used the language that "its property in the State is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and its business."

A still stronger case in the same direction is that of *Rail-*

road Company v. *Peniston*, 18 Wall. 5. The plaintiff in that action, the Union Pacific Railroad Company, was incorporated under a law of the United States. The State of Nebraska, under a revenue law passed by its legislature, undertook to lay a tax upon the property of that company which was used or embraced within the limits of its territory, upon a valuation of $16,000 per mile. The property thus rated and taxed consisted of its road-bed, depots, stations, *telegraph poles*, *wires*, bridges, etc. It will be here observed that a part of the valuation on which this tax was levied was made up of the telegraph poles and wires belonging to the company.

The argument was pressed in that case that the railroad company held its franchises from the government of the United States, and that its property could not be taxed by the State, but this court held otherwise, and in the opinion used this language:

"It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise." pp. 30, 31.

The case of *Thomson* v. *Pacific Railroad Co.*, 9 Wall. 579, is then cited, where it was held that the property of that company was not exempt from state taxation, though their railroad was a part of a system of roads constructed under the authority and direction of the United States, and largely

for the uses and to serve the purposes of the general government. The court further said:

"A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. *Telegraph lines* are employed in the national service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons or of corporations, who are agents or instruments of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the state governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that state taxation of such property is impliedly prohibited." p. 33.

In *National Bank* v. *Commonwealth*, 9 Wall. 353, which was a case of a tax levied upon the shares of a national bank, the same objection in regard to a tax by state authority was pressed upon the court, but this court said that the principle of exemption of Federal agencies from state taxation has a limitation growing out of the necessity upon which the principle is founded. "That limitation is, that the agencies of the Federal government are only exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. . . . So of the banks. They are subject to the laws of the State, and are

governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax." p. 362.

The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes, or by the commerce clause of the Constitution.

It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the Commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company and entirely without that State was over three millions of dollars. In the statement of the treasurer of the company it is said that the value of real estate owned by the company within the State of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that State on the calculation above referred to, and since no real estate of the corporation was owned or taxed within

its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But if this were otherwise we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the Circuit Court and not from that of the State, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result.

It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that State to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily, or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation.

The result of these views is, that the tax assessed against the plaintiff in error is a valid tax; that the judgment of the court below, "that the sum claimed by the plaintiff (below) to be due for taxes, to wit, $10,618.46, be paid to said State by said corporation, with interest thereon," is without error, and so much of said judgment is hereby affirmed.

The decree or judgment, however, proceeds and awards an injunction against the company in the following language,

added to that above extracted: "and that an injunction shall be issued out of and under the seal of this court, directed to said corporation, and its officers, agents and servants, commanding them and each of them absolutely to desist and refrain from the further prosecution of the business of said corporation until said sums due to the said Commonwealth for taxes, as aforesaid, shall have been fully paid, with interest and costs, unless the said sum is paid by said defendant within thirty days from the entry hereof."

The effect of this injunction, if obeyed, is to utterly suspend the business of the telegraph company, and defeat all its operations within the State of Massachusetts. The act of Congress says that the company accepting its provisions "shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States." It is found in this case that 2334.55 miles of the company's lines, out of 2833.05 on which this tax is assessed, are along and over such post-roads, and of course the injunction prohibits the operation of the defendant's telegraph over these lines, nearly all it has in the State.

If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines, as we have repeatedly held it had, the State can have no authority to say it shall not be done. The injunction in this case, though ordered by a Circuit Court of the United States, is only granted by virtue of section 54 of chapter 13 of the Public Statutes of Massachusetts. If this statute is void, as we think it is, so far as it prescribes this injunction as a remedy to enforce the collection of its taxes by the decree of the court awarding it, the injunction is erroneous.

In holding this portion of section 54 of chapter 13 of the Massachusetts statutes to be void as applicable to this case, we do not deprive the State of the power to assess and collect the tax. If a resort to a judicial proceeding to collect it is deemed expedient, there remains to the court all the ordinary means of enforcing its judgment — executions, sequestration, and any other appropriate remedy in chancery.

Syllabus.

That part of the decree of the Circuit Court which awards the injunction is, therefore, reversed, and the case is remanded to that court for further proceedings in conformity to this opinion.

MR. JUSTICE BRADLEY was not present at the argument of this case and took no part in its decision.

BUCHER *v.* CHESHIRE RAILROAD COMPANY.

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

No. 132. Argued January 11, 1888. — Decided March 19, 1888.

The plaintiff sued the defendants in a state court and recovered judgment. The highest appellate court of the State, reviewing the case decided the points of law involved in it against the plaintiff, set aside the judgment for error in the ruling of the court below, and sent the case back for a new trial. The plaintiff then became nonsuit, and brought the present suit in the Circuit Court of the United States on the same cause of action. *Held*, that he was not estopped.

The provision in Rev. Stat. § 721 that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply" is not applicable to proceedings in equity, or in admiralty, or to criminal offences against the United States.

The courts of the United States adopt and follow the decisions of the highest court of a State in questions which concern merely the constitution or laws of that State; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character, when established by repeated decisions.

The Supreme Judicial Court of Massachusetts having, in a cause between the same parties litigating in this action, arising out of the transaction herein litigated, and on the facts herein established, *held;* (1) that the plaintiff when injured by the negligence of the defendants' servants was not travelling "for necessity or charity" within the meaning of those terms as used in the General Statutes of Massachusetts, c. 84, § 2; (2) that the provision in those statutes, c. 84, § 2, that whoever travels on

Statement of the Case.

the Lord's Day except for necessity or charity shall be punished by a fine not exceeding ten dollars is a bar to recovery in an action against a railroad company by a person injured through the negligence of its servants while travelling on its railroad on Sunday, not for necessity or charity; and (3) that the act of the Massachusetts legislature of May 15, 1877, that this prohibition against travelling on the Lord's Day shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by the person so travelling, does not apply to a case happening before the passage of the act; *Held*, that these adjudications are sustained by a long line of numerous decisions, which establish a local rule of law within the State of Massachusetts, binding upon this court, though not meeting its approval.

This action was brought to recover damages for personal injuries inflicted upon the plaintiff by reason of the joint tort of the defendants, while he was travelling in the State of Massachusetts, as a passenger on a train operated by one of them. The defendants' plea was a general denial, and a further allegation "that if the plaintiff was travelling, as alleged by him, and while travelling was injured, he was travelling on a Sunday or Lord's Day, and not from necessity or charity, and in violation of said law of said Commonwealth of Massachusetts, and that if he suffered any injury it arose from and happened in consequence of his violation of said law."

There was a verdict for defendants, under instructions from the court, and a judgment on the verdict, to review which this writ of error was sued out.

Before the commencement of this action, the plaintiff had sued the defendants on the same cause of action in a state court of Massachusetts. He obtained a judgment against them in the court below, which was reversed by the Supreme Judicial Court of the Commonwealth, *Bucher* v. *Fitchburg Railroad*, 131 Mass. 156, and the case remanded for a new trial. The plaintiff thereupon became nonsuit, and commenced this action in the Circuit Court of the United States. The case as presented in this court, is shown in the bill of exceptions, allowed by the court below, as follows:

"This was an action of tort for damages alleged by plaintiff to have been sustained by him through the negligence of the defendants while he was a passenger in the cars of said Fitch-

burg Railroad Company. The writ, declaration, and all pleadings on file are referred to as a part of this bill of exceptions.

"Defendants are both common carriers of freight and passengers, the Fitchburg Railroad Company running trains from North Adams, Mass., to Boston, and the Cheshire Railroad Company from Fitchburg, Mass., to Keene, N. H., and thence to Bellows Falls, Vt., both companies running on the same track from Fitchburg to Ashburnham, Mass. At the trial before the jury the plaintiff, a resident and citizen of Philadelphia, Penn., testified that at the time of the accident he was the managing agent of a fire insurance company, attending to their business in New England; that on Saturday, August 5, 1876, being in Rutland, Vt., he took passage and started on the early morning railroad train of the Bennington & Rutland railroad in course and *en route* for Boston, said train connecting with said Fitchburg railroad train at North Adams; that the train was due and he expected and intended to reach Boston at 10.30 that evening; that this train reached North Bennington, Vt., a half hour too late to make connections for Boston with the Troy & Boston railroad train which connected with the state railroad run by the Fitchburg railroad at North Adams; that he then inquired of the ticket agent at that station what chance he had to get to Boston that night; that the ticket agent glanced along the time-table on the wall and said: "You can get to Boston at 7.22 in the morning by taking the express freight at North Adams," and advised him to drive right over to Hoosac, a distance of about eight miles; that plaintiff took a carriage and did so, and there took a mixed train, which carried him to North Adams, where he arrived about eleven o'clock that evening, and was there told by the conductor that the express freight started in about twenty minutes, but he found that this train also was delayed; he waited around the station until the express freight backed up and then got aboard, going into the caboose car with the consent of the conductor, starting from North Adams at about one or two o'clock Sunday morning; that there were other passengers in the car; that he had a ticket, which he had bought the previous week, entitling him to be carried over the

Fitchburg Railroad Company's line from Miller's Falls to Boston, and expected and was ready to pay his fare from North Adams to that place, the office at North Adams being closed so that he could not buy a ticket; that the train reached Ashburnham at about eight o'clock in the morning, and about a half hour afterward, whilst rounding a sharp curve about six miles from Fitchburg, collided with a train operated by the said Cheshire Railroad Company which was standing still upon the said track used in common by both defendants from Ashburnham to Fitchburg; that the car in which plaintiff was riding was telescoped, and he was seriously injured in his side and about his head, having his arm and the bones of his neck fractured, occasioning a permanent disability, for which he claimed damages to the amount of ten thousand (10,000) dollars."

The plaintiff also testified, in answer to questions put to him by counsel on direct and cross-examination, as follows, viz:

"(By Mr. Clark, pl'ff's counsel:) Q. When you came down to Bennington and missed the Boston train why did you not stay over there? A. I wanted to reach Boston for a special reason. Q. What was that? A. I had heard from my sister, who was in Minnesota, stopping with an uncle, where I sent her for her health a year previous to that. I had a letter from her that she was very ill, and expressed in her letter that she preferred to be brought home to die. She had been feeble for a number of years. Q. Were you supporting her at this time? A. I was; yes. Q. Had you made any reply to the letter she sent you? A. I wrote her back that if she could prevail on my cousin to bring her as far as Chicago I would meet her there and bring her the rest of the way; or if he preferred to go clear through to Philadelphia I would be very glad, because my business was such that it was disadvantageous to leave my field any longer than it was necessary. Q. Had you informed your sister where she could reach you by mail? A. I had, and when. Q. Where was it? A. That I would be in Boston on the first Saturday of August, and whatever was her wish I would carry out — either go to Chicago or through to St. Paul if it were necessary. Q. That is, would

you go through to St. Paul after leaving Rutland in the morning? Do you mean you would have gone there if this letter had not stopped you in Boston? A. It is equivalent to that, yes. Q. What time did you expect this letter from your sister to reach Boston — to reach you in Boston? A. I expected it to be there on the Saturday I was going. Q. Then, as I understand, if this man could not accompany her East you were going on after her and bring her yourself? A. I would have gone on Saturday night. Q. Was that letter brought to you at any time? A. It came to me whilst I lay at the Roolstone House, Fitchburg, on the Tuesday after the accident. Q. Brought up by any person? A. By Mr. Merrifield, the general agent of my company residing in Boston.

"(By Mr. Sohier, defendants' counsel:) Q. You say you expected a letter from her in Boston? A. Yes, sir. Q. What is the date of the letter you wrote her? A. It may have been about the 15th of the month or it may have been later than that date. I am rather inclined to the opinion that it was the 20th of the month. Q. The month of July? A. The 20th of July. Q. You say you wrote your sister. You have been examined before in this case in the Massachusetts Supreme Court? A. Yes, sir. Q. Did not you say before the letter was received about the 15th of July? A. Yes, sir; and I say so now; about the 15th of July, but I think the probabilities are that it was the 20th or 21st, the reasonable probabilities. Q. When did you receive the letter from her? A. About that time. Q. A short time before you answered it? A. Yes, sir. Q. You answered it the 15th? A. 15th to the 20th. Q. Have you had any occasion or reason why you should change any part of your previous testimony? A. No, sir; I don't, except to make the correction in that one important particular. Q. What is that? A. That I expected that letter that Saturday in Boston, at the office of the general agent. I as fully expected it as yesterday I expected to be on the witness stand to-day. Q. You expected to find a letter from your sister, then? What made you expect to find it then more than any other Saturday? A. Because I had notified her where to address me, and the time. Q. When did you

give her that notice? A. I gave her that notice perhaps as late as July 22d. Q. Is the letter you now allude to the same letter which you say was about the 15th? A. It is the same letter, for I think it was likely the 20th or 22d. Q. Where were you when you wrote that letter? A. I think that letter was written from Concord, to the best of my recollection — Concord, N. H. To the best of my recollection, I was at Concord the 21st, 22d, 23d, and 24th of July. Q. Are you testifying from memoranda you made? A. No; except in trying to rehearse my field of operations to see where I was and ascertain as nearly as I can where I received the letter from my sister.

"(By Mr. Clark:) Q. Something has been said about your testifying, at the last trial of the case before the Massachusetts Supreme Court, that you wrote the letter to your sister about the 15th of July. When was the time of writing that letter first called to your attention? A. When I was asked the question on the witness stand before said court. Q. When you testified at the last trial before said court? A. Yes, sir. Q. Was that the first time you had ever had your attention called to it? A. That was the first time. Q. You then stated about the 15th of July? A. Yes, sir. Q. How long after the accident was it when you testified — how many years? A. Nearly three years. Q. Had your attention ever been called in any way to the date of that letter until you were testifying? A. No; it had not. Q. Well, since then have you refreshed your recollection in any way as to the time when you wrote it? A. The best I could within the past few days. Q. How? A. By thinking over my routes of operations when out in the field of labor taking care of the interests of my company, where I was likely to have been on such a week and at such a week, and when I was likely to have received this letter and when I was likely to have answered it. Q. On what day did you expect this letter to arrive in Boston? A. Which letter do you now refer to? Q. The answer which was to come back from your sister. Did you expect that the answer from your sister would arrive before the 5th day of August, upon Saturday? A. I directed her to write me at Bos-

ton by Saturday, the first Saturday of August, that I would be in Boston at that time, and would complete arrangements for bringing her home or sending for her. Q. Now if you will answer the question, whether you expected the letter to arrive earlier than Saturday? A. Not earlier than Saturday.

"(By MR. SOHIER:) Q. Your sister was in Minnesota. Where was she — in St. Paul? A. In St. Paul. Q. Where she could be telegraphed to? A. Yes, sir. Q. Where she could telegraph you if she knew where you were? A. Yes, sir."

The conductor of defendant, Fitchburg Railroad Co.'s, train, called by plaintiff, testified that his train was some two hours late in leaving North Adams; that he was accustomed and allowed by the Fitchburg Railroad Co. to carry passengers on that train, and he took fares, which he turned over to the company; that he had not asked plaintiff for his fare or ticket, as he had been asleep; that the collision occurred between stations, and the trainmen in charge of the train of the Cheshire Railroad Co., defendant, with which his train collided, neglected when they brought their train to a standstill to send back or set any or proper danger signals to warn him of their so being on the track ahead. No fault was ascribed to plaintiff except that he was travelling on Sunday.

Plaintiff contended and introduced evidence tending to show that said collision occurred through the joint negligence of defendants and that the nature and extent of the injuries received by him and caused by same were of a serious and permanent character, occasioning damages amounting to a sum exceeding $5000, which he claimed a right to recover upon the evidence.

At the conclusion of the testimony offered by plaintiff defendants' counsel, not offering any evidence, cited and read to the court the case of this plaintiff against defendant, the *Fitchburg Railroad Co.* alone, reported in Massachusetts Reports, vol. 131, p. 156 (which it was admitted was brought to recover damages for the accident now made the subject of this suit and in which the plaintiff became nonsuit voluntarily after a new trial was granted), and contended that under the law of Massachusetts relied on in its answer the plaintiff could not recover;

that there was no evidence which would justify the jury in finding that he was travelling from necessity or charity, and that he could not maintain the action.

Plaintiff's counsel contended and claimed and asked the court to rule that the mere fact that he was travelling on the Sabbath or Lord's Day was not of itself alone a defence to the action or such as to prevent a recovery independently of the question whether he was travelling from necessity or charity or not; that the statutes of the State of Massachusetts on that subject did not apply and constituted no defence under the law and the decisions of the Federal courts.

His honor the presiding judge ruled as follows, viz.:

"In respect to the motion for a nonsuit the defendant bases his motion upon three grounds:

"First, that this case has been before the Supreme Court of Massachusetts, and the Supreme Court, upon the same state of facts arising upon the construction of a local statute, have decided that the plaintiff cannot recover by reason of a violation of the law with respect to Sunday; secondly, that the United States courts are bound to follow the construction which the Supreme Court of a State puts upon a local or state statute; and, thirdly, that the case presented by the plaintiff is substantially the same case which was presented before the state court. It seems to me that the law is well settled that the United States courts are bound to follow the decisions of the Supreme Court of a State upon the construction of a local statute, and that this case comes within that principle or doctrine, and that therefore the only question which arises here is whether the plaintiff does present a different case from that which was decided by the Supreme Court of the State. Of course this identical case was before the Supreme Court — the very case which we have here — and the only point is whether the facts which the plaintiff now presents are different from the facts which were before the state court. It does not seem to me that there is any material change in the testimony. I think that the testimony is substantially the same as was presented before the state court; that the changes which the plaintiff makes are immaterial, and do not affect the principles

which were laid down by the state court — that is, admitting the testimony to be true as it goes in here, the principles laid down by the state court in construing the Sunday law, so called, would apply to this case.

"Now the state court decided that this was not an act of charity or necessity on the part of the plaintiff; that he was not engaged in an errand of charity or of necessity. It seems that he was to receive a letter upon his arrival in Boston which was to determine whether he should go to the West for the relief of his sister. He was injured on coming to Boston before his arrival here — that is, in one sense, the act of necessity or charity had not begun. It was not determined whether he should be obliged to go upon this errand until he received this letter. The letter might be of such purport as not to call for him to go for the relief of his sister, and therefore the Supreme Court say that the act of ascertaining whether a person shall do a charitable act is not an act of charity, and so far as the necessity of the act is concerned the Supreme Court say that it must be a necessity which cannot be avoided; it must not be a necessity which arises from convenience. In other words, I cannot perform my secular duties during the week to the neglect of a necessary act, and then wait until Sunday to perform an act and call it a necessary act. I cannot repair a water-wheel upon Sunday, during the time that the mill may have been stopped, although the stoppage of the mill upon a week day might throw a thousand men out of employment and cause me very material damage. So here the plaintiff in this case received a communication from his sister about her illness the second week in July. Now whether he directed her to immediately answer the letter which he sent in reply to that communication, which was the condition of the evidence in the state court, or whether he directed her to answer the letter upon Saturday, August 6th, when he was to arrive here, and not, if you please, to have the letter arrive sooner, cannot make any difference in the principle of the case, because from the second week in July up to the 6th of August he was engaged in his secular avocations, and therefore the act was not such an act of necessity as could not be helped, but he

postponed his necessary act in order to engage for some time in his secular avocations. Therefore, it is very clear to my mind that upon the slight change in the testimony which is produced here the plaintiff still comes within the rulings of the supreme court of this State.

"Now, I am not here to decide the question whether the court approves of this Sunday law or not. I am not here to decide the question whether, if the case came up in the first place before this court, I should not allow this question, whether it was an act of necessity or charity, to go to the jury. In my present position I am debarred from this, and the only question for me to decide is whether the case presented here is substantially the same case as that presented in the supreme court and whether the principles laid down there in this identical case apply to the slightly different state of facts which is presented here. That is the only question. I am of opinion that it is substantially the same case, and therefore that I should abide by the decision of the supreme court of the State. As it is not customary for the United States courts to grant a nonsuit, perhaps the better way would be to direct a verdict for the defendant."

Mr. Clark: "Will your honor pardon me for submitting one more point: Whether or no, as the evidence now stands, we are entitled to go to the jury upon the question whether this letter, in the ordinary course of the mail, would not have arrived upon the day which he says he expected it to come. We base it on this state of the evidence — that the letter was written to his sister about the 22d of July. The evidence shows that it would take four or five days for the letter to go out there and then four or five days for a letter to come back, and under the circumstances and as the evidence puts it his sister was to ascertain whether a gentleman would accompany her as far as Chicago or perhaps as far as her home in Philadelphia, or whether, if he found himself unable to come with her, she was in a condition to be moved; and, further, whether this man was to go on for her. Now, it seems to us that there is a question which the jury are entitled to pass upon: Whether the letter, under all the circumstances, would have

arrived in Boston earlier than Saturday, the 5th day of August, when he says he expected it to come — that is, that the facts which appear in the record of the lower court are not the same facts that are shown here, and that there is something for the jury to pass upon in that particular, because, as your honor sees, if it took four or five days for the letter to go out there and four or five days for the reply to come back, that would consume ten days, and from the 22d of July to the 5th of August it would leave only two or three days, and the question is, Whether or no Mr. Bucher was entitled to believe that she might take those two or three days for the purpose of ascertaining whether this gentleman would come with her or if she was in a condition to be moved and to make up her mind whether he should come for her at this time."

Colt, J.: "I hardly think that could make any difference. It seems to me that he, having knowledge that his sister was ill the second week in July, ought then immediately, under the decision and ruling of the supreme court of the State, to have communicated with her, and not to have delayed from the second week in July until the 22d or the 26th — that is, from the time that he received this letter for several weeks he was engaged in his secular business."

Mr. Clark: "I think your honor has misunderstood what I said was the testimony now. The fact of his sister's illness did not come to his knowledge until the 22d of July. The first knowledge that he had of it, as he says and as the evidence stands, was from the letter that was forwarded to him at Concord, New Hampshire, from the main office. That he fixes as the 22d of July, so that he did not have knowledge of his sister's illness on the 15th; but as soon as he ascertained, on the 22d, that his sister was ill he immediately replied to her letter, as the evidence now stands."

Mr. Wadleigh: "Your honor will remember that he fixes the time of his being at Concord from the 20th to the 24th. This letter was forwarded to him at Concord, and he received it there and answered it as soon as he received it."

Colt, J.: "I cannot but think that, upon the testimony presented, this case comes within the principles laid down. The motion is granted."

The presiding judge thereupon directed the jury to return a verdict for defendants, and plaintiff then duly excepted to all said rulings and refusals to rule, directions, and doings of the presiding judge, and said exceptions were duly allowed. The jury returned a verdict for defendants, as directed by the presiding judge, as above stated.

The statute of Massachusetts referred to in the defendants' plea, as in force at that time, is to be found in the General Statutes of the State, c. 84, § 2, and is as follows: "Whoever travels on the Lord's day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars."

After the accident happened, and before the suit in the state court was brought, the legislature of Massachusetts enacted the following statute:

"The provisions of § 2 of c. 84, Gen. St., prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."

This last-named statute was held by the state court not to be retroactive, and not to affect this case.

Mr. A. A. Ranney for plaintiff in error.

I. The court below erred in regarding this as a question of local law, in which the Federal court was concluded by the decision of the state courts.

The court below followed the doctrine of law as held by the Supreme Court of the State of Massachusetts, which this court will find stated in *Stanton* v. *Metropolitan Railroad*, 14 Allen, 485, thus: "Being engaged in a violation of law, without which he would not have received the injury sued for, the plaintiff cannot obtain redress in a court of justice." He seems, however, to have gone further than this, and treated the ruling of the state court in *Bucher* v. *Fitchburg Railroad Co.*, 131 Mass. 156, — that the evidence reported therein was not sufficient to warrant a verdict for the plaintiff, and that a new trial must be had before a jury, leave for which was granted, — as a conclusive adjudication on the issue of fact presented again

to a jury in the Circuit Court, rather than as a legal authority only. The adjudication in the state court was not pleaded in bar, and would not have availed as such, if it had been, as there was only a voluntary nonsuit in the case.

The only effect which can properly be given to the decisions of the state court in this case is as an authority in matter of law, except that possibly the construction put upon the statute of May 15, 1877, as to its not being retroactive, may be binding on this court; and we respectfully submit that the court below erred in this respect. He disregarded a general principle and rule of law, as adjudicated in the Federal courts, and by other high authorities in other States, and followed the doctrine as held in the State of Massachusetts, treating the same as binding upon him, although his own opinion might be otherwise.

In the case of *Sawyer* v. *Oakman*, 1 Lowell, 134, affirmed 7 Blatchford, 290, the court held itself bound by the doctrine of this court as against the decisions of the courts of Massachusetts. The court says: "Now, to the extent of holding that work done in contravention of the statute is illegal, it may be that the local law should govern, but the statute itself is silent concerning the legal consequences of doing such an act, excepting to the extent of the penalty directly imposed. The effect which it may have on the wrong-doer's standing, as regards third persons, is no part of the construction of the statute, but the application of a general principle of law."

It is also held, in *Hough* v. *Railway Co.*, 100 U. S. 214, that where a case depends upon principles of general law, and not upon statute regulations, this court is not bound by the decisions of the state courts. That was a railroad case of tort. See also *Myrick* v. *Michigan Cent. Railroad*, 107 U. S. 102; *Railroad Co.* v. *National Bank*, 102 U. S. 14; *Chicago City* v. *Robbins*, 2 Black, 418; *Oates* v. *National Bank*, 100 U. S. 239; *Branch* v. *Macon & Brunswick Railroad*, 2 Woods, 385.

In *Burgess* v. *Seligman*, 107 U. S. 20, 34, this court says: "As the very object of giving to national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribu-

nals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

It may be regarded as an established rule in this court that, where private rights are to be determined by the application of common-law rules alone, the Federal courts are not bound by the decisions of the state courts.

There is a very good reason why this court should have a doctrine of its own in cases like the one at bar.

Lines of railway are long and continuous, extending through different States, and citizens of different States travel over them. There ought to be a uniform rule of law to be administered in Federal courts on such a subject.

If right in this position, we then submit that the doctrine laid down by this court in *Phil. Wilmington &c. Railroad Co.* v. *Towboat Co.*, 23 How. 209, and followed by Lowell, J., in case of *Sawyer* v. *Oakman*, 1 Lowell, 134 (approved by Woodruff, J.), is the only sensible and sound view to take of the law.

We cite also, in support of this contention, the following cases, namely: *Sutton* v. *Wauwatosa*, 29 Wis. 21; *Schmid* v. *Humphrey*, 48 Iowa, 652; *Carroll* v. *Staten Island Railroad*, 58 N. Y. 126; *Mohney* v. *Cook*, 26 Penn. St. 342; *S. C.* 67 Am. Dec. 419; *Merritt* v. *Earle*, 29 N. Y. 115; *S. C.* 86 Am. Dec. 292; *Johnson* v. *Irasburgh*, 47 Vt. 28; Bigelow on Torts, 309; 2 Thompson on Negligence, 1094; *Strickler* v. *Hough*, 1 Pittsb. (Penn.) 237; *Moulton* v. *Sanford*, 51 Maine, 127; *Baker* v. *Portland*, 58 Maine, 199; *Norris* v. *Litchfield*, 35 N. H. 271; *S. C.* 69 Am. Dec. 546; *Corey* v. *Bath*, 35 N. H. 530; *Landers* v. *Staten Island Railroad*, 13 Abb. Pr. (N. S.) 339; Wharton on Neg., § 321; Cooley on Torts, 156, 157.

The trouble with the doctrine, as held by the Supreme Court of Massachusetts, is this: It has applied its doctrine to cases of highway and railway accidents alike, disregarding the distinction made by the Supreme Court of Vermont in *Johnson* v. *Irasburgh*, 47 Vt. 28. It makes that an efficient cause of the injury which is not such. It treats travelling on Sunday as

contributing necessarily to the result, when it is not the natural or usual result of travelling on Sunday that damages should follow. It is a species of judicial outlawry; it ignores the analogies of the law and the principles of humanity; it impinges upon a well-settled rule of general law, which the same court has itself recognized and enforced in other cases, to wit: *Welch* v. *Wesson*, 6 Gray, 505; *White* v. *Lang*, 128 Mass. 598; *Steele* v. *Burkhardt*, 104 Mass. 59.

The doctrine of the court of Massachusetts is generally regarded as strained, unwarranted, and unjust: *Wallace* v. *Navigation Co.*, 134 Mass. 65, 95; *Commonwealth* v. *Louisville & Nashville Railroad*, 80 Kentucky, 291; *Platz* v. *Cohoes*, 89 N. Y. 219; *Baldwin* v. *Barney*, 12 R. I. 392; *Bayley* v. *New York &c.* 3 Hill, (N. Y.), 531; *Kerwhaker* v. *Railroad*, 3 Ohio St. 172; *S. C.* 62 Am. Dec. 246; *Opsahl* v. *Judd*, 30 Minnesota, 126; *Jacobus* v. *St. Paul &c. Railway*, 20 Minnesota, 125; *Wood* v. *Erie Railway*, 72 N. Y. 196.

The mere fact that the plaintiff on the one hand, or the defendant on the other, was engaged in violating the law in a given particular at the time of the happening of the accident will not bar the right of action of the former, nor make the latter liable to pay damages, unless such violation was an efficient cause of the injury.

We insert copious extracts from the opinions of the court in some of the cases cited, showing that this general rule of tort governs the case at bar.

Mr. Justice Grier, in *Philadelphia, Wilmington &c. Railroad* v. *Towboat Co.*, 23 How. at page 207, says: "The law relating to the observance of Sunday defines a duty of a citizen to the State, and to the State only. For a breach of that duty, he is liable to the fine or penalty imposed by the statute and nothing more. Courts of justice have no power to add to this penalty the loss of a ship by the tortious conduct of another, against whom the owner has committed no offence."

The court say, in *Carroll* v. *Staten Island Railroad Co.*, 58 N. Y. 126: "The defence is purely extraneous. . . . The negligence of the defendant was as wrongful on Sunday as on any other day, and was as likely to be followed by injurious or fatal

consequences. The plaintiff's unlawful act did not in any sense contribute to the explosion. . . . To hold the carrier exempt from liability because the plaintiff was violating the Sunday statute would be creating a species of judicial outlawry, to shield a wrong-doer from a just responsibility for his wrongful act." p. 136.

Dixon, C. J., in *Sutton* v. *Wauwatosa*, 29 Wis. 21, demonstrates that the violation of the law is an independent and disconnected act, and not a concurring or contributing cause within the rule of common law, and concludes: "Connection, therefore, merely in point of time, between the unlawful act or fault of the plaintiff, and the wrong or omission of defendant, the same being in other respects disconnected and independent acts or events, does not suffice to establish contributory negligence, or to defeat the action on that ground. As observed in *Mohney* v. *Cook*, such connection, if looked upon as in any sense a cause, whether sacred and mysterious or otherwise, clearly falls under the rule — *Causa proxima non remota spectatur*." p. 29.

In *Baker* v. *Portland*, 58 Maine, 199, the court say: "The fact that a party plaintiff in an action of this description was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half of the road, or that he was travelling on runners without bells, in contravention of the statute (see *Moulton* v. *Sanford*, 51 Maine, 134, by Appleton, C. J.), or that he was smoking a cigar in the streets, in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travellers, if the commission of the plaintiff's offence did not in any degree contribute to produce the injury of which he complains." p. 205.

In *Schmid* v. *Humphrey*, 48 Iowa, 652, the court say: "The fact that the plaintiff was at the place at the time he was injured did not directly contribute thereto. As well might it be said, if he had never come to Iowa, or been born, he would not have been injured, and that, therefore, by reason of such facts, he contributed to the injury." p. 654.

In *Johnson* v. *Irasburgh*, 47 Vt. 28, the court agree with

the doctrine of the cases cited above, to the extent that the unlawful act of travelling on Sunday does not prevent a recovery because it was in any sense contributory negligence, or because it was simply an illegal act. They say: "Whether he is lawfully or unlawfully there, when there, the same causes and forces produce the accident in one case as in the other; and the fact that the injured one is present unlawfully is not a factor which contributes to the happening of the accident." p. 34.

In *Strickler* v. *Hough*, 1 Pitts. (Penn.) 236, the court say: "The injury arose from the sole act of the defendant, an obstruction to the navigation unlawful at all times and seasons, and unmitigated by any fault in the plaintiff uniting in the production of the injury. Not that the plaintiff was without fault in his breach of the Sabbath, but that he was in none which united in the causation of the injury. It is true, if the plaintiff had not navigated the stream, the injury would not have happened; but it happened, not because he navigated on Sunday, but because he navigated at all. No logical consequence follows from the time of navigation to the injury happening. As to the time, the injury is *post hoc, non propter hoc*. . . . Let Sunday navigation be right or wrong, the time is not the cause of the injury ; and the plaintiff participates not in the cause, but the wrong is the same, whether it happened on one day or another. This being the position of defendant toward the case, he cannot ask that not only the penalty of a violated statute, but that a forfeiture of a right of action not arising out of its breach, or dependent on its observance, shall be inflicted to give it efficacy. . . . It is impossible to perceive how a wrong-doer in one thing can protect himself against redress because his injury fell upon one who was a wrong-doer in another." p. 242. The case there is analogous to the present one.

If the law forbade smoking or profane swearing on the cars, and a passenger was guilty of this, and while so doing was injured by the independent fault or wrong of the defendant, it might with equal propriety be urged in defence to an action for the tort of the defendant, as is said by Dixon, C. J., in effect, in 29 Wis. 21: "The principle is that the violation

of Sunday law does not contribute to the result since it is not the natural or usual result of travelling on Sunday that damages should follow."

Bigelow on Torts, 309. "Wrongful acts or omissions cannot be set off against each other so as to make the one an excuse for the other, unless they stand respectively in the situation of true causes to the damage."

It is a misnomer to call the offence against the law contributory negligence, or "a contributory cause," unless the same operated as an efficient cause in the production of the injury. Two passengers, one travelling from necessity or charity, and the other not, sit side by side, and both using the same kind and degree of care: both are injured by defendant's tortious act. How can it be justly said that there is contributory cause, or a want of due care, in one case more than the other?

The rule adopted in the Massachusetts cases, and followed blindly in one or two other of the New England States, closely impinges on the well-settled general rule of law as to the effect of collateral unlawful acts, and is condemned in 2 Thompson on Negligence, 1093–4.

This court condemned the doctrine of two of the leading cases in Massachusetts, such as *Bosworth* v. *Swansey*, 10 Met. 363; *S. C.* 43 Am. Dec. 441; *Gregg* v. *Wyman*, 4 Cush. 322. The latter case was condemned in *Woodman* v. *Hubbard*, 25 N. H. 67; *S. C.* 7 Am. Dec. 320; and in *Morton* v. *Gloster*, 46 Maine, 520; and, finally, the case was overruled in the same court in *Hall* v. *Corcoran*, 107 Mass. 251.

The Supreme Court of Connecticut, in *Frost* v. *Plumb*, 40 Conn. 111, has dealt with the doctrine also, pushing that of the overruling case still further.

The state court has, however, adhered uniformly to the old general doctrine, not heeding the case cited from this court in 23 How. 209.

When the people began to realize the fact, the general court came to the rescue and overruled the doctrine as held: first, as to torts of common carriers, in the law of 1877 cited; then, generally, as to all parties, in the statute of 1884, c. 37. It is no longer the law of the State, thanks to the general court.

Argument for Plaintiff in Error.

Upon principle, it cannot be justly held that the plaintiff's cause of action in the case at bar rests upon any illegal contract. The injury arose from a tort independent of all contract. The contract for passage was made in the State of Vermont on Saturday, and the delay of the trains was caused by an unforeseen accident, which the plaintiff was not bound to anticipate. There was no moral turpitude. "The duty imposed by law upon a carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury against a passenger, an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and, whether the action is brought upon contract or for failure to perform the duty, the liability is the same." *Carroll* v. *Staten Island Railroad Co.*, 58 N. Y. 126; *Merritt* v. *Earle*, 29 N. Y. 115; *S. C.* 86 Am. Dec. 292.

In *Bretherton* v. *Wood*, 3 Brod. & Bing. 54, Dallas, C. J., says: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words by the common law to carry and convey their goods and passengers safely and securely, so that by their negligence or default no injury or damage happens. A breach of this duty is a breach of the law; and for this breach an action lies, founded on the common law." p. 62.

In *Philadelphia &c. Railroad Co.* v. *Derby*, 14 How. 468, 485, Grier, J., says: "This duty does not result alone from the consideration paid for the service: it is imposed by law." *Tattan* v. *Great Western Railway*, 2 El. & El. 844; Hutchinson on Torts, § 563, and cases cited therein.

If this court does not adopt the views advanced, then we submit, as to the exception of the statute, that the state court, in dealing with the case before them, were determining whether the evidence adduced was sufficient to sustain the verdict which had been rendered. They were dealing with an issue of fact, with reference to the law, and not with a rule of law simply.

What the court say in *Smith* v. *Railroad*, 120 Mass. 490, is the law of Massachusetts, namely:

"It is not easy to define, as a matter of law, what state of

facts will make travelling an act of necessity or charity within the exception in the Lord's Day Act, or when the plaintiff's own illegal conduct can be said to be a direct, rather than a remote, cause contributing to the injury. The first of these questions is to be determined, to a great extent, by considerations of moral fitness and propriety; the last by the evidence in each case bearing upon the complicated relations of cause and effect. In most cases, both questions should be submitted to the jury, with proper instructions."

So in *Feital* v. *Middlesex Railroad*, 109 Mass. 398, the court say: "The necessity of travelling, within the exception in the Lord's Day Act, is, to a great extent, determined by its moral fitness and propriety; and it would have been erroneous to have ruled, as matter of law, that travelling for such a purpose was not within the exception."

The court, in construing the statute as matter of law, have defined the words "necessity" or "charity" to comprehend all acts which it is morally "fit and proper should be done on the Sabbath."

"The necessity intended by the statute is not to be limited, on the one hand, to absolute physical necessity, nor, on the other hand, is it to be so enlarged as to include mere business convenience or advantage." *Davis* v. *Somerville*, 128 Mass. 594, 597.

The case in the state court, as I remember it, went to the full court on a report, so the court could determine certain exceptions, and whether the jury were justified on the case shown them in rendering the verdict. The court only held, in reviewing the facts, that the verdict was against the evidence, or without evidence, under the rules of law laid down.

The court below has held the ruling conclusive in this case, just as though it was *res adjudicata*, when such it was not, not being so pleaded, and there being no final judgment which could properly so operate, if pleaded.

A careful examination of that opinion shows that the court held adversely to the plaintiff, on the ground that he had made the aid to his sister a consideration subordinate to his secular business. I must confess that I fail to appreciate the

ground on which that idea is based. He did not arrange his secular business so as to necessitate travelling on Sunday, in Massachusetts, in violation of the statute. He planned so he would arrive in Boston early Saturday evening. He did for his sister all that mercy and charity required, in perfect consistency with an observance of the law. His necessity for travelling on Sunday for the rest of the route arose, not from his plan, but from an unforeseen emergency. The theory of the court would seem to be that he should have dropped all business at once, and gone to his sister before the time required, and should not have waited till the proper time came for him to go. He, as the case now appears, after he had looked up the dates for the first time, was to get the letter the very Saturday night in question. He had written her from Concord, N. H., some time from July 21 to 24, that he would be in Boston, Saturday, the 5th of August, that being his post-office address ; was not expecting the letter to arrive earlier than that. So long as he subserved his sister's necessities in the matter of charity, he might also regard his business interests, provided he did not in plan and course of conduct contemplate travelling on Sunday. Had he arranged to start for Boston, and travel in Massachusetts, on Sunday, instead of Saturday, he would not have been justified.

But this is not a case of that kind. He did not arrange for, nor contemplate, travelling on Sunday over defendants' road, or any other road. Had he, in violation of law, got to Boston when he expected, he could have spent Sunday in Boston, and started for Chicago Monday morning. The Massachusetts court might, but probably would not, hold the opening and reading of his sister's letter on Sunday to have been illegal, —he would have had time to do that Saturday night. The controlling element in this case, with the state court, seems to have been that his sister's letter arrived, or would have arrived, earlier, if his letter was written July 15, as was his erroneous impression in the trial of the state case, and which was corrected in the Circuit Court. But, for the life of me, I cannot see why the plaintiff was in fault, if he arranged to get to Boston as soon as the letter would, and that a week-day named.

Considerations connected with his sister, combined with the emergency, rendered it fit and proper for him to proceed as he did do. It is a strange doctrine, if held, that, when a passenger starts in season to reach Boston Saturday evening, and the train is delayed on the way, beyond the hour of midnight, he is bound to leave the train and stay over Sunday at the place where that hour finds him. He may be at that time within a few miles of his own home, or, in these days of rapid transit, within a short ride, in point of time. This is manifestly an issue of fact for the jury, even under the local law.

I have dealt with this last branch of the case, not knowing whether this court will hold to the Massachusetts decisions on the other point, or will adhere to what it has heretofore adjudged to be the true rule of general law.

Mr. Charles A. Welch for defendant in error cited: *Bucher* v. *Fitchburg Railroad*, 131 Mass. 156; *Jones* v. *Andover*, 10 Allen, 18; *Stanton* v. *Metropolitan Railroad*, 14 Allen, 485; *Commonwealth* v. *Sampson*, 97 Mass. 407; *Commonwealth* v. *Josselyn*, 97 Mass. 411; *McGrath* v. *Merwin*, 112 Mass. 467; *Davis* v. *Somerville*, 128 Mass. 594; *Wallace* v. *Merrimack River Navigation Co.*, 134 Mass. 95; *Day* v. *Highland Street Railway*, 135 Mass. 113; *Read* v. *Boston & Albany Railroad*, 140 Mass. 199; *Cronan* v. *Boston*, 136 Mass. 384; *Baker* v. *Worcester*, 139 Mass. 74; *Burgess* v. *Seligman*, 107 U. S. 20; *Sumner* v. *Hicks*, 2 Black, 532; *Leffingwell* v. *Warren*, 2 Black, 599; *Rowan* v. *Runnels*, 5 How. 134; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416; *Pease* v. *Peck*, 18 How. 595; *Douglas* v. *Pike County*, 101 U. S. 677.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The plaintiff in error was plaintiff in that court, and sought to recover of the defendants for injuries which he sustained by reason of their negligence while travelling upon their roads. The court on the trial substantially instructed the jury that the

plaintiff could not recover because the injury complained of occurred while he was travelling upon the Sabbath day, in violation of the law of the State of Massachusetts.

A suit between the same parties in regard to the same transaction had been brought in the Supreme Court of that State, in which, on a trial before a jury, the plaintiff obtained a verdict. This was carried to the court in bank, and was there reversed and sent back for a new trial. The plaintiff then became nonsuit in the state court and brought the present action in the Circuit Court of the United States.

It is important to inquire what was at issue upon the trial in the state court. There the defendant set up the law of the State found in the General Statutes, c. 84, § 2, which is as follows: "Whoever travels on the Lord's Day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars;" and insisted that the plaintiff, being in the act of violating that law at the time the injury occurred, could not recover. On the 15th of May, 1877, after the plaintiff was injured, the legislature of Massachusetts passed a statute declaring that this prohibition against travelling on the Lord's Day should not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by the person so travelling. Mass. Stat. 1877, c. 232.

The Supreme Court of that State had decided previous to this, in *Stanton* v. *Metropolitan Railway Co.*, 14 Allen, 485, a similar case, that the plaintiff, being engaged in a violation of law, without which he would not have received the injury sued for, could not obtain redress in a court of justice. Also in *Bosworth* v. *Swansey*, 10 Met. 363, and in *Jones* v. *Andover*, 10 Allen, 18. In the trial of the case now under consideration, before the jury in the state court, the plaintiff does not seem to have controverted the general doctrine thus declared, but insisted that the present case did not come within the statute, because, first, the act of May 15, 1877, had declared that travelling on Sunday should no longer be a defence to actions for injuries suffered by reason of the negligence of carriers of passengers, although this statute was passed after the accident occurred upon which the right of action was founded; and,

second, that at the time he was injured he was, within the meaning of the statute, travelling upon an errand of charity or necessity, specially excepted from its provisions.

The court below sustained both of these propositions of the plaintiff, and the court in bank reversed the trial court upon both of them. It held that the act of May 15, 1877, did not govern a case where the injury had occurred before its passage; that it was not retroactive, and also held that the facts set out in the bill of exceptions did not show that the plaintiff was travelling at the time of the accident either from necessity or for charity. It may be as well to state here that the facts found in the bill of exceptions relating to this latter question, as it was presented before the Supreme Court of Massachusetts, were identical with those appearing in the bill of exceptions of the case now before us, being in both cases the plaintiff's own statement of his reasons for travelling on that day.

Upon the trial in the Circuit Court of the United States the judge was requested by the plaintiff to charge the jury that the circumstances detailed in the testimony of plaintiff and found in the bill of exceptions concerning the illness of his sister in Minnesota, of which he had received knowledge by letter, and had replied that he would meet her in Chicago at a certain time, and that, having been delayed by accidental circumstances, the travel on Sunday, when he was injured, became necessary to enable him to fulfil that promise, were sufficient to be submitted to the jury in order that they might pass upon the question of whether or not this act of travelling on the Lord's Day was a work of necessity or charity. This the court declined to do, saying that the same question having been submitted to the jury in the trial in the state court, and having been passed upon by the Supreme Court of the State, he did not consider that there was evidence sufficient to go to the jury upon that subject.

This is one of the assignments of error now before us, and upon this point we are of opinion that the court below ruled correctly. It is not a matter of estoppel which bound the parties in the court below, because there was no judgment entered in the case in which the ruling of the state court was

made, and we do not place the correctness of the determination of the Circuit Court in refusing to permit this question to go to the jury upon the ground that it was a point decided between the parties, and therefore *res judicata* as between them in the present action, but upon the ground that the Supreme Court of the State in its decision had given such a construction to the meaning of the words "charity" and "necessity" in the statute, as to clearly show that the evidence offered upon that subject was not sufficient to prove that the plaintiff was travelling for either of those purposes. The court in its opinion, which is reported in *Bucher* v. *Fitchburg Railroad*, 131 Mass. 156, said:

"The act of plaintiff in thus travelling on the Lord's Day was not an act of necessity within the meaning of the statute. . . . In order to constitute an act of charity, such as is exempted from the Lord's Day act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity; but, so far as the statute is concerned, the only question in that case would be, is this act a necessary act? That involves the question, whether the act is one which it is necessary to do on the Lord's Day; and no previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's Day." p. 159.

After citing other cases which had been decided in that court, it was further said:

"It is apparent that the plaintiff's duty to his sister was made subservient to his secular business. We are, therefore, of opinion that the ruling should have been given that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity, within the meaning of the statute." p. 160.

Taking, therefore, this construction of the language of the statute, as well as prior decisions to the same purport in which we think we are bound to follow the Supreme Court of the State, we agree that the record in this case as in that does not furnish evidence which should have gone to the jury upon that branch of the subject.

The other assignment of error, in regard to the effect of travelling on the Lord's Day in violation of the statute of Massachusetts, submitted as a defence to what would otherwise be a liability of the railroad for the negligence of its servants, presents the matter in a somewhat different aspect.

It is not easy to see that there was anything in the case as it arose in the Circuit Court which required a construction of the meaning of that statute, after eliminating what has just been suggested as to the signification of the words "necessity" or "charity." The remainder is a short prohibition against travelling upon the Lord's Day, and provides for the imposition of a penalty for so doing. This is very plain; it admits of no doubt as to its meaning, and its validity has never been controverted. When, therefore, the Supreme Court of Massachusetts, in a long line of decisions, has held that the violation of this statute may be set up as a defence to a liability growing out of the negligence of a railroad company in carrying passengers upon its road, it must have been on some other ground than that to be found in the expressions used in the statute itself. There is no such provision in it, and there is no necessary inference to be drawn from its language that it was intended to control the relations between the passenger and the carrier, or to modify the obligations of the one to the other.

The language of the court in *Stanton* v. *Metropolitan Railway Co.*, already cited, is that "because the plaintiff was engaged in the violation of law, without which he would not have received the injury sued for, he cannot obtain redress in a court of justice." This principle would seem to be as applicable to a man engaged in any other transaction forbidden by law as to that of violating the Sabbath. Whether the doctrine thus laid down is a sound one, and whether, if it be not sound as it commends itself to our judgment, we should follow it as being supported by the decisions of the Supreme Court of Massachusetts in numerous instances, presents in this case the only serious question for our consideration. *Hamilton* v. *City of Boston*, 14 Allen, 475; *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen, 18; *Day* v. *Highland Street*

Railway Co., 135 Mass. 113; *Read* v. *Boston & Albany Railroad Co.*, 140 Mass. 199.

If the proposition, as established by the repeated decisions of the highest court of that State, were one which we ourselves believed to be a sound one, there would be no difficulty in agreeing with that court, and, consequently, affirming the ruling of the circuit judge in the present case. But without entering into the argument of that subject, we are bound to say that we do not feel satisfied, that, upon any general principles of law by which the courts that have adopted the common law system are governed, this is a true exposition of that law.

On the contrary, in the case of *Phila., Wilmington & Balt. Railroad* v. *Steam Towboat Co.*, 23 How. 209, this court had under consideration the same question. It arose in regard to the effect of a statute of Maryland forbidding persons "to work or do any bodily labor, or willingly suffer any of their servants to do any manner of labor on the Lord's Day, works of charity or necessity excepted," and prescribing a penalty for a breach thereof. It was held by this court that where a vessel was prosecuting her voyage on Sunday, and was injured by piles negligently left in the river, this statute making travelling on Sunday an offence and punishing it by a penalty, constituted no defence to an action for damages by the vessel. A number of cases were cited sustaining that view of the subject, and the court, through Mr. Justice Grier, used this language: "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in inflicting an additional penalty of seven thousand dollars on the libellants, by way of set off, because their servants may have been subject to a penalty of twenty shillings each for the breach of the statute." p. 218.

In that case, however, there had been no decision of the courts of Maryland, holding that a violation of the Sabbath would constitute a defence to the action against the company which had left the piles in the river. In this view of the matter it is not unworthy of consideration that, shortly after the injury in the present case was inflicted, the General Court of

Massachusetts passed a statute, to which we have already referred, declaring that travelling on the Lord's Day should not "constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling."

The question then arises, how far is this court bound to follow the decisions of the Massachusetts Supreme Court on that subject?

The Congress of the United States, in the act by which the Federal courts were organized, enacted that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Rev. Stat. § 721; Judiciary Act, 24 Sept., 1789, c. 20, § 34, 1 Stat. 92. This statute has been often the subject of construction in this court, and its opinions have not always been expressed in language that is entirely harmonious. What are the laws of the several States which are to be regarded "as rules of decision in trials at common law" is a subject which has not been ascertained and defined with that uniformity and precision desirable in a matter of such great importance.

The language of the statute limits its application to cases of trials at common law. There is, therefore, nothing in the section which requires it to be applied to proceedings in equity, or in admiralty; nor is it applicable to criminal offences against the United States, (see *United States* v. *Reid*, 12 How. 361,) or where the Constitution, treaties or statutes of the United States require other rules of decision. But with these, and some other exceptions which will be referred to presently, it must be admitted that it does provide that the *laws* of the several States shall be received in the courts of the United States, in cases where they apply, as the rules of decision in trials at common law.

It has been held by this court that the decisions of the highest court of a State in regard to the validity or meaning of the constitution of that State, or its statutes, are to be considered as the law of that State, within the requirement of

this section. In *Leffingwell* v. *Warren*, 2 Black, 599, this court said, in regard to the statutes of limitations of a State: "The construction given to a statute of a State by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text."

In the case of *Luther* v. *Borden*, 7 How. 1, 40, Chief Justice Taney said: "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the constitution and laws of that State; and the well-settled rule in this court is, that the courts of the United States adopt and follow the decisions of the state courts in questions which concern merely the constitution and laws of the State." See also *Post* v. *Supervisors*, 105 U. S. 667.

It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts.

The principle also applies to the rules of evidence. In *Ex parte Fisk*, 113 U. S. 713, 720, the court said: "It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts." See also *Wilcox* v. *Hunt*, 13 Pet. 378; *Ryan* v. *Bindley*, 1 Wall. 66.

There are undoubtedly exceptions to the principle that the decisions of the state courts, as to what are the laws of that State, are in all cases binding upon the Federal courts. The case of *Swift* v. *Tyson*, 16 Pet. 1, which has been often followed, established the principle that if this court took a different view of what the law was in certain classes of cases which ought to be governed by the general principles of commercial law, from the state court, it was not bound to follow the latter. There is, therefore, a large field of jurisprudence left in which the question of how far the decisions of state courts constitute the law of those States is an embarrassing one.

There is no common law of the United States, and yet the

main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its local usages, customs, and common law. *Wheaton* v. *Peters*, 8 Pet. 591; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 519.

When, therefore, in an ordinary trial in an action at law we speak of the common law we refer to the law of the State as it has been adopted by statute or recognized by the courts as the foundation of legal rights. It is in regard to decisions made by the state courts in reference to this law, and defining what is the law of the State as modified by the opinions of its own courts, by the statutes of the State, and the customs and habits of the people, that the trouble arises.

It may be said generally that wherever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20. Where such local law or custom has been established by repeated decisions of the highest courts of a State it becomes also the law governing the courts of the United States sitting in that State.

We are of opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath day, contrary to the statute of the State, being thus in the act of violating a criminal law of the State, shall not recover against a corporation upon whose road he travels for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so far as they can establish it, and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect

to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject.

Affirmed.

Mr. Justice Harlan, with whom concurred Mr. Justice Field, dissented upon the grounds:

1, That the question whether the provision in c. 84, § 2 of the General Statutes of Massachusetts that "whoever travels on the Lord's Day, except for necessity or charity, shall be punished by a fine not exceeding ten dollars" is a bar to a recovery in this action, is a question of general law upon which the Federal courts are at liberty to follow their own convictions; and,

2, That it is settled by *Philadelphia, Wilmington, and Baltimore Railroad* v. *Philadelphia and Havre de Grace Towboat Co.*, 23 How. 209, that such a state statute is not a bar to a recovery in an action like this in a Federal court.

BOWERMAN *v.* ROGERS.

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

No. 187. Argued February 16, 1888. — Decided March 19, 1888.

From the evidence in this case it is clear that the assignor of the defendants in error employed the plaintiffs in error as their agents to enter at the Custom House in New York importations of sugar imported by them, and, after protest, to commence suits to recover an excess of duty imposed upon the importations, and that the plaintiffs in error undertook to perform those services; and, it being settled in actions brought by other persons under similar circumstances and on like importations, that such duties were illegally exacted, and the plaintiffs in error having failed to commence suits within the period limited by law to recover such as were illegally exacted from the assignor of the defendants in error, *Held*, that the judgment of the court below for their recovery must be affirmed.

THE CASE is stated in the opinion of the court.

The defendants in error were assignees of Burgess, and were admitted by the court, under the provisions of the code of New York to appear as such, and as plaintiffs there to prosecute the suit to judgment.

Mr. Edwin B. Smith for plaintiffs in error.

Mr. Everett P. Wheeler for defendants in error.

MR. JUSTICE MILLER delivered the opinion of the court.

The writ of error in this case is to a judgment of the Circuit Court of the United States for the Southern District of New York. This judgment was entered upon a verdict rendered by a jury in favor of the plaintiffs, Benjamin F. and Walter Burgess, under the peremptory instructions of the court, for the sum of $6105.77, against the defendants, Bowerman Brothers.

Burgess & Sons were dealers in sugars and molasses, residing in Boston, and Bowerman Brothers were sugar brokers, residing in New York. Burgess & Sons had a large part of the articles in which they dealt, either for themselves or as agents for others, landed in New York, and entered at the custom-house there. In such cases they employed Bowerman Brothers as their agents, and it is not disputed that this agency extended to the entry of these goods at the custom-house in New York, as well as to the sale of them afterward. With regard to two shipments of goods so entered there, from two different vessels, a question arose as to the duties assessed upon them by the collector. This controversy proceeded as far as the payment of the duties through Bowerman Brothers, followed by an appeal from the decision of the collector to the Secretary of the Treasury, and a protest against the final action of the Department. All this was attended to and faithfully performed in due time by the defendants. They, however, did not bring suit to recover back the duties so paid, and the

single question to be decided here is, whether it was the duty of Bowerman Brothers, under the circumstances of their employment, to have brought such a suit against the collector for the excess of duties claimed to have been imposed by him on these importations.

The case arises in this way. Suits were brought by other parties who had paid similar duties upon like importations, and recoveries had against the collector upon precisely the same grounds mentioned in the protest of the plaintiffs in this suit, and in a case brought to this court the error of the Treasury Department was established. But the statute allowing recoveries to be had against the collector for excessive duties which have been paid requires the suits to be brought within ninety days after such payment has been made, and that period had elapsed before the decisions in those cases. It was for that reason too late for Burgess & Sons to cause suit to be brought to recover back their alleged excessive payments.

Bowerman Brothers maintain that, as mere sugar brokers, it was no part of their duty to cause suit to be brought on account of the imposition of excessive duties, and that they are not liable, therefore, for the failure to do so, by reason of which it is very clear the sum recovered in this suit was lost to the plaintiffs. On the other hand, Burgess & Sons insist that, whether it was a part of their duty as brokers to institute such suit or not, they had come under an obligation to do it by reason of conversation or correspondence which passed between the parties. The whole of this correspondence, and the verbal testimony of one of the plaintiffs which is very brief, is found in the bill of exceptions, and we concur with the judge who tried the case below that this correspondence itself makes out the obligation of Bowerman Brothers to have caused the institution of such a suit.

About the only piece of verbal testimony that is of any consequence in the consideration of this matter is the statement of Mr. Burgess on the stand, that his firm fully relied upon the defendants to attend to the matter of bringing such a suit. Some of the letters produced, which passed between them, make this very plain.

On January 27, 1881, the plaintiffs wrote to the defendants as follows:

"We notice the tests and have seen the sample. They are certainly very beautiful sugars for their class. Now, we feel anxious as to the duties on the dry test, but if they should be decided against us we must protest as soon as duties are paid, and place the matter in the hands of a first-class lawyer, the one employed by Messrs. Knowlton, perhaps, unless you know of a better, to commence the suit as soon as possible, but we hope all this will not be necessary.

* * * * *

"If the sugars are marked up on dry test, it is necessary to formally protest against the decision of the collector and then appeal to the Secretary of the Treasury. This is the first step, and when the duties are paid to enter suit."

To this the defendants replied on the next day: "Your favor of yesterday is received and contents noted, all of which will be duly attended to."

Several other letters then follow concerning other importations and protests made by Bowerman Brothers on behalf of plaintiffs against the duties levied on those goods. On March 31, 1881, the plaintiffs wrote to the defendants: "Of course you will duly appeal from the government assessing duties by tests." On April 15, the defendants wrote to Burgess & Sons as follows:

"We have your favor of yesterday and enclose herewith the Secretary of the Treasury's reply to our appeal of March 5th, (sugars per 'Santiago,' Jan. 25, '81.) The collector's decision is affirmed. We suppose you will wait the decision in the Welch suit before commencing proceedings.

"Please advise us."

To this the plaintiffs replied on April 16, as follows:

"We are in receipt of your favor of yesterday enclosing the reply of the Secretary of the Treasury to your appeal of March 5 regarding sugars *ex* Santiago, Jan. 25. We would await the decision in the Welch suit before commencing proceedings, if there is time.

"Please keep us posted in the sugar case."

On April 27, 1881, Bowerman Brothers wrote to plaintiffs as follows:

"Your favor of yesterday is received. The Kioto sugars are about half out of ship, and we send you to-night by express samples and tests of each mark. Our market is quiet but strong. We hear that the government has decided to appeal from the decision (in New York) in the Welch case. Sales reported as below."

On June 18, 1881, Bowerman Brothers again wrote to plaintiffs as follows:

"We presume you have in mind the Santiago's cargo — centrifugal, Angelita — which arrived here July 6th, 1880, the most of which was raised on polariscope test, one-fourth cent and 25 per cent above the legitimate rate of entry on Dutch standard, and will commence suit against the government in due season."

To this latter the plaintiffs, Burgess & Sons, replied on June 20, as follows:

"We have your favor of the 18th, in which you say, 'We presume you have in mind the Santiago's cargo — centrifugal, Angelita — which arrived July 6, '80, the most of which was raised on polariscope test, one-fourth and 25 per cent above the legitimate rate of duty on Dutch standard, and will commence suit against the government in due season.'

"The cargo you refer to did not pay at all, as we understand, duty above the Dutch standard, it having just escaped on dry test.

"Of course we must not let any of our cases escape due attention. We attend here to all our Boston cases and enter suits as fast as they come around, and we suppose you can do the same as our agents in New York. Are we right? Please look into every case and keep us timely informed and whether there is anything for us to do personally or by power."

We think the whole of this correspondence leads to the inevitable conclusion that the defendants, either expressly or by fair implication, assumed the duty of causing suit to be brought within a reasonable time; living, as they did, in New York, where the transactions all occurred, where the suit

must be brought, and being frequently admonished by the letters of plaintiffs to see that suit was brought in due time.

This is especially evident from the last letter quoted above, in which the expectation of plaintiffs is distinctly stated that defendants would cause suit to be brought "in due season," and an inquiry made whether they are right in that supposition. They had by the statement in their letter, "Please look into every case and keep us timely informed and whether there is anything for us to do personally or by power," which is not denied, raised an implied acknowledgment on the part of the defendants that they would attend to this matter.

Taking the evidence all together, it is very clear that Burgess & Sons understood that Bowerman Brothers would attend to the whole affair from the beginning to the end, and, without regard to their special occupation as mere sugar brokers, would take charge of all that was necessary to secure the rights of the plaintiffs in the matter of paying duties, making proper protests, getting the goods through the custom-house, and seeking redress by suit against the collector if that became necessary. And that they might be sure that they were not mistaken in this understanding, the letter of the 20th of June was written, which required in good faith that if Bowerman Brothers did not consider themselves charged with the duty of having a suit brought in due time, they should have made a disclaimer of it by an immediate answer. It cannot be denied that the loss by Burgess & Sons of the sum of money found in the verdict, was due to the failure of Bowerman Brothers to fulfil faithfully the obligation in this particular which they had assumed in this correspondence, and which Mr. Burgess swears his firm relied upon them to perform.

The judgment of the Circuit Court is

Affirmed.

UNION TRUST COMPANY *v.* MORRISON.

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

No. 64. Argued and submitted November 10, 1887. — Decided April 2, 1888.

The entire rolling stock of a railway company in Illinois was covered, as well as all its other property, by a mortgage to trustees to secure an issue of outstanding bonds. A judgment creditor of the company being about to levy upon some of the rolling stock, the company filed a bill in equity to restrain the levy and to set aside the judgment as obtained by fraud, and an injunction issued restraining the creditor from making the levy, a bond with surety being first filed, conditioned to pay the judgment debt if the injunction should be dissolved. The surety in that bond took as security a chattel mortgage of four locomotives. Proceedings were then taken for the foreclosure of the mortgage, and a receiver of all the property covered by the mortgage was appointed. Several suits against the company were then pending in which appeal had been taken and appeal bonds given, in order to protect the rolling stock. The receiver then suggested, making special mention of the above recited case, that the sureties should be protected in the event of adverse decisions, and the court authorized him in his discretion to protect such sureties as ought to be protected, by reason of the protection afforded to the property and assets of the company, by the giving of their bonds; and an order was made that all persons having claims or liens against the property or its proceeds should file intervening petitions on or before a day named. The surety in the injunction bond intervened within the time fixed, setting forth the facts, and that judgment had been recorded against him, and asking to be protected from the consequences of signing the bond, as the receiver had not been able to pay the debt of the judgment creditor. The property covered by the mortgage was then sold, and purchased by persons representing the bondholders, and it was referred to a master to report upon the intervening claims. The trustee and the receiver objected to the allowance of the claims of the surety on the injunction bond, on the ground that the execution in the original suit could not become a lien upon the property as against the mortgage bondholders, and on the further ground that the surety had not paid the judgment debt. The surety then paid the judgment debt, and filed a supplemental petition, setting that fact forth and repeating this original application, but the master rejected the claim on the ground that the payment was not made when he filed his original claim, nor until the time had expired for claims to be presented. *Held:*

Statement of the Case.

(1) That the claim was presented in time; and that although the surety had not paid the judgment when the claim was presented, he was entitled in equity to be protected from making the payment;

(2) That the purchasers at the foreclosure sale, having been represented in the foreclosure proceedings by the trustees of the mortgage were bound by whatever bound the trustees, including the orders of the court respecting the paramount liens of the intervening claimants;

(3) That as, until the mortgage was enforced by entry or judicial claim, the personal property of the company was subject to its disposal in the ordinary course of its business, and to be seized and taken on execution for its debts, subject, however, to the contentions of the mortgage trustees, the act of the surety on the injunction bond had operated to keep the property together, and to keep up the railroad as a going concern;

(4) That the taking of the chattel mortgage by him showed that he intended to look to the property, and not alone to the personal security of the company;

(5) That the evidence referred to in the opinion showed that the receiver received moneys from which he might have paid the judgment debt;

(6) That the purchasers of the property accepted a deed, executed under order of court, in which they recognized the right of the surety as an intervenor.

The court does not intend, in this case, to decide anything in conflict with *Burnham* v. *Bowen*, 111 U. S. 776, and only decides that this claim, being based upon a *bona fide* effort by the intervenor to preserve the fund from spoliation after the mortgage debt was in arrear and the right to reduce to possession had accrued, the claimant can pursue earnings which had been appropriated to the purchase of property that had been added to the fund.

The action of the intervenor not being taken for the purpose of being subrogated to the questionable rights of a judgment creditor, the court expresses no opinion upon the rights of an execution creditor, levying on the personal property of a railroad company in Illinois, as against those of a mortgagee.

The court stated the case as follows:

This case grows out of the foreclosure of a mortgage given by the Cairo and St. Louis Railroad Company on the 2d day of October, 1871, to the Union Trust Company, to secure the payment of two thousand five hundred bonds of one thousand dollars each, with interest semi-annually. Morrison, the appellee, intervened in the proceedings, by petition, claiming a lien on the property mortgaged, by reason of having become liable as surety on an injunction bond given to obtain an injunction

to prevent an execution sale of a portion thereof. The court below by a decree dated May 4th, 1884, allowed his claim, amounting to the sum of $15,352.19, with interest from May 20th, 1882. The purchasers at the foreclosure sale (who purchased on behalf of the bondholders), having transferred the property to the St. Louis and Cairo Railroad Company (organized for that purpose), said company was allowed to become a party to the proceedings for the purpose of appealing from the decree; and did appeal from the same in connection with the Union Trust Company. The case is now before us on that appeal.

The facts necessary to be understood in the determination of the case are as follows:

The Cairo and St. Louis Railroad Company was a corporation of Illinois owning and operating a railroad in that State, extending from Cairo to a point opposite St. Louis. The mortgage referred to purported to convey and embrace all the property and assets of the company, real, personal, and mixed, then held and owned, or thereafter to be acquired, and the tolls, incomes, rents, issues, and profits thereof; and it contained provisions authorizing the mortgage trustee (the Union Trust Company) to take possession of said property and assets in case of default, for a certain period of time, in the payment of interest, or of the instalments of a sinking fund provided for; and gave said trustee power, on such default, to declare the principal due. The railroad company made default in the payment of interest in October, 1873, and at every subsequent period of payment, and never paid any instalments of the sinking fund.

Meantime, the company was harassed by suits, and, amongst others, one Henry Holbrook, on the 26th of November, 1872, recovered a judgment against it in the Circuit Court of St. Clair County, Illinois, for the sum of $9500, besides costs. Execution was issued, but not levied. But in October, 1874, an *alias* execution was issued, and the sheriff of St. Clair County threatened to levy upon the rolling stock of the company, a great part of which was in that county, opposite St. Louis. The company, believing the judgment to have been fraudulently

and wrongfully obtained, filed a bill in equity in the St. Clair Circuit Court to enjoin Holbrook from proceeding to its collection. An injunction was granted accordingly on the 30th of December, 1874; but only upon the condition that the company should give an injunction bond, with sureties, for the payment of judgment and costs, if the injunction should be dissolved. Morrison, at the request of the company, executed such bond as surety. In February, 1877, the bill for injunction was dismissed, and in June, 1879, the decree of dismissal was affirmed by the Supreme Court of Illinois, and the injunction was definitively dissolved. Thereupon Holbrook sued Morrison on the injunction bond, and on the 30th of September, 1880, recovered judgment against him for the sum of $13,965.

Prior to this time, in November, 1877, the Trust Company declared the principal of the bonds due, and filed a bill in the court below to have a receiver appointed and the mortgage foreclosed. Henry W. Smithers was appointed receiver, with power to operate the road and equip it and keep it in repair, and to pay all amounts due and owing by the railroad company for labor or supplies that might have accrued in the operation and maintenance of the railroad property within six months immediately preceding. The receiver, on taking possession of the property, found a number of suits against the company pending on appeal, and claims for protection on the part of those who had become sureties on the appeal bonds; and on the 29th of December, 1877, he presented a petition to the court, asking its advice and instruction in regard to said bonds, and whether he should protect the sureties in the event of adverse decisions in any of the cases. He stated the fact that such appeal bonds were given by some of the officers of said railroad company, with others as sureties, in order to protect the rolling stock or other personal property of said railroad company from levy or sale under execution pending the determination of the appeals; in each of which cases execution on the judgment or decree was either levied on personal property of said railroad company or the levy thereof threatened at the time of taking the appeal and giving the bond. He mentioned the Holbrook case in particular, which was then pending before

the Supreme Court of Illinois on appeal, and called attention to the injunction bond given in that case; and he expressed his concurrence in the statement of the sureties generally, that they had become such on the assurance of being protected, and that their action had been to the benefit of all parties interested in the property of the company, since, in default of payment, it would have been sacrificed to meet the demands. The court, on consideration, made a decree authorizing the receiver, in his discretion, to prosecute or defend the appeals and cases, according as the interests of the receivership should in his judgment be best promoted; and to protect such sureties as in his judgment ought to be protected in equity and good conscience by reason of the protection afforded to the property and assets of the company by means of the giving of such bonds. And, for the purposes of this decree, the receiver was authorized to use and pay out any moneys coming into his hands as such receiver, over and above expenses for operation and repairs. The receiver, for alleged lack of funds coming into his hands, failed to protect any sureties except two, one Rosborough and one Pellet.

On the 16th of May, 1881, a decree was made in the foreclosure suit, ascertaining the amount due on the bonds and coupons to be $4,301,157.53, and directing a sale of the mortgaged premises to satisfy the same. The decree required all persons having claims or liens against the railroad and property, or against the proceeds of the sale thereof, to file intervening petitions on or before the 1st day of July, 1881.

In accordance with this order, Morrison, on the 30th day of June, 1881, filed his intervening petition, setting up the facts respecting his becoming surety on the injunction bond, the preservation of the rolling stock by means thereof, the proceedings in the case, and the proceedings against himself on the bond, resulting in the judgment rendered against him on September 30th, 1880. He also set out the copy of a mortgage on four locomotive engines given to him by the railroad company in June, 1875, by way of indemnity against his liability on the injunction bond; which mortgage was duly recorded in the clerk's office for St. Clair

County, but was never enforced by him; he stating the fact to be, that the said company and the receiver had used the said locomotive engines continuously since the execution of the said mortgage, and the same were then in the possession of the receiver, and were to be sold at the sale of the property under the said decree of foreclosure. He further set out a copy of the petition presented to the court by the receiver, asking for instructions as before stated, and bringing to the notice of the court the Holbrook judgment and appeal and the injunction bond given in that case. He further stated that the receiver, since his appointment, had not been able, out of the earnings of the railroad, to pay the judgment of Holbrook, and thus protect the sureties on the injunction bond. His petition closed with a prayer for a decree that he should be fully protected from all the consequences of signing the said bond, and from the judgment recovered against him and for further relief.

On the 5th of July, 1881, an order was made declaring that no claim presented or filed after the 1st of July, 1881, should be received or filed; and that all claims not so filed on or before that date should be forever barred from any benefit under the decree, or from the property, or the proceeds of its sale.

On the 14th of July, 1881, the railroad and other property covered by the mortgage were duly sold in accordance with the decree of May 16th, and Josiah A. Horsey and Charles J. Canda, on behalf of the bondholders, became the purchasers for the sum of $4,000,000; which sale was, on the same day, ratified by the court, and an order was made referring to a special master, Frank H. Jones, all the intervening claims and petitions filed in the cause, to take proof and report his conclusions of fact and law thereon for the consideration of the court; and to give notice to the parties of the time and place of taking testimony.

On the 1st of August, 1881, an order was made referring it to a master to examine and report the amount of receiver's certificates remaining unpaid, and of all claims against the receivership, or railroad assets in the receiver's possession, as shown by intervening petitions or claims filed in the cause before July 1st, for labor, supplies or other claims; and whether

there was sufficient showing in the several cases to warrant funds to be paid into court to cover the same: also the probable amount of costs and fees. The object of this order was to ascertain how much money the purchasers should be required to pay into court, and how much of their bid might be paid in bonds.

On the 19th of August, 1881, the Union Trust Company and the receiver filed a joint answer to Morrison's petition of intervention, in which all its material statements were admitted; but whilst admitting that the sheriff of St. Clair County did threaten to levy on the railroad company's locomotives and rolling stock they denied that, as against the bondholders and the Union Trust Company mortgage, the execution was a lien on said locomotives and stock paramount to that of the mortgage; they also denied that the chattel mortgage alleged to have been given by the railroad company upon certain locomotives for the purpose of securing the sureties on the injunction bond, could have any effect or create any lien on said property paramount to that of the Union Trust Company mortgage. The respondents admitted that the railroad company and the receiver had continually used the engines and property owned by the company in 1875; but whether they were the same which were included in the alleged chattel mortgage, they could not say. They admitted that the receiver had not paid, and had not been able out of the earnings of the road to pay, the judgment of Holbrook, and submitted to the court, that if he had been able, he would not have had any right or authority to pay the same. They further alleged upon information and belief, that the judgment remained wholly unpaid, that neither Morrison nor the railroad company had paid it, and they submitted to the court that there was no liability on the part of the receivership or of the property for the payment of the judgment.

On the 22d of December, 1881, an order was made by the court, by which, after reciting that Horsey and Canda had paid to the commissioner the full amount of their bid for the railroad property and assets, namely, in cash, one hundred thousand dollars, and the residue in first mortgage bonds of

the railroad company, it was ordered and decreed that the commissioner should execute a deed of conveyance of the said property and assets to the said Horsey and Canda, to be held subject to all taxes legally due, to the lien of all unpaid receiver's certificates; "and also subject to the lien of any and all claims against the said railroad property and assets which are now before this court by intervening petitions, and which shall be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by said mortgage or deed of trust."

On the 19th of January, 1882, the receiver was also directed to make a conveyance to the purchasers, in order to cover certain real estate, rolling stock and other property which had been acquired by him during his receivership; and to deliver the possession of all such real estate and other property to the purchasers or their grantees, when the commissioner's deed should be presented to him and demand should be made. The receiver made such conveyance on the 30th of January, 1882, and on the 31st, Horsey and Canda conveyed all the property to the St. Louis and Cairo Railroad Company, the appellants; and on the following day, February 1st, 1882, the receiver delivered the railroad and all its appurtenances to said company.

As the Union Trust Company and the receiver, in their answer to Morrison's intervening petition, raised the objection that he had not paid the Holbrook judgment (though, of course, he was bound to pay it), he filed a supplemental petition on the 5th of June, 1882, stating that he had paid the judgment on the 29th of May previous, amounting on that day, for principal and interest, to the sum of $15,352.19, and repeated his original application for relief. To this supplemental petition the Union Trust Company and the receiver filed an answer by which they denied that Morrison had paid the judgment; recited the previous orders requiring claims to be filed by the 1st of July, 1881, and barring those not so filed; the sale of the property, the conveyance thereof to Horsey and Canda, and by them and the receiver to the new company, and the delivery of the railroad property to said company;

and averred that there were no proceeds of the sale in the hands of the receiver out of which payment could be made to Morrison upon his claim.

On the 19th of December, 1883, the special master, Frank H. Jones, to whom, at the time of the sale of the railroad, had been referred intervening claims and petitions filed in the cause, made a report, in which he set forth in detail all the facts and circumstances in relation to the intervening petition and claim of Morrison, as they have been already stated, and the evidence taken by him thereon. The only point contested by the respondents was, the fact of payment by Morrison, and its effect under the previous orders of the court. The evidence reported by the master, however, showed that Morrison did actually pay the judgment at the time stated in his supplemental petition, and the master so found. The exception taken on this point by the respondents, based on the fact that Morrison, in order to make the payment, raised the money on his note, and that it did not appear that he had paid his note, is too trivial for serious consideration. The conclusion reached by the master was, that the claim was barred because Morrison had not actually paid Holbrook's judgment when he filed his original petition, and did not pay it until after the time had expired for claims to be presented, namely, July 1st, 1881.

Morrison excepted to the report, and on the 5th of May, 1884, the court sustained the exception, and allowed the claim, and decreed that Morrison had an equitable lien for the payment thereof against the property sold under the decree of foreclosure, and transferred to the St. Louis and Cairo Railroad Company, with leave to apply to the court for further relief if the claim should not be paid before the first Monday of September then next. This is the decree from which the appeal is taken to this court.

Mr. William Ritchie for appellants. *Mr. S. Corning Judd*, *Mr. Edward B. Esher*, and *Mr. Edward S. Judd* were with him on the brief.

Argument for Appellants.

I. The evidence does not show that appellee has ever paid the Holbrook claim. Whatever relief appellee may claim, it is plain that, unless he has actually paid Holbrook, the court should not have decreed any sum of money to be paid to him, or any lien therefor to be created in his favor. Prior to such payment a surety may, perhaps, compel the creditor to pursue the principal debtor in court, but, until payment in full, Mr. Morrison cannot be subrogated to the rights and remedies of Holbrook, the judgment creditor. "The right of subrogation does not arise in favor of a surety until he has actually paid the debt for which he is liable as surety; the right does not accrue to the surety upon his making a partial payment, until the creditor is wholly satisfied. . . . Where the surety is allowed by bill in equity after the debt has become due to compel the creditor to enforce his demand against the principal debtor, yet he cannot be subrogated to the creditor's liens, securities and equities for the debt until he has actually paid it." Sheldon on Subrogation, Sec. 127. See also *Conwell* v. *McCowan*, 53 Ill. 363; *Darst* v. *Bates*, 51 Ill. 439; *Pennsylvania Bank* v. *Potius*, 10 Watts, 148; *Kyle* v. *Bostwick*, 10 Alabama, 589; *Snyder* v. *Blair*, 33 N. J. Eq. (6 Stewart) 208; *Bonney* v. *Seely*, 2 Wend. 481; *Read* v. *Norris*, 2 Myln. & Cr. 361; *Memphis &c. Railway* v. *Dow*, 120 U. S. 287, 301; *Maxwell* v. *Jameson*, 2 B. & Ald. 51; *Taylor* v. *Higgins*, 3 East, 169; *Ex parte Sargent*, 1 Glyn & Jameson, 183; *S. C.* affirmed, 2 Glyn & Jameson, 23; *Taylor* v. *Mills*, Cowper, 525; *Shinn* v. *Budd*, 14 N. J. Eq. (1 McCarter) 234; *Bank of the United States* v. *Winston*, 2 Brock. 252; *Cummings* v. *Hackley*, 8 Johns. 202; *Wynn* v. *Brooke*, 5 Rawle, 106.

II. Aside from all considerations as to the time and mode of its presentation in the court below, appellee is not, legally or equitably, entitled to a lien upon this property in the hands of the St. Louis and Cairo Railroad Company.

The purchasers at the foreclosure sale took the property free from all equities which were subordinate to those of the mortgage creditors. The sale cut off all claims subsequent in time to the execution of the mortgage and not superior in equity thereto. The purchasers' title relates back, for this

purpose, to the date of the mortgage, and (in the absence of provisions to the contrary in the decree of sale) covers the interests of all persons who are parties to the cause. 2 Jones on Mortgages, §§ 1653, 1654. This is as true of railroad as of other mortgages. This appellant, deriving its title under the sale, took what it purchased subject to no liens or claims save such, if any, as were paramount to the deed of trust under which the sale was made. *Morgan County* v. *Thomas*, 76 Ill. 120; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806; *Menasha* v. *Milwaukee &c. Railroad*, 52 Wis. 414; *Wright* v. *Milwaukee & St. Paul Railroad*, 25 Wis. 46. The purchaser takes free even from taxes accruing against the mortgagor under certain circumstances. *Cooper* v. *Corbin*, 105 Ill. 224. See also *Houston* v. *Huntsville Bank*, 25 Ala. 250; *Calvin* v. *Owens*, 22 Ala. 782; *Dozier* v. *Lewis*, 27 Mississippi, 683; *Winslow* v. *Otis*, 5 Gray, 360; *Tubbs* v. *Williams*, 9 Iredell, 1; *Pierson* v. *Catlin*, 18 Vt. 77; *Ohio Life Ins. & Trust Co.* v. *Winn*, 4 Maryland Ch. 264.

What, then, were Holbrook's rights under his judgment of November, 1872? Being subsequent, it would ordinarily be subordinate, to the mortgage, which covered all the debtor's property then owned or thereafter acquired. *Pennock* v. *Coe*, 23 How. 117; *Dunham* v. *Railway Co.*, 1 Wall. 254; *Scott* v. *Clinton &c. Railroad*, 6 Bissell, 529; *Central Trust Co.* v. *Railroad Co.*, 30 Fed. Rep. 895; *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 91.

Prima facie the proceeds of the sale belong to the mortgage creditors. *Fosdick* v. *Schall*, 99 U. S. 235. To overcome this presumption, there must be some "peculiar equity," some "special circumstances," the existence of which the claimant himself must clearly and affirmatively establish to the court's satisfaction, for the chancellor will always observe great caution in establishing such a preference as appellee here claims. *Miltenberger* v. *Logansport Railway*, 106 U. S. 287; *Fosdick* v. *Schall*, *supra*; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 458, 479; *Meyer* v. *Johnston*, 53 Ala. 237, 349; *Blair* v. *Railway Co.*, 22 Fed. Rep. 475.

The appointment of a receiver, presumably holding and

conducting the business for the benefit of all the creditors, should have no effect, of itself, to change the relations of the creditors to each other or to the common debtor.

In the case at bar there is no allegation or proof as to the nature of the claim upon which Holbrook's original judgment was rendered. This, it would seem, ought, of itself, to dispose of appellee's claim.

The Holbrook judgment was rendered November 26, 1872. On January 3, 1873, execution thereon was issued, but held until April 3, 1873, when it was returned by the sheriff without levy, by order of Holbrook's own attorneys. In the October following the company defaulted in its interest on the mortgage, making it possible *at that time* for the mortgagee to proceed to foreclosure. But Holbrook still withheld execution until October 27, 1874, (at which time the company, of course, had defaulted in several more instalments of interest). At the latter date he took out an *alias* execution, but still delayed to levy, when, on December 30, 1874, the company, by filing its injunction bond, with appellee and others as sureties, prevented any further efforts to collect the judgment, if any were contemplated. The injunction suit was then allowed to drag its slow length along until at the June term, 1879, of the Supreme Court, a final decision was had. Does this statement exhibit such "special circumstances" as would raise any "peculiar equity" in appellee's favor?

If we are to indulge in conjecture, it is more than possible that the mortgagee has actually suffered by the act of the appellee in staying Holbrook's execution, or will suffer thereby, if appellee's claim herein is to be allowed. Holbrook, instead of levying on the rolling stock, might have made his claim out of the *income* of the road while the mortgagor remained in possession. This he could have done without interference with any of the mortgagee's rights or interests. *Gilman* v. *Telegraph Co.*, 91 U. S. 603; *Mississippi Valley Railway Co.* v. *United States Express Co.*, 81 Ill. 537; see also *Mitchell* v. *Dewitt*, 25 Texas (suppl.) 180; *S. C.* 78 Am. Dec. 561; *Burns* v. *Huntingdon Bank*, 1 Penn. 395; *Potter* v. *Nathans*, 1 W. & S. 155; *Farmers' Bank* v. *Sherley*, 12

Bush, 304; *Fishback* v. *Bodman*, 14 Bush, 117; *Johnson* v. *Morrison*, 5 B. Mon. 106; *Glass* v. *Pullen*, 6 Bush, 338, 350.

In fact, appellee is a *volunteer*. He was not a party to the original contract between Holbrook and the Cairo and St. Louis Railroad Company. He became a party without Holbrook's consent, indeed, against the latter's interest, and for the very purpose of delaying or defeating him. *Bank* v. *Winston*, 2 Brock. 252; *Ins. Co.* v. *Dorsey*, 3 Maryland Ch. 334; *Swan* v. *Patterson*, 7 Maryland, 164; *Gadsden* v. *Brown*, 1 Speer Eq. 37; *Shinn* v. *Budd*, 14 N. J. Eq. 234.

As toward other creditors Mr. Morrison must be deemed to have trusted to his principal and not to the property. *Johnson* v. *Morrison*, 5 B. Mon. 107; *Wiggins* v. *Dorr*, 3 Sumner, 419; *Bank* v. *Rudy*, 2 Bush, 329. As against one whose interests accrued prior to the execution of the injunction bond or bail bond, the surety on such bond has so identified himself with the principal as not to be distinguished from him. *Burns* v. *Huntingdon Bank*, above cited; *Parsons* v. *Briddock*, 2 Vernon, 608; *Wright* v. *Morley*, 11 Ves. 12; *Smith* v. *Anderson*, 18 Maryland, 520; *McCormick* v. *Irwin*, 35 Penn. St. 111.

The practical effect of Mr. Morrison's act in becoming surety was to prevent the Holbrook judgment from being satisfied at all at a time when it might have been satisfied out of property not covered by appellant's mortgage. To this extent appellee's act impaired appellant's security. *Bank of Hopkinsville* v. *Rudy*, 2 Bush, 326, 330, 331. If there was any property in December, 1874, not covered by the mortgage, Holbrook held a lien upon it. The case, then, becomes one where a creditor having a lien on two funds, releases one fund to the prejudice of another creditor, having a lien only on the latter. *Glass* v. *Pullen*, above cited.

By executing the injunction bond Mr. Morrison destroyed the effect of the Holbrook judgment as a lien on the personalty, and released the latter. *Launtz* v. *Gross*, 16 Bradwell (Ill. App.) 329.

Consequently, even if subrogated to Holbrook's rights, Morrison could claim no lien on the personalty. There never was

a levy under the judgment, and as a lien the execution had become *functus officio* before the receiver took possession. *Carroll* v. *The Steamboat Leathers*, Newb. Adm. 432; *Roberts* v. *The Huntsville*, 3 Woods, 386; *The Madgis*, 31 Fed. Rep. 926.

Even without such bond Holbrook could not have seized the company's realty under his judgment (such of it, at least, as was covered by mortgage. Jones on Railroad Securities, §§ 104–106). *Gue* v. *Canal Co.*, 24 How. 257; *Hammock* v. *Loan & Trust Co.*, above cited.

Appellee can, therefore, claim no "peculiar equity" against the mortgagee as having saved the realty from seizure.

[Counsel then considered at length and *seriatim* cases in which debts accruing subsequently to the mortgage have been awarded by the courts priority over the mortgage debt (citing among others *Meyer* v. *Johnston*, above cited; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 463; *Fosdick* v. *Schall*, 99 U. S. 235, 252; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Miltenberger* v. *Railway Co.*, 106 U. S. 286, 311; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Dunham* v. *Railway Co.*, 1 Wall. 254; *Porter* v. *Bessemer Steel Co.*, 120 U. S. 649, 671; *Huidekoper* v. *Locomotive Works*, 99 U. S. 258); and contended that the appellee's claim did not come within any of the favored classes and continued:]

The lower courts have uniformly held that a judgment against the mortgagor, subsequent to the mortgage, but prior to the receivership, must be held subject to the mortgage. *Central Trust Co.* v. *Railroad Co.*, 30 Fed. Rep. 897; *Hiles* v. *Case, Receiver*, 9 Bissell, 549; *Duncan* v. *Railroad Co.*, 2 Woods, 542; *Newport Bridge Co.* v. *Douglass*, 12 Bush, 673; *Kelly* v. *Railroad Co.*, 10 Bissell, 151.

Not only is this claim not of the nature of a "current debt," but *it comes within no reasonable limit as to time.*

The Holbrook judgment was rendered in 1872, and the receiver was not appointed until *five years* thereafter. While the courts have never undertaken to designate any fixed, certain period of limitation for all cases, it is submitted that such

a period as *five years* is without precedent. The usual period fixed by order of court is commonly six months, seldom over that. *Scott* v. *Clinton &c. Railroad*, 6 Bissell, 535; *Turner* v. *Indianapolis &c. Railway*, 8 Bissell, 315; *Blair* v. *Railroad Co.*, 22 Fed. Rep. 474. Such was the period so fixed in this case. Holbrook himself compelled the delay. We submit that five years exceeds all reasonable limits, and that the claim is stale.

III. Appellee's claim was barred by the excludatory orders entered previous to the foreclosure sale. The St. Louis and Cairo Railroad Company, the principal appellant here was not a party, save by fiction of law, to the principal cause below; it had no day in court and no opportunity to favor or oppose any of the steps in the cause. It would, therefore, seem no more than just that, in determining its rights herein, as liberal a construction of the orders of the court should be made in its favor as is consistent with the language in which such orders are expressed. *Koontz* v. *Northern Bank*, 16 Wall. 196; *Miller* v. *Sherry*, 2 Wall. 237, 250; *Hamlin* v. *McCahill*, Clarke Ch. N. Y. 249. The doctrine of notice by *lis pendens* is one *strictissimi juris*. *Cockrill* v. *Maney*, 2 Tenn. Ch. 49; see also *Brightman* v. *Brightman*, 1 R. I. 112; *Sapp* v. *Wightman*, 103 Ill. 150.

Bearing in mind that this question is here raised on behalf of a *purchaser* for value (the St. Louis and Cairo Railroad Company), we submit, that to fix a purchaser, pending suit, with notice of equities arising out of the suit, the pleadings, etc., must be clear, explicit and direct as to the nature of the claim. The fact that, by possibility, the claim may, upon a contingency not yet accrued, acquire an interest in the *res*, or a lien upon the property in suit, is not enough to charge the property with such a lien in the hands of such purchaser. See also *Shallcross* v. *Dixon*, 7 L. J. (N. S.) Ch. 183; *Cake* v. *Lewis*, 8 Penn. St. 493; *Ex parte Barwis*, 6 De G., McN. & G. 762; *Kyle* v. *Bostick*, above cited.

The question, then, would seem to turn upon this: When the St. Louis and Cairo Railroad Company bought this property, it bought with notice that appellee was so situated that

he was liable to pay a debt for which the common debtor was primarily responsible; that at the time of such purchase appellee, in fact, had not paid such debt; but that, in case appellee ever should thereafter pay, immediately he would be entitled to recover the amount so paid from the common debtor. Did all this amount to a notice that appellee ever would pay? Under the facts as disclosed in the evidence, could appellant even have felt any certainty (in case it had inquired into the facts) that appellee ever could pay?

IV. Appellee should not have been permitted to file his "supplemental" petition of June 5, 1882. Affecting materially, as this question does, the substantial rights and interests of the parties, there is no reason why the ordinary rules of pleading, devised for the better enforcement or protection of the rights of suitors, should not be applied here to appellee, though his claim is presented by intervening petition merely.

Equity Rule 57 makes leave of court necessary to the filing of a supplemental bill. No leave was had in this case.

This supplemental petition sets forth a fact which, though essential to appellee's recovery, did not exist at the time of his original petition. The supplemental petition prays that the receiver be compelled to pay petitioner a certain sum of money — a measure of relief not possible under the original petition. "We have found no authority that goes so far as to authorize a party, who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill." *Pinch* v. *Anthony*, 10 Allen, 470. See also *Vaughan* v. *Vaughan*, 30 Ala. 329; *Hill* v. *Hill*, 10 Ala. 527.

The objection is not one of mere form, but the ground of it is, that, to allow this subsequent act of appellee set forth in the supplemental petition to be availed of, as a part of appellee's *original* case, would give to such act a retroactive effect, that would operate as a practical fraud upon both the appellants in this case. When the St. Louis and Cairo Railroad Company bought this property and took possession, the matter of this

supplemental petition did not exist, and the purchasers had no means of knowing that it ever would exist. They bought supposing, and having a clear right to suppose, that no claim against the property, which had not been perfected and filed on or before July 1, 1881, would be allowed. To charge them with a burden accruing not only after July 1, 1881, but even after they had bought and taken possession, can hardly be designated otherwise than as a legal, if not a moral, *fraud.*

When the question of *lis pendens* arises upon an "amended bill, it is regarded as an original bill for that purpose," and, as concerns rights thereby affected, the bill must be taken as filed only when the amendment was made. *Miller* v. *Sherry*, 2 Wall. 237; *Griffiths* v. *Griffiths*, 1 Hoffman Ch. 153; *S. C.* on appeal, 9 Paige, 315.

We submit that, whether we consider the nature of the claim itself or the time and mode of its presentation to the court below, no ground in law or equity can be found for the support of the decree in appellee's favor.

Mr. Charles W. Thomas and *Mr. Gustav Koehner* for appellee submitted on their brief.

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

The plea that the claim was not presented in time we think is wholly untenable. It was brought to the notice of the court by the receiver himself a few days after his appointment. The case, however, was still pending in the state court on appeal, and it was yet uncertain what would be the result. The injunction was not definitely dissolved until June, 1879. The liability of Morrison on his bond was still unadjudicated, and not in a condition to be presented by him as a fixed and determinate claim against the railroad company and its property. Suit was then brought against him, and judgment rendered on the 30th of September, 1880. The foreclosure proceedings were still pending. In May, 1881, the final decree of foreclosure of the railroad property was made, and the time for

presenting claims was fixed, to expire on the 1st of July, 1881. Morrison presented his claim by filing his intervening petition within that time. He stated his entire case. He had not paid the judgment against him, it is true; but, in equity, (if he had any equity at all), he ought to have been protected from making that payment. It ought to have been made by the receiver out of the property which came into his hands. The reason he (the receiver) did not pay it seems to have been want of pecuniary funds. As will be seen, he had disposed of these funds in other ways. But surely, if Morrison had an equitable right to be protected, he ought not to be shut out from all remedy, because he did not do what ought to have been done by the receiver himself, or by the parties whom the receiver represented. We think that the court below was perfectly justified in sustaining the exception to the master's report so far as it was based on the idea that Morrison's claim was barred by reason of his not actually paying the Holbrook judgment until after the period of limitation fixed by the court for the presentation of claims. The claim was presented in time, and, when presented, was ripe for the protection asked for by the petitioner. If he was afterwards compelled to make the payment himself, which those who received the railroad property ought to have made, it only converted his claim for protection into a claim for indemnity, and made his equity all the stronger.

The plea of want of notice on the part of the purchasers of the railroad is equally groundless. The purchasers were really the bondholders themselves. They were represented in the foreclosure suit by the Union Trust Company. They purchased expressly subject to the lien of any and all claims against the railroad property and assets which were then before the court by intervening petition, and which should be, upon final determination and adjudication, decreed to be paid as paramount liens. Morrison's claim was in this category. It was then before the court by his intervening petition. The purchasers were bound to take notice of it. They had notice of it. The pretence of want of notice is entirely without foundation.

Opinion of the Court.

The only serious ground of defence to the petition is the legal question, — whether a claim arising under the circumstances, and at the time, in which this did, has an equity to be paid out of the property of the railroad company sold under the mortgage and conveyed to the present company. The ground of the claim is, that a portion of the property covered by the mortgage, being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner. It is denied that the property was in any peril, because, as contended by the respondents, it could not have been taken in execution by reason of the prior lien of the mortgage. But it must be conceded that, until the mortgage was enforced by entry or judicial claim, the personal property of the railroad company was subject to its disposal in the ordinary course of business, and, as such, was liable to be seized and taken on execution for its debts. This is not only common law, but the positive law of Illinois. By the constitution of 1870 (art. XI, § 10), it is declared that, "the rolling stock, and other movable property belonging to any railroad company or corporation in this State, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals." Even if it would have been subject to the mortgage, when taken on execution, nevertheless it could have been taken, and this would necessarily have disturbed, and perhaps interrupted, the operations of the railroad, by separating the property seized from the corpus of the estate. The trustees of the mortgage might have prevented such a catastrophe, it is true, by filing a bill of foreclosure, and for an injunction and receiver; but they did not choose to take this course until nearly three years afterwards: on the contrary, they allowed the railroad company to continue to use the property, and to take care of it for them, and stood by and saw Morrison, (who had no interest in the matter,) put his hands into the fire and rescue the rolling stock of which they were to receive the benefit, — both directly, by receiving the property itself without contest or controversy, and indirectly, by keeping up the railroad as a going concern. Morrison's money, or the fruits of it, has

gone into their pockets. And, in this regard, we make no distinction between the mortgagees, the bondholders whom they represented, the nominal purchasers Horsey and Canda, or the present company. They were all one and the same in interest. If the property became justly affected by the equity of the petitioner's claim, it remains so affected in the hands of the present company.

A circumstance to which some weight is due is the chattel mortgage given by the railroad company to Morrison on the four locomotives therein described, to secure him and his co-sureties against the payment of Holbrook's judgment. It shows that they intended to look to the property and not alone to the personal security of the company. He did not attempt to enforce this mortgage, it is true, and did not have it renewed, but followed out the original idea of preserving the stock entire, and keeping up the property as a going concern. Instead of giving this mortgage, the company might, with perfect propriety, have placed funds in the hands of the sureties to enable them to protect themselves, and the transaction would not have been questioned. By not doing so, the receipts and revenues which would have been required for this purpose, went, in the end, to the benefit of the bondholders. It enabled the company to continue its operations for the time being, and resulted in supplying the receiver with the means of purchasing outside property, which, by order of the court, he conveyed to the purchasers of the road, or their assignees.

The main pretence for not protecting Morrison and his co-sureties was that the receiver never had receipts in his hands with which he could have protected them; and this assertion seems to have been credited by the intervenor. But this pretence cannot be true. It is refuted by the record itself. The order of January 19th, 1882, recites that the deed from the special commissioner who sold the railroad under the decree of foreclosure, did not fully cover and convey the legal title to certain real estate acquired by and conveyed to Smithers as receiver, purchased by him under authority of the court, and he was, therefore, ordered to convey all such property, as well

as all personal property and rolling stock purchased by him whilst receiver, to the purchasers of the railroad, or their assigns. This shows that he had receipts with which he purchased new property, real estate and rolling stock, which went to increase the corpus of the fund of which the bondholders received the benefit.

The intervenor's equity is a very strong one. His case clearly came within the scope and intent of the decree made February 4th, 1878, which authorized the receiver to protect those sureties on appeal and injunction bonds, who ought to be protected in equity and good conscience by reason of the protection afforded the property and assets of the railroad company through or by means of the giving of such bonds. The complainants (the mortgagees) raised no objection to that decree. Until after the sale of the railroad, and until the trust came to be wound up, the only plea was that the receiver had not realized sufficient funds from the current receipts of the road to enable him to protect the intervenor. This plea, (if a good one,) as we have seen, is not sustained by the facts. He actually expended moneys in the purchase of new property, real estate and rolling stock, and paid over to the purchasers everything that came into his hands before and after the sale, not used for expenses. It is not shown what these purchases and payments amounted to; but they were probably considerable, and the complainants and receiver could easily have shown that they were insufficient for the indemnification of the intervenor, if such had been the fact. The proof was in their hands, and not in his.

It is further to be borne in mind, that the purchasers of the railroad accepted a deed therefor from the commissioner under an order of the court expressly declaring that they should hold the property subject to all taxes legally due, to the lien of all unpaid receiver's certificates; and also subject to the lien of any and all claims against the railroad property then before the court by intervening petitions, which should be, upon final determination and adjudication, decreed to be paid as liens paramount to the indebtedness secured by the mortgage. The intervenor's claim is precisely in that category.

The case is a special one; and in view of the discretion which the court of first instance is obliged to exercise in matters of this character, taking all the circumstances into consideration, we cannot say that equitable relief was unduly extended in allowing the intervenor's claim. An examination of the cases bearing upon the subject do not lead to a contrary conclusion. See *Fosdick* v. *Schall*, 99 U. S. 235; *Miltenberger* v. *Logansport Railroad*, 106 U. S. 286; *Union Trust* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust* v. *Ill. Midland*, 117 U. S. 434; *Dow* v. *Memphis &c. Railroad*, 124 U. S. 652; *Sage* v. *Memphis &c. Railroad*, ante, 361. The appellants place much reliance on the case of *Burnham* v. *Bowen*, where it was held that debts for operating expenses are privileged debts, entitled to be paid out of current income; and that if such income is diverted by the mortgage trustees or the receiver for the improvement of the property, such debts will be decreed to be paid out of the mortgage fund. But it was added by way of caution: "We do not now hold, any more than we did in *Fosdick* v. *Schall*, or *Huidekoper* v. *Locomotive Works*, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide is, that, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." It is this remark on which the appellants rely. It is not our intention, however, to decide anything in the present case in conflict with it. The claim in that case was for operating expenses only, and the rule laid down had special reference to them. The present claim is of a different character, based upon a *bona fide* effort made by the intervenor to preserve the fund itself from waste and spoliation after the mortgage was in arrears and the right to reduce it to possession had accrued. But even here, as we have seen, if the claimant could pursue only the earnings, it is shown that they have been appropriated to the purchase of property which has been added to the fund.

Opinion of the Court.

Much of the argument of the appellants is based on the hypothesis that the claim of the intervenor was a claim to be subrogated to the lien of the Holbrook judgment; and it is argued that this lien was subordinate to that of the mortgage held by the complainants. We do not understand that the claim was presented in any such view. The Holbrook judgment and execution could have greatly deranged the business of the company as a going concern. The rolling stock could have been seized and removed. Whether such seizure could, or could not, have been prevented by the mortgagees is a different question. It would, at all events, have required legal proceedings, and probably serious litigation; and this the mortgagees did not see fit to undertake. To save the property from being taken, to prevent the catastrophe which its taking would have caused, and the serious questions which would have arisen had it actually been sold, the intervenor gave his bond to obtain an injunction. It was not done for the purpose of being subrogated to the questionable rights of Holbrook under his judgment; but to prevent the certain injury to the property itself, which the attempted enforcement of those rights would have involved. It is unnecessary, therefore, to discuss the rights of an execution creditor, levying on the personal property of a railroad company in Illinois, as against those of a mortgagee. We express no opinion upon that subject. The claim was presented upon the equities arising in favor of the intervenor for taking the action he did, and thus securing the results which followed, and upon the other circumstances of the entire case taken together; and it was upon these grounds that the claim was allowed by the court below.

The decree of the Circuit Court is affirmed.

Counsel for Parties.

DeWOLF *v.* HAYS.

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

No. 868. Submitted January 6, 1888. — Decided April 9, 1888.

Upon the proofs in this case the court finds that the settlement which the bill seeks to set aside was a prudent and fair one, made deliberately and under advice of competent counsel, and that, independently of any question of laches, no ground is shown for maintaining this suit.

THE original suit was a bill in equity, filed May 7, 1884, by Florence W. Hays, the widow of John J. Hays, against Frank E. DeWolf and wife and Horace M. Barnes, to set aside a deed of real estate from DeWolf and wife to Barnes, and to compel a conveyance to the plaintiff. Upon a hearing on pleadings and proofs, the Circuit Court entered a decree for the plaintiff, and the defendants appealed to this court. The case is stated in the opinion.

Mr. Benjamin F. Thurston and *Mr. Louis T. Haggin* for appellants, cited on the question of laches, and the presumption of acquiescence after considerable delay: *Wollensak* v. *Reiher*, 115 U. S. 96; *Sullivan*, v. *Portland &c Railroad*, 94 U. S. 806, 812; *Beaubien* v. *Beaubien*, 23 How. 190; *Stearns* v. *Page*, 7 How. 819; *Moore* v. *Greene*, 19 How. 69; *Marsh* v. *Whitmore*, 21 Wall. 178, 185; *Godden* v. *Kimmell*, 99 U. S. 201; *Badger* v. *Badger*, 2 Wall. 87, 95; *Wood* v. *Carpenter*, 101 U. S. 135; *Lansdale* v. *Smith*, 106 U. S. 391; *Fisher* v. *Boody*, 1 Curtis, 206, 219; *Prevost* v. *Gratz*, 6 Wheat. 481; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Piatt* v. *Vattier*, 9 Pet. 405, 416; *Stearns* v. *Paige*, 1 Story, 204, 217; *Wagner* v. *Baird*, 7 How. 234; *Hough* v. *Richardson*, 3 Story, 659.

Mr. W. Hallett Phillips, and *Mr. Benj. Morgan* for appellee, cited to the same points: *Allone* v. *Jewell*, 94 U. S. 506, 512; *Insurance Co.* v. *Eldridge*, 102 U. S. 545, 547.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

The question upon which the decision of this case turns is one of fact; and upon full consideration of the evidence, we are unable to adopt the conclusion of the Circuit Court.

Hays and wife and DeWolf and wife, connections by marriage and intimate friends, took up their residence in California in 1871. Hays was in ill health, and DeWolf had the confidence of Hays and wife and often transacted business for them. In 1872, DeWolf and wife owned a ranch of 4160 acres in Fresno County, California, and at his suggestion Mrs. Hays purchased an undivided half of the tract for the price of $23,425, part of which she paid out of her separate funds, and for the rest of which she gave them her promissory note for $10,135, secured by mortgage of the land.

It is alleged in the bill, and shown by the evidence, that afterwards DeWolf and wife, without consideration, assigned the note and mortgage to one Haggin, and he commenced an action of foreclosure, which was dismissed upon the plaintiff's executing and delivering to Haggin a deed of the land; that in 1877 the same was conveyed, without consideration, by Haggin to one Dimmock, and by him to Mrs. DeWolf; and that in all these transactions Haggin, as well as Dimmock, acted as agent of the DeWolfs.

The bill alleges, and the answers deny, that the plaintiff executed and delivered the deed to Haggin "at the urgent solicitation of her husband, who was at the time an invalid, unable to attend to business, and who importuned the plaintiff to make said deed, urging as a reason that he was unwilling to die and leave her involved in a litigation which might result in her pecuniary ruin, and the plaintiff, yielding to his entreaties and persuasions, consented to and did make said deed;" and that DeWolf and wife, at the time of the execution of that deed, "well knew that the same was made by the plaintiff under the influence of her said husband and because of his persuasion and solicitation, and was not her free and voluntary act."

In March, 1884, DeWolf and wife conveyed the land to

Barnes. The bill alleges that this conveyance was made "for the purpose of covering up and concealing their title to the same, the better to cheat and defraud the plaintiff." The answers deny that it was made with that or any other fraudulent or wrongful purpose.

It appears by the evidence that, at and before the time of the making of the deed to Haggin, Mrs. Hays and her husband had very little other property, while Haggin and DeWolf were wealthy; and that her husband was very ill of consumption complicated with other diseases (of which he died a year afterwards) and was, as his attending physician testified, "extremely nervous and sensitive, and easily affected by almost everything surrounding him," and less fit to transact business than he had previously been. Mrs. Hays testifies that she was induced to make the deed by the persuasions and entreaties of her husband, who was greatly worried by the fear of leaving her without means in a network of legal trouble.

But the other circumstances, preceding and attending the execution of the deed, which are clearly established by the evidence, give a different color to the matter.

In May, 1876, Mrs. Hays brought an action in a court of the State against DeWolf and wife, alleging that she had been induced to make her original purchase by their fraudulent representations as to the value of the property, and demanding damages for the fraud, as well as that the note and mortgage might be declared void. Haggin's action to forclose the mortgage was brought in November, 1876.

Mr. Rearden, a counsellor at law, whose integrity and veracity are not impugned, and who had long been acquainted with Hays and wife and their affairs, and was one of her counsel, testifies that while those two suits were pending the question of a compromise and settlement was discussed between himself and the opposing counsel, by which of them first suggested he did not remember; that he had conversations on the subject at his office in San Francisco with Hays alone, and afterwards with him in the presence of his wife at their residence in Redwood; that "they stated a number

of facts which, if proved, might possibly be defences to the note and mortgage;" that the reasons Hays gave him for wanting to settle the matter were that "they were practically without means to carry on any extensive litigation, which seemed to be opening up, and his health was bad, and he did not want to risk his labor and time on the great uncertainties of this business;" and that he carefully suggested to Hays various items of the possible expenses of the litigation, and, among other things, that one of the pending suits "would possibly cost him all the way from $1500 to $2500."

It was after Hays had talked with Rearden, that, as Mrs. Hays testifies, he entreated her and she consented "to wipe out the whole thing, the DeWolf suit and the Haggin suit and everything, if they could just get out of it, and not continue in it at all."

Mrs. Hays further testifies that, at Rearden's request, she went without her husband to San Francisco "to see the DeWolfs in relation to this matter of the deed and the suit," and negotiations were had at Rearden's office between Mrs. Hays and Rearden on the one side and DeWolf and his counsel on the other, lasting a great part of two days, before a settlement was effected. The only evidence of any knowledge on the part of the defendants that Mrs. Hays was acting under the influence of her husband is her testimony that she then told DeWolf "that she wanted to wipe out the whole thing on account of her husband's ill health, and that she did it because it was a wife's duty, in other words, to do what he told her to do."

The terms of the settlement, as then agreed upon and some days afterwards carried out, were that the mortgage note was delivered up to Mrs. Hays, two debts of hers of about $1200 were paid by DeWolf, and Hays and wife executed the deed conveying the land to Haggin, and a deed of release of all claims against the DeWolfs. These deeds were dated January 16, 1877; and annexed to each of them was a certificate of a notary public to its acknowledgment by Hays and wife, and that she, upon being examined apart from her husband, and made acquainted with its contents, acknowledged her execution and did not wish to retract it.

Syllabus.

The plaintiff, in her present bill, filed in 1884, does not allege any fraud or undue influence in the original transaction in 1872, by which she purchased the property and gave the note and mortgage for part of the price; but, on the contrary, claims title under that purchase, and offers to pay the amount of the mortgage note and interest, deducting any rents and profits received by the defendants. The uncontradicted testimony of well informed witnesses proves that at the time of the settlement in 1877 the value of the undivided half of the land did not exceed the amount of the mortgage, although it has since greatly increased because of the introduction of irrigation. In the state of facts then existing, the settlement appears to have been a prudent and fair one, made deliberately and under advice of competent counsel. Independently of any question of laches, therefore, no ground is shown for maintaining this suit.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the bill.

DOOLAN *v.* CARR.

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

No. 34. Argued October 24, 25, 1887. — Decided November 21, 1887.

The proper Circuit Court of the United States has jurisdiction, irrespective of the citizenship of the parties, of an action in ejectment, in which the controversy turns upon the validity of a patent of land from the United States.

Want of power in an officer of the Land Office to issue a land patent may be shown in an action at law by extrinsic evidence, although the patent may be issued with all the forms of law required for a patent of public land.

Land within the limits of a valid Mexican grant (which grant was *sub judice* when the grant of public land in aid of the Pacific Railroads was made by the act of July 1, 1862, as amended July 2, 1864, and March 3, 1865), if found after the location of the railroads to be within the prescribed limits on either side of them, did not pass to the corporations as "public

Citations for Defendant in Error.

land," if it was described by specific boundaries; or if it was known or described by a name by which it could be identified; but if it was described as a specific quantity within designated outboundaries containing a greater area, only so much land within the outboundaries as is necessary to cover the specific quantity granted was excluded from the grant to the railroad companies.

Official documentary evidence of a Mexican grant which has been confirmed by the proper authorities of the United States, is admissible on the trial of an action in ejectment, to show a want of power in the Land Office to issue a patent for the same land as "public land" under the statutes granting "public land" to aid in the construction of the Pacific Railroads.

It would seem also that parol testimony is admissible to identify the land as coming within the terms of the grant.

EJECTMENT. Verdict for the plaintiff and judgment on the verdict. Defendants sued out this writ of error. The case is stated in the opinion.

Mr. Michael Mullany for plaintiffs in error cited: *Newhall* v. *Sanger*, 92 U. S. 761; *Kansas Pacific Railroad* v. *Dunmeyer*, 113 U. S. 629, 642; *Rosecrans* v. *Douglass*, 52 Cal. 213; *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733; *Wilcox* v. *Jackson*, 13 Pet. 498, 509; *Easton* v. *Salisbury*, 21 How. 426; *Hissel* v. *St. Louis Public Schools*, 18 How. 19; *Reichart* v. *Felps*, 6 Wall. 160; *Polk* v. *Wendall*, 9 Cranch, 87; *Carr* v. *Quigley*, 57 Cal. 394; *McLaughlin* v. *Powell*, 50 Cal. 64; *McLaughlin* v. *Fowler*, 52 Cal. 203; *Robinson* v. *Forest*, 29 Cal. 317; *Parker* v. *Duff*, 47 Cal. 554; *Kernan* v. *Griffith*, 27 Cal. 87; *Kernan* v. *Griffith*, 31 Cal. 462; 34 Cal. 580; *Knight* v. *Roche*, 56 Cal. 15; *Summers* v. *Dickinson*, 9 Cal. 554; *Doll* v. *Meador*, 16 Cal. 295; *Connecticut Ins. Co.* v. *Schaeffer*, 94 U. S. 457; *United States* v. *Minor*, 114 U. S. 233, 240; *Terry* v. *Megerle*, 24 Cal. 609; *S. C.* 85 Am. Dec. 84; *Lytle* v. *Arkansas*, 9 How. 314; *Cunningham* v. *Ashley*, 14 How. 377; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Sherman* v. *Buick*, 93 U. S. 209, and cases cited; *Patterson* v. *Weim*, 11 Wheat. 380; *Jackson* v. *Lawton*, 10 Johns. 23; *S. C.* 6 Am. Dec. 311; *Langdean* v. *Hanes*, 21 Wall. 521; *Wright* v. *Roseberry*, 121 U. S. 488.

Mr. Walter H. Smith (with whom were *Mr. A. T. Britton* and *Mr. A. B. Browne* on the brief) for defendant in error cited: *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Reich-*

art v. *Felps*, 6 Wall. 160; *Quinn* v. *Chapman*, 111 U. S. 445; *Turnpike Road* v. *Myers*, 6 S. & R. 12; *Baptist Church* v. *Mulford*, 3 Halsted (8 N. J. L.), 181; *Darnell* v. *Dickens*, 4 Yerg. 7; *Burrill* v. *Nahant Bank*, 2 Met. 163; *S. C.* 35 Am. Dec. 395; *Commercial Bank* v. *Kortwright*, 22 Wend. 348; *S. C.* 34 Am. Dec. 317; *Lovett* v. *Steam Saw Mill*, 6 Paige, 54; *Reed* v. *Bradley*, 17 Ill. 321; *Johnson* v. *Towsley*, 13 Wall. 72; *Frend* v. *Fyan*, 93 U. S. 169; *Ehrhardt* v. *Hogeboom*, 115 U. S. 67; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530; *United States* v. *Schurz*, 102 U. S. 378; *Quinby* v. *Conlan*, 104 U. S. 420; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Moore* v. *Wilkinson*, 13 Cal. 478; *Beard* v. *Federy*, 3 Wall. 478; *Steel* v. *Smelting Co.*, 106 U. S. 447.

Mr. Justice Miller delivered the opinion of the court.

William B. Carr, the defendant in error, brought his action of ejectment in the Circuit Court of the United States for the District of California against James Doolan and James McCue, to recover possession of 320 acres of land, described as "the east half of section 27, township 2, range 1 East of the Mount Diablo base and meridian, of the public land surveys of the United States of America, in the State of California," and he had judgment for the land.

No citizenship of either party is alleged, and this is urged as a ground of reversal in this court, to which the case has been brought by a writ of error. It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the District of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States within the meaning of the act of March 3, 1875. 18 Stat. 470.

On the trial before the jury the plaintiff introduced in evidence a patent from the United States to the Central Pacific Railroad Company for the land in question, among many other tracts, dated February 28, 1874. This patent purported to be issued under "the act of Congress approved July 1st, 1862, as amended by the act of July 2d, 1864, to aid in the construction

of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, and the act of March 3d, 1865," and in accordance with the laws of the State of California, by which the Central Pacific Railroad Company and the Western Pacific Railroad Company were consolidated. Although the introduction of this patent was objected to by the defendants, it appears upon its face to be valid, and it was therefore properly admitted as evidence. The plaintiff also introduced a deed of conveyance from the Central Pacific Railroad Company to himself, and, after further evidence as to the use and occupation of the land, its value, and that the amount in controversy was over ten thousand dollars, rested.

The defendants, thereupon, in order to show that the patent to the railroad company was issued without authority of law, and therefore void, offered evidence to show "that on, to wit, April 10, A.D. 1839, the Mexican government granted to José Noriêga and Robert Livermore a certain tract of land known by the name 'Las Pocitas,' and which embraced all the land within the following boundaries, viz.: Bounded on the north by the Lomas de las Cuêvas, on the east by the Siêrra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, containing in all two square leagues, provided that quantity be contained within the said boundaries; and if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land.

"That the departmental assembly of the Mexican nation confirmed said grant to said Noriêga and Livermore on, to wit, May 22d, 1840.

"That on, to wit, February 27th, 1852, said Noriêga and Livermore petitioned to the board of land commissioners appointed under the provisions of the act of Congress, approved March 3d, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' to have said grant confirmed, and on, to wit, the 14th day of February, A.D. 1854, the said board of land commissioners confirmed the same

to said Noriêga and Livermore, their heirs and assigns, and the decree of confirmation so made to said Mexican grant by said board of land commissioners described the boundaries thereof to be: On the north by the Lomas de las Cuêvas, on the east by the Sierra de Buenos Ayres, on the south by the dividing line of the establishment of San José, and on the west by the rancho of Don José Dolores Pacheco, provided that within the same no greater quantity than two square leagues were found to be contained; and if a less quantity should be found therein, then that less quantity was confirmed and all of said described tract of land.

"That the United States District Court for the Northern District of California, on appeal to it from said decree of the board of land commissioners, duly confirmed said Mexican grant on, to wit, February 18th, A.D. 1859, to the same extent and by the same description, and under the same conditions as said board of land commissioners had done, and the Supreme Court of the United States, at the December term, A.D. 1860, affirmed the said decree of said United States District Court and every part thereof.

"That during the year 1865 an official survey of the lands so confirmed to said Noriêga and Livermore was made by or under the directions of the surveyor general of the United States for the State of California, and which was duly approved by said surveyor general in the year A.D. 1866, and which survey included the half section of land described in the complaint herein; that said survey was set aside by the Secretary of the Interior in the year A.D. 1868, and a new survey ordered to be made of said Mexican grant within the boundaries set forth in said decrees, which should contain but two square leagues of land, or thereabouts.

"That in March, 1869, the United States surveyor general for California caused the said Mexican grant to be surveyed and designated in accordance with the claims thereof and within the boundaries set forth in said decrees of confirmation, the amount so segregated consisting of about two square leagues, in accordance with the said order of the Secretary of the Interior, and said survey was approved by said surveyor

general on, to wit, May 11th, 1870; and the said survey was approved by the Commissioner of the General Land Office on, to wit, March 1st, 1871; and said survey was finally approved by the Secretary of the Interior on, to wit, June 6th, 1871, and on said last-named date the surplus (or sobrante) of the land embraced within the boundaries contained in said grant and in said decrees became freed and discharged from the claims and reservation of said Mexican grant, and became public land of the United States and a part of the public domain thereof.

"That the entire half section of land described in the complaint herein is located and embraced within the boundaries stated and tract described in and confirmed by the said decree of the board of land commissioners of the United States District Court and of the Supreme Court of the United States, but it was not included within the tract so surveyed in March, 1869, and finally approved on June 6th, A.D. 1871, as aforesaid, as the final survey of said Mexican grant, and said half section of land described in the complaint herein was held and claimed as a part and parcel of said Mexican grant, and was reserved as such continually from the 10th day of April, A.D. 1839, down to the 6th day of June, A.D. 1871, and on said last-named day it became for the first time public land of the United States.

"That the line of the road of said Western Pacific Railroad Company of California was definitely fixed under the provisions of said act of Congress on, to wit, the 30th day of January, 1865, under and within the intent and meaning of the provisions of the act of Congress of July 1st, 1862, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean,' and the act amendatory thereof and supplemental thereto; and that on the 31st day of January, 1865, the lands within the limits designated by said acts of Congress as being granted to said railroad company were withdrawn from preëmption, private entry, and sale under the provisions of said acts, and that no part of the lands described in the complaint has been taken or used for any depot, shop, switch, turn-out or road-bed of

said railroad or of said railroad company; that said railroad was completed prior to the year 1870."

The plaintiff objected to the proof thus offered to be made by the defendants, and to other proof not material to the point now under consideration, on the ground "that the United States patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said United States patent and the recitals therein contained are conclusive evidence in this action that the legal title of the lands therein described was granted and transferred by the United States to the grantee named in said patent, and, taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover."

The court sustained the objection, and refused to allow said proof, or any part of it, to be made, to which the defendants excepted. The court then charged the jury that "the patent title to this land to the Central Pacific Railroad Company is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all it is only by a direct proceeding for the purpose of vacating the patent; and, without further remark upon this, one way or the other, it may be sufficient to say that I charge you the law is that, so far as this case is concerned, the patent from the government to the railroad company, the first patent introduced here, is conclusive of the rights of the parties in this case."

To this charge the defendants excepted, and the case before us turns upon the correctness of the ruling of the court on the proposition that in this action at law none of the evidence offered by the defendants could be received to impeach the validity of the patent, and that such an issue as that attempted to be raised by the defendants could only be made by a suit in equity to set it aside.

There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject,

however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void — void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The decisions of this court on this subject are so full and decisive that a reference to a few of them is all that is necessary. *Polk's Lessee* v. *Wendall*, 9 Cranch, 87; *New Orleans* v. *United States*, 10 Pet. 662, 730; *Wilcox* v. *Jackson, dem. McConnell*, 13 Pet. 498, 509; *Stoddard* v. *Chambers*, 2 How. 284, 317; *Easton* v. *Salisbury*, 21 How. 426, 428; *Reichart* v. *Felps*, 6 Wall. 160: *Best* v. *Polk*, 18 Wall. 112, 117; *Leavenworth Railroad* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *Sherman* v. *Buick*, 93 U. S. 209; *Smelting Co.* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Co.*, 106 U. S. 447; *Kansas Pacific Railway Co.* v. *Dunmeyer*, 113 U. S. 629, 642; *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687.

The case of *Polk's Lessee* v. *Wendall* is, perhaps, the earliest one in this court where this subject received full consideration. That was an action of ejectment in the Circuit Court of the United States for the Western District of Tennessee. On the trial, the plaintiff, who was also the plaintiff in error, introduced and relied upon a patent from the State of North Carolina, of the date of April 17, 1800, which included the land in controversy.

The defendant then offered in evidence a patent issued by the same State, dated August 28, 1795, which also included the land in dispute. The reading of this prior patent was objected to, but, the objection being overruled, the patent was read in evidence. Testimony was then offered to impeach it, and it is upon this branch of the subject that the opinion of the court, delivered by Chief Justice Marshall, is pertinent. After considering the many guards which the statutes provide to secure the regularity of grants and the incipient rights of individuals, as well as to protect the state from imposition, he expresses the view, in language the substance of which has been often since repeated, that, in general, a court of equity appears to be a tribunal better adapted to the object of examining into objections to a patent which affect its validity than a court of law. He then says: "In general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law." p. 99.

In that case, the court held that it could be shown, as a defence to the patent, that the entries on which it was granted were never made, and that the warrants were forgeries; in which case no right accrued under the act of 1777, and, no purchase of the land having been made from the State, the grant was void by the express words of the law, and that in rejecting the testimony on this point the Circuit Court erred. The judgment was, therefore, reversed.

The case of *Wilcox* v. *Jackson* was an action of ejectment brought against Wilcox, the commanding officer at Fort Dearborn, to recover possession of land held by him in that character. This land was entered under a preëmption claim by one Beaubean, who paid the purchase money and procured the register's receipt therefor. He afterwards sold and conveyed his interest to the lessor of the plaintiff. The question was, whether the register's certificate, which seems to have been treated as sufficient evidence of title if it was valid, could be

impeached by testimony that the land was not subject to entry. In the opinion of the Supreme Court on this subject the language used in *Elliott* v. *Peirsol*, 1 Pet. 328, 340, is quoted with approval:

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void."

The court then proceeds: "Now, to apply this. Even assuming that the decision of the register and receiver, in the absence of fraud, would be conclusive as to the facts of the applicant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant preëmptions in land in which the law declares that they shall not be granted, then they are acting upon a subject-matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum should attempt to take cognizance of a case beyond that sum." p. 511.

In *Stoddard* v. *Chambers*, which was an action of ejectment, an attempt was made to show that the defendant's patent was void. This court said in that case:

"The location of Coontz was made in 1818, and his survey in 1818. At these dates there can be no question that all land claimed under a French or Spanish title, which claim has been filed with the recorder of land titles — as the plaintiffs' claim had been — were reserved from sale by the acts of Congress above stated. This reservation was continued up to the 26th of May, 1829, when it ceased, until it was revived by the act of 9th July, 1832, and was continued until the final confirmation of the plaintiffs' title by the act of 1836. The defendant's patent was issued the 16th of July, 1832. So that it appears that when the defendant's claim was entered, surveyed, and patented, the land covered by it, so far as the location interferes with the plaintiffs' survey, was not 'a part of the public land authorized to be sold.' On the above facts the important ques-

tion arises, whether the defendant's title is not void. That this is a question as well examinable at law as in chancery will not be controverted. That the elder legal title must prevail in the action of ejectment is undoubted. But the inquiry here is, whether the defendant has any title as against the plaintiffs. And there seems to be no difficulty in answering the question, that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. . . . No title can be held valid which has been acquired against law, and such is the character of the defendant's title, so far as it trenches on the plaintiffs'. . . . The issuing of a patent is a ministerial act, which must be performed according to law. A patent is utterly void and inoperative which is issued for land that had been previously patented to another individual. . . . The patent of the defendant having been for land reserved from such appropriation, is void; and also the survey of Coontz, so far as either conflicts with the plaintiffs' title."

These principles were recognized in and governed the decision of the court in *Easton* v. *Salisbury*.

In *Reichart* v. *Felps*, which was an action of ejectment, the plaintiff claimed under two patents, of the dates of 1838 and 1853, which the court says "exhibit conclusive evidence of title if the land had not been previously granted, reserved, or appropriated." This was permitted to be proved by the patent of Governor St. Clair, dated February 12, 1799, duly registered in 1804, with a survey made in 1798. This was held to be conclusive evidence that the land was so reserved, and defeated the patents of 1838 and 1853.

In *Best* v. *Polk* the plaintiff, in support of his title in an action of ejectment, produced a patent from the United States, dated March 13, 1847, which seemed in all respects to be regular, granting the section of land described to James Brown in fee, who conveyed to Polk. The defendant, Best, being in possession, attempted to defeat this patent by showing that the land in question was reserved under the treaties of 1832 and 1834 with the Chickasaw Nation of Indians, which authorized members of the tribe who desired to do so, and heads

of families, to locate lands, which when so located were to be reserved from sale or other disposition by the United States. The defendant undertook to show that the land on which he was settled, which was the subject of controversy, had been properly located by an Indian, and was therefore not liable to sale at the time that Brown purchased it of the land officers. The court below rejected the evidence because of certain deficiencies in the certificate made by one Edmondson, a register of the land office at Pontotoc, who certified that the land in question was located as a reserve by a Chickasaw Indian, under the treaty, in July, 1839. This court reversed the judgment rendered in favor of plaintiff in the court below, holding that the certificate was sufficient, and that it showed that under the treaty, and by the action of the Indian in settling upon it, and procuring a certificate of that fact from the proper officer, the land had become reserved in the language of the treaty, and that the patent under which the plaintiff claimed was therefore void: citing also *Polk's Lessee* v. *Wendell*, and *Bagnell* v. *Broderick*, 13 Pet. 436.

In the case of *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, decided last year, which was an action to recover possession of part of a vein or lode of mineral deposit, plaintiff relied on a patent for a placer mine, and the contested vein was within the lines of its superficial area extended perpendicularly. The statute on which this patent was issued declared that it should not confer any right to veins known to exist within it at the time the grant was made. Defendants offered evidence to show that the vein in controversy was known to the patentee to exist at the time of his application for the patent.

The Circuit Court charged the jury that because the defendants had shown no right whatever to the vein, but were in possession as naked trespassers, they could not, in defence of that possession, show this defect in plaintiff's title. But this court (the Chief Justice dissenting) held that this ruling was erroneous, and that, as in all other actions of ejectment, plaintiff must recover on the strength of his own title, and not on the weakness of defendants'.

With the principles so well established by these decisions, of the right in an action at law to prove by competent extrinsic evidence that a patent of the United States is void for want of power in the officers to issue it, and the facts which show that want of power, we come to the case of *Newhall* v. *Sanger*, 92 U. S. 761, which establishes the proposition that land covered by a Mexican claim was not public land within the meaning of the act of Congress making the grant to the railroads, but was reserved from the granting clause of those statutes.

In *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733, decided at the same time with *Newhall* v. *Sanger*, the opinions in both cases being delivered by Mr. Justice Davis, the question of the right to show this want of authority was also very fully discussed. That was a case in which the railroad company had brought suit in equity to establish its title to tracts of land lying within the Osage country, in Kansas, which had been certified to the governor of that State as part of the grant made by Congress to aid in the construction of certain railroads. This was done by the supposed authority of the act of March 3, 1863, 12 Stat. 772, granting every alternate section of land in the State of Kansas, designated by odd numbers, for ten sections in width, on each side of said road, and of each of its branches.

It also contained the usual reservation, that in case it should appear when the line or route of said railroad and branches was definitely fixed, that the United States had sold any of the land granted, or that the right of preëmption or homestead settlement had attached to the same, then the right was given to select other lands; and it provided that any and all lands theretofore reserved to the United States by the acts of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, "be, and the same are hereby, reserved to the United States from the operation of the act."

The route of the road in that case was located through lands which had belonged to the Osage Indians, and to which their title was not extinguished until September 29, 1865. This court held that, notwithstanding the generality of the granting

clause, it was not intended by that statute to grant anything but *public* lands of the United States at the date of the grant, and that the reservation clause was sufficient to except these lands, then in the possession of the Indians, out of the grant, even if the general language could be construed to include them. The court says: "A special exception of this land was not necessary in these grants, because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. The legislation which reserved it for any purpose, excluded it from disposal as the public lands are usually disposed of."

In the case of *Newhall* v. *Sanger* the object of the suit was to determine the ownership of a quarter section of land in California. The patent under which the appellee claimed was issued in 1870, under the act of 1862 granting lands to railroad companies for the purpose of constructing a railroad to the Pacific Ocean. 12 Stat. 489, 492. One of the companies was the Western Pacific Railroad Company, to which was granted every alternate section of *public land*, designated by odd numbers, within ten miles on each side of its road, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or preëmption claim may not have attached at the time the line of the road was definitely fixed. The act also declared, as in other cases, that it should not defeat or impair any preëmption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler. The appellant asserted title under a patent of the United States of later date, which recited that the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the company. It was conceded that the land in controversy fell within the limits of the railroad grant as enlarged by the amendatory act of 1864, 13 Stat. 356, 358, the same act now under consideration, "and the question arises," said the court, "whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are public within the meaning of the acts of Congress

under which the patent whereon the appellee's title rests was issued to the railroad company."

It will be seen that this is the precise question presented in the case under consideration, and the court, referring to the preceding case of *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733, and reciting the fact that in that case they confined a grant of every alternate section of "*land*" to such whereto the complete title was absolutely vested in the United States, proceeds: "The acts which govern this case are more explicit, and leave less room for construction. The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could the order withdrawing lands from preëmption, private entry, and sale apply." The court then goes on to show that the status of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it, was such that the right of private property could not be impaired by a change of sovereignty, and that such lands were not included in the phrase "public lands" of these specific railroad grants, and that until such claims were finally decided to be invalid they were not restored to the body of public lands subject to be granted.

Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger outboundaries, and they were frequently described by the name of a place, or ranche. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within outboundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined, and to which therefore the phrase "public lands," could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located.

It is objected that the testimony offered in the present case, and rejected by the court below, to prove the facts concerning the Mexican grant which would defeat the patent to the railroad company, is parol, and that even conceding the right to assail the patent in an action at law founded on the title conveyed by it, this cannot be done by parol testimony. But without deciding in this case how far such testimony can be received in an action at law for that purpose, it is sufficient to say that the evidence rejected by the court below in the present case is entirely documentary and matter of record, being the written evidence of the grant by the Mexican government, of its confirmation by the Land Commission of California, of the affirmance of the award of that commission by the District Court of the United States, and by this court, and of the record of the two surveys made by the surveyor of the United States, the latter confirmed by the Commissioner of the General Land Office, showing the location and confirmation of the Mexican grant, and the dates at which all those transactions occurred. We do not doubt that this evidence was admissible for the purpose for which it was offered, and if any oral testimony were necessary to identify the land in controversy as coming within the Mexican grant, and the surveys of the Land Office, under the decisions of the courts, we do not think it would be inadmissible, although it is not clear that any such was necessary or was offered.

For the radical error of the court in rejecting this evidence and in the instructions given to the jury on the same point,

The judgment is reversed, and the case remanded to the Circuit Court for a new trial.

Mr. Chief Justice Waite dissenting.

I feel compelled to withhold my assent to this judgment. The ground of my dissent is not that in a proper case the validity of a patent of the United States for the conveyance of lands may not be attacked in a suit at law by proving that it was issued without the requisite authority, but that this is not a proper case for the application of that rule. To show that I

recognize the existence of the right to make such proof, if the person who offers it is in a position to do so, it is only necessary to refer to *Simmons* v. *Wagner*, 101 U. S. 260, where, as the organ of the court, I announced its decision, that one in possession under a certificate issued by a proper officer in the regular course of his official duty, showing that he had bought and paid for the land, might successfully defend an action of ejectment brought against him by the holder of a patent issued upon an entry by another party made long after his rights accrued; and this because, after the purchase under which he was in possession the land was no longer a part of the public domain, and the officers of the United States had no authority in law to sell it a second time.

In my opinion, however, such proof can only be made by one who holds a right at law or in equity which is prior in time to that of the patentee, or by one who claims under the United States by a subsequent grant or some authorized recognition of title. Unless I have misinterpreted the cases on this subject, that has always been the doctrine of this court.

In *Polk's Lessee* v. *Wendall*, 9 Cranch, 87, the controversy was between two persons, one holding under a patent issued by the State of North Carolina, dated August 28, 1795, and the other under another patent for the same land, issued by the same State, dated April 17, 1800, and the question was, whether as against the second patent the first was good. In *Wilcox* v. *Jackson*, 13 Pet. 498, the defendant was an officer of the United States, in possession of a military post under the authority of the government, and the plaintiff was the holder of certificates of the register and receiver of the proper land office, showing that he had bought and paid for the land under a preëmption entry. The officer in possession, holding under and for the United States, was allowed to prove that at the time of the entry and purchase the land had been reserved from the mass of public lands, and that its sale by the officers of the government was unauthorized and void. In *Stoddard* v. *Chambers*, 2 How. 284, the controversy was between one claiming under a Spanish grant and a patentee under the location of a New Madrid certificate. The confirmation of the

grant was not made until after the location, but as the right of the grantee was prior in time to that of the New Madrid claimant, he was permitted to show that the land was reserved from sale, and consequently the location of the certificate was unauthorized, and the patent thereunder invalid. In *Easton* v. *Salisbury*, 21 How. 426, the question arose upon substantially the same facts, and was decided in the same way. In *Reichart* v. *Felps*, 6 Wall. 160, the holder of a French settler's claim, recognized in the grant by Virginia to the United States of the northwest territory, and confirmed or patented by Governor St. Clair, under the act of June 20, 1788, was permitted to contest the validity of patents issued by the United States for the same land, one in 1838 and one in 1853, on the ground that the land had "been previously granted, reserved from sale, or appropriated," and therefore the patents were inoperative and void. In *Best* v. *Polk*, 18 Wall. 112, the parties were the holder of a title under a treaty of the United States with the Chickasaw Nation of Indians and a junior patentee. The holder of the elder title was permitted to show that when the claim was made under which the subsequent patent was issued, the land had been "previously granted, reserved from sale, or appropriated," and consequently no title could be acquired under it. In *Newhall* v. *Sanger*, 92 U. S. 761, one side claimed under a patent issued upon the same railroad grant that is involved in the present suit, and the other under a subsequent patent which recited that "the land was within the exterior limits of a Mexican grant called Moquelamos, and that a patent had, by mistake, been issued to the [railroad] company." Such a junior patentee was allowed in that suit to contest the validity of the elder patent to the company. The case of *Leavenworth, Lawrence and Galveston Railroad* v. *United States*, 92 U. S. 733, was a suit brought by the United States against the railroad company to quiet its title to lands claimed by the company under a land grant. That of *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, so much relied on, presented the question as between the claimant under a railroad grant and the holder of a patent from the United States issued on a homestead entry made subsequently. *Sher-*

man v. *Buick*, 93 U. S. 209, was between the holder of a patent of the United States and the holder of a patent from the State of California, claiming under a prior grant from the United States of the same land for school purposes. *The Smelting Company Cases*, 104 U. S. 636, and 106 U. S. 447, were between those claiming under a patent for a placer mining claim and certain occupants of lots in the town site of Leadville which had been reserved from sale prior to the location of the claim. In *Reynolds* v. *Iron Silver Mining Company*, 116 U. S. 687, the question was not one of admitting proof to invalidate a patent, but as to the legal effect of a patent for a placer mining claim, and it was held not to include veins or lodes within the boundaries of the claim as located on the surface and extended vertically downwards, if known to exist when the patent was issued. In *Wright* v. *Roseberry*, 121 U. S. 488, decided at the last term, one party held under a conveyance by the State of California of a tract of land which the State claimed under the grant by the United States of swamp and overflowed lands, and the other under a patent from the United States issued upon a preëmption entry. Many more cases of a similar character might be cited, but it is needless to pursue them further. They establish beyond all question that, if one holds under an older title, or if he is in a position under a junior claim to represent the title of the government, he may attack the validity of a patent in a suit at law on the ground that it was issued without proper authority.

On the other hand, it seems to me equally well settled, that if he who seeks to contest the patent is a volunteer, a mere intruder, he will not be heard. Thus, in *Hoofnagle* v. *Anderson*, 7 Wheat. 212, the contest was between the holders of two Virginia military land warrants, who had made their entries on the same tract of land. One entered and got his patent eighteen months before the other located his warrant. At the trial the holder of the junior warrant sought to show that the former grant was "obtained contrary to law, being founded on a warrant which was issued by fraud or mistake;" but Chief Justice Marshall, in delivering the opinion of the court, said: "The title of the respondent to the particular tract included

in his patent was complete before that of the appellants commenced. It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the commencement of title, and have sustained a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. But they have gone no farther. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. A patent appropriates the land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the government may provide means for repealing it; but no individual has a right to annul it, to consider the land as still vacant, and appropriate it to himself." pp. 214, 215. This seems to me to be the true rule; and one way the government may adopt to annul a patent which has been issued without authority of law, is to grant the land to another, and thus clothe the new grantee with its own power to test the validity of the former proceedings to divest it of title. Such a grantee will thus be made to represent the United States by authority, and he may sue for the land. With such a title, or something equivalent to it, the courts may properly, as has been done heretofore, allow him to assert his own title, that is, the title of the government, against one which was apparently granted before. Such an attack on the title would be direct, not collateral, as authority to proceed had been given by the government for that purpose.

In *Cooper* v. *Roberts*, 18 How. 173, the suit was brought by one holding title under a patent of the State of Michigan conveying a tract of what was claimed to be school land, against one who had got into possession under a lease by the Secretary of War for mining purposes. The title of the State was adjudged to be good as against the United States and the defendant in possession. The defendant then objected to the plaintiff's right of recovery because "the officers of the State

violated the statutes of Michigan in selling the lands, after they were known, or might have been known, to contain minerals." As to this, Mr. Justice Campbell, speaking for the court, p. 182, said: "Without a nice inquiry into these statutes, to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known, or might have been known, to contain minerals, we are of opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the State, and who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached. Michigan has not complained of the sale, and retains, so far as this case shows, the price paid for it. Under these circumstances we must regard the patent as conclusive of the fact of a valid and regular sale on this issue."

So in *Field* v. *Seabury*, 19 How. 323, the same rule appears. There it was said that the question whether a grant from a sovereignty or by legislative authority was obtained by fraud was exclusively between the sovereignty making the grant and the grantee. It seems to me clear that the same rule applies to questions of illegality. The case of *Spencer* v. *Lapsley*, 20 How. 264, is equally significant. There the question was as to the validity of a Mexican grant, and the court refused to investigate the fairness of the grant at the instance of one who had "entered without a color of title," and in so doing said, again speaking through Mr. Justice Campbell: "Neither the State of Coahuila and Texas, nor the Republic of Texas, nor the State of Texas, has taken measures to cancel this grant, nor have they conferred on the defendant any commission to vindicate them from wrong. He is a volunteer. The doctrines of the court do not favor such a litigant."

The last case in this court to which I will refer in the present connection is *Ehrhardt* v. *Hogaboom*, 115 U. S. 67. There the suit was brought by one claiming title under a patent of the

United States issued to a preëmption settler, against one who contended the patent was void because the lands were, at the time of the preëmption entry, swamp and overflowed lands which passed to the State of California under an act of Congress passed in 1850. As a defence to the action the defendant offered to prove the character of the land, but we held this offer was properly denied because he was, as to the land in dispute, "a simple intruder, without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States, . . . and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it."

In some of the state courts the same ruling has been made. Thus, in *Crommelin* v. *Minter*, 9 Alabama, 594, before the Supreme Court of Alabama in 1846, it was decided that "a patent fraudulently obtained, or which has issued in violation of law, is void, and does not authorize a recovery against a party in possession under color of title. But a mere intruder cannot insist on the invalidity of the patent." And so in *Doll* v. *Meador*, 16 Cal. 295, it was held by the Supreme Court of California, in 1860, that "a patent, not void upon its face, cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title;" and the court, in delivering its opinion, was careful to say, "the point here is as to the *status* of the party who can raise any question as to its [the patent's] validity, when it is regular on its face."

I cannot but believe this is the true doctrine. If the government is satisfied with what has been done, all others must be; and it will be deemed in law to be satisfied, unless it proceeds itself to correct the error or authorizes some one else to do so.

It only remains to consider what position Doolan and McCue occupy in this litigation. The land was patented to the Central Pacific Railroad Company February 28, 1874, and the railroad company conveyed to Carr, the plaintiff below, June 10, 1874. No attempt has been made by the United States, so far as this record discloses, to annul the patent. On the 10th of November, 1882, Doolan and McCue each entered on 160

acres of the land under a claim of preëmption settlement. Each of them then made and subscribed a declaratory statement of his intention to claim and preëmpt the land on which he had settled under the laws of the United States, and presented it to the register of the proper land office; but he refused to receive it on the ground of the existence of the patent to the railroad company. This is all the claim of title which they have; but the decisions are uniform to the effect that what had thus been done conferred on them no rights as against the United States. Certainly it gave them no right to represent the United States in a suit to avoid the patent which had been issued.

In *Frisbie* v. *Whitney*, 9 Wall. 187, it appeared that in March, 1862, this court decided that what had been supposed to be a valid Mexican grant of the Soscol Ranch was void for want of authority in the Mexican government to make it. At the time of this decision Frisbie was in possession of the quarter section involved in the suit under the Mexican title. Whitney afterwards took forcible possession of the same quarter section and claimed to hold it as a settler under the preëmption laws of the United States. He applied to the proper land officers to make his declaration under the statute but they refused to receive it. On the 3d of March, 1863, Congress passed an act, c. 116, 12 Stat. 808, by which the *bona fide* purchasers under the Mexican title were allowed to buy the lands from the United States. Frisbie availed himself of this statute and got his patent. Whitney then sued him for a conveyance of the legal title because of the alleged superior equity which he, Whitney, had acquired by his preëmption settlement. This court however decided that a settlement on the public lands of the United States, no matter how long continued, conferred no right against the government, and, it was added, "the land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and has paid the requisite purchase money." For this reason the title of Frisbie was sustained and the bill dismissed. The *Yosemite Valley Case*, 15 Wall. 77, is to the same effect.

It has also been held that a right of preëmption can never be acquired by intrusion upon the actual possession of another. *Trenouth* v. *San Francisco*, 100 U. S. 251; *Atherton* v. *Fowler*, 96 U. S. 513. In the present case, Carr alleges that he was in possession when the entry was made by Doolan and McCue, and this is not denied except by saying that Carr was not ousted at any time while he was the owner of the land.

As these parties have received from the government no recognition of their preëmption entries, therefore, and have not paid the purchase money, they stand before the law as mere volunteers and intruders on the possession of the patentees. They do not and cannot represent the title of the United States as against the patent, and are not entitled to be heard in opposition to it. As to them, in their present situation, the land was as much segregated from the public domain by the issue of the patent as it would have been if there were no dispute about the authority for its issue.

To show that Congress has been accustomed to treat such preëmption settlers as mere intruders and entitled to no consideration by the government, it is only necessary to refer to the act for the relief of purchasers of parts of the Soscol Ranch, just cited, and the act passed March 3, 1887, c. 376, 24 Stat. 556, which directs the Secretary of the Interior immediately to adjust, in accordance with the decisions of this court, each of the land grants made by Congress to aid in the construction of railroads, and theretofore unadjusted, and to demand from the several companies a relinquishment of their title to all lands that had been erroneously certified or patented. It there provides, § 4, that if any of the lands so erroneously certified or patented, with a few specified exceptions, have "been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents

of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount."

I cannot believe that one whose claim to rights under the laws of the United States is thus ignored by Congress in what was decided in *Frisbie* v. *Whitney*, *ubi supra*, to be valid legislation, can avail himself of a want of authority in the officers of the government to issue a patent, which is valid on its face, to protect himself against eviction from the patented land on which he has entered as a trespasser, and without any color of title.

JOHNSON *v.* CHRISTIAN.

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

No. 195. Submitted April 2, 1888. — Decided April 16, 1888. — Decree vacated May 14, 1888.

In a suit in equity, in a Circuit Court, to obtain a release of land from liability under a deed of trust, the plaintiff had a decree. On an appeal to this court by the defendant, no evidence of the jurisdiction of the Circuit Court on the ground of citizenship was found in the record. This court reversed the decree with costs, and remanded the case for further proceedings.

The decree reversing the decree of the Circuit Court in this case on the ground that the record contained no evidence of the jurisdiction of that court was then vacated, because the record showed that the suit was brought to restrain the enforcement of a judgment in ejectment recovered in the same Circuit Court.

BILL IN EQUITY. The prayer of the bill was that the complainants "may have the order and decree of the court releas-

ing their said lands from further responsibility under the said original deed of trust from James F. Robinson to Lycurgus L. L. Johnson, and the cloud upon their title to said lands and premises by virtue of the sale and purchase by defendant of their said lands and premises at the sale made by I. L. Worthington and Theodore Johnson, as executors, &c., as aforesaid, be removed, and that the pretended deed made to the defendant at such sale for the lands of complainants be decreed to be delivered up and cancelled, and that in the meantime complainants may have a temporary restraining order, issuing out of and under the seal of this court, enjoining and restraining defendant — enforcing or attempting to enforce his judgment in ejectment against said lands until the further order of the court, and that at the final hearing hereof said injunction be made perpetual;" and for further relief.

The decree was in the complainants' favor, from which the respondent appealed. The case is stated in the opinion.

Mr. Attorney General and *Mr. D. H. Reynolds* for appellant.

Mr. U. M. Rose 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 Eastern District of Arkansas, by George Christian and Jerry Stuart, against Joel Johnson, to obtain a decree for the release of certain land from liability under a deed of trust. The defendant appeared and answered, a replication was filed, and proofs were taken. The court, on final hearing, made a decree in favor of the plaintiffs. The defendant has appealed to this court.

On looking into the record, we can find no evidence of the jurisdiction of the Circuit Court. The bill commences in this way: "The complainants, George Christian and Jerry Stuart, citizens of the county of Chicot and State of Arkansas, would respectfully represent," etc. Joel Johnson is the sole defendant, but there is no allegation as to his citizenship, nor does that appear anywhere in the record. Under these circum-

stances, this court must take notice for itself of the absence of the averment of the necessary facts to show the jurisdiction of the Circuit Court, and must reverse the decree, in accordance with the settled practice.

It is only necessary to refer to the case of *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237, where it was said, citing numerous cases: "It was settled at a very early day that the facts on which the jurisdiction of the Circuit Courts rest must, in some form, appear on the face of the record of all suits prosecuted before them;" and that "it is error for a court to proceed without its jurisdiction is shown."

It was also said in the same case, citing *Morgan* v. *Gay*, 19 Wall. 81, and *Robertson* v. *Cease*, 97 U. S. 646, that, if the party in regard to whom the necessary citizenship was not shown actually possessed such citizenship, the record could not be amended in this court so as to show the fact, but that the court below might, in its discretion, allow that to be done when the case should get back there.

In accordance with these views,

The decree of the Circuit Court is reversed, with costs, and the case is remanded to that court for further proceedings.

Mr. Rose thereupon, on the 28th of April, 1888, presented and obtained leave to file the following petition, entitled in the cause.

"The appellees beg leave to ask for a reconsideration of the judgment herein, because it is based on an obvious oversight.

"The opinion states that the object of the suit was 'to obtain a decree for the release of certain land from liability under a deed of trust.'

"But the object was to enjoin the execution of a judgment in ejectment obtained by appellant in the court below against the appellees.

"The bill states: 'That afterwards said defendant, [claiming] by virtue of said sale and purchase, instituted his suit in ejectment on the law side of the court, and your complainants, not being admitted to interpose their equitable defence to the

same, he did at the —— term, 188–, obtain judgment in ejectment against them, and now seeks to oust them of the possession of said lands by writ of possession founded on said judgment.' Tr. 3.

"There is a prayer for temporary and permanent injunctions against the judgment at law. Tr. 4.

"The answer admits the allegations as to the judgment at law. Tr. 40.

"Of course in that case the judgment could only be enjoined by the Federal Court, and the citizenship of the parties is of no significance. *Freeman* v. *Howe*, 24 How. 450, and cases cited; *Stone* v. *Bishop*, 4 Clifford, 597; *Dunn* v. *Clarke*, 8 Pet. 1; *O'Brien County* v. *Brown*, 1 Dillon, 588; *St. Luke's Hospital* v. *Barclay*, 3 Blatchford, 262; *Railroad Companies* v. *Chamberlain*, 6 Wall. 748; *Jones* v. *Andrews*, 10 Wall. 327."

On the 14th of May, 1888, MR. JUSTICE BLATCHFORD delivered the opinion of the court.

In this case, on the 16th of April last, this court made a decree reversing with costs the decree of the Circuit Court and remanding the case to that court for further proceedings. This was done upon the view that the record contained no evidence of the jurisdiction of the Circuit Court, arising out of the citizenship of the parties; but the fact was overlooked that the bill states that the defendant had obtained a judgment in ejectment in the same court, (the Circuit Court of the United States for the Eastern District of Arkansas,) and was seeking to oust the plaintiffs from the possession of the land involved, by a writ of possession founded on the judgment. The bill further sets forth that the plaintiffs in this suit, who are the appellants, had not been admitted to interpose in the ejectment suit an equitable defence to the same, which they state with particularity in the bill in this suit, and which they seek to avail themselves of herein. One of the prayers of the bill is for a perpetual injunction restraining the defendant from enforcing or attempting to enforce against the land the judgment in ejectment. The answer admits the recovery of the judgment in the same court.

This is sufficient to give the Circuit Court jurisdiction of the case, without any averment of the citizenship of the parties; and not only is the present suit in equity merely an incident of and ancillary to the ejectment suit, but no other court than the one which rendered the judgment in the ejectment suit could interfere with it or stay process in it, on the grounds set forth in the bill. *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609, 633; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Pacific Railroad* v. *Missouri Pacific Railway*, 111 U. S. 505.

The decree made by this court on the 16th of April last is therefore vacated, and the case will stand for hearing on the merits at the next term of this court, in its order on the docket.

UNITED STATES *v.* BAKER.

APPEAL FROM THE COURT OF CLAIMS.

No. 1394. Submitted April 2, 1888. — Decided April 16, 1888.

A person who was appointed a midshipman in the navy in September, 1867, and an ensign in July, 1872, and as to whom the lowest grade having graduated pay held by him since last entering the service was, under the act of July 15, 1870, c. 295, 16 Stat. 330, § 3, that of ensign, is entitled to be credited, under the act of March 3, 1883, c. 97, 22 Stat. 473, with the time he so served as a midshipman, on the ground that service as a midshipman, at the naval academy, was service as an officer in the navy.

THE case is stated in the opinion.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *Mr. F. P. Dewees* for appellant.

Mr. John Paul Jones and *Mr. Robert B. Lines* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an appeal by the United States from a judgment of the Court of Claims, awarding to the claimant $836.71, on the following facts:

On the 30th of September, 1867, the claimant was appointed a midshipman in the navy, by a form of appointment which stated that he was "appointed to the grade of midshipman in the United States Navy." By § 12 of the act of July 15, 1870, c. 295, 16 Stat. 334, it was provided that "the students in the naval academy shall hereafter be styled cadet midshipmen;" and that, "when cadet midshipmen shall have passed successfully the graduating examination at said academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." After the passage of that act, the form of appointment was changed by striking out the words "appointed to the grade of midshipman," and inserting the words "appointed a cadet midshipman;" but no appointment in the amended form was issued to the claimant. After completing his academic course at Annapolis, the claimant was, on the 14th of July, 1872, promoted to the grade of ensign; on the 6th of December, 1876, to that of master; and, on the 10th of January, 1884, to that of lieutenant, in which grade he was serving when his petition was filed.

By the act of March 3, 1883, c. 97, 22 Stat. 473, it was provided as follows: "And all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service." The claimant alleged in his petition that the lowest grade having graduated pay held by him since last entering the service was, under the act of July 15, 1870, c. 295, 16 Stat. 330, § 3, now § 1556 of the Revised Statutes, that of ensign, and that he was, under the act of 1883, entitled to have credit given to him upon his grade of ensign for all of his service prior to the date of his commission as ensign, namely, 4 years, 9 months, and 14 days, from September 30, 1867, to July 14, 1872, which included all of the time of his service as

midshipman. The question is as to whether he is entitled to the difference of pay resulting from such credit. The Court of Claims decided in his favor, awarding to him for that pay the sum of $836.71.

The single question involved is whether the claimant, while he was a midshipman, was serving as an officer or enlisted man in the navy, within the meaning of the act of 1883. The contention on the part of the United States is that the claimant, whilst a student at the naval academy, did not, in the sense of the act of 1883, serve either as an officer or an enlisted man; and that, in that view, it is immaterial whether, as a student, he is or is not to be regarded as an officer of the navy. It is denied by the United States that the entry of a pupil into the academy is his entry into the naval service, and that the period of his pupilage is actual service, within the meaning of the act of 1883; and it is argued that he does not enter into actual service until he is appointed either in the line of the navy, the marine corps, or the engineer corps; that, as a student, he does not serve, but is preparing to serve; that he does not render service to the government, but is receiving favors from it; that he can only commence service after his graduation, such service depending upon his graduating merit; and that the compensation of $500 a year given to him is not a payment for service rendered, but is a gratuity and an allowance made to him for his support in his preparation for service to be rendered.

When the claimant was appointed a midshipman in the navy, on the 30th of September, 1867, the act of July 16, 1862, c. 183 (12 Stat. 583), was in force. The first section of that act divides the active list of line officers of the navy into nine grades, the first of which is "rear-admirals," the eighth of which is "ensigns," and the ninth of which is "midshipmen." The 11th section of that act provides that the students at the naval academy shall be styled midshipmen, until their final graduating examination, when, if successful, they shall be commissioned ensigns, ranking according to merit. Thus, § 1 of that act creates the grade of midshipman as one of the nine grades of the active list of line officers of the navy, and § 11 declares that the students at the naval acad-

emy shall be styled midshipmen. If these statutory provisions were not varied as respects the claimant prior to July 14, 1872, when he was promoted to the grade of ensign, he was all the time an officer in the line of the navy, and serving as such officer.

Section 12 of the act of July 15, 1870, c. 295 (16 Stat. 334), provides that the "students in the naval academy shall hereafter be styled cadet midshipmen," and that, when they "shall have passed successfully the graduating examination at said academy, they shall receive appointments as midshipmen, ranking according to merit, and may be promoted to the grade of ensign as vacancies in the number allowed by law in that grade may occur." The provisions of that section do not seem to have been applied to the case of the claimant. He did not thereafter receive an appointment as cadet midshipman, nor does he appear to have received an appointment as midshipman after he passed successfully the graduating examination at the academy, but he was promoted to the grade of ensign after he had completed his academic course at Annapolis.

It is very questionable whether the 12th section of the act of 1870 applies to persons who had been theretofore appointed midshipmen. It would rather seem to be limited in its provisions to persons thereafter to be appointed to the distinct grade of cadet midshipmen, and therefore not to include the case of the claimant. But, even if § 12 of the act of 1870 applies so far to those who were then students in the naval academy, that they were thereafter to be styled cadet midshipmen, yet they were still to discharge the same duties as before, and be subject to the same naval discipline and control as before, and to receive the same pay as before. We see nothing in the act of 1870 to exclude the claimant from the position which he occupied prior to the passage of that act, as a member of a grade in the active list of line officers of the navy, so far as respected his service at the naval academy after the date of the passage of that act, whether he was thereafter to be styled a cadet midshipman or to continue to be styled a midshipman.

Syllabus.

No legislation which took place after the 14th of July, 1872, can affect the question arising under the act of 1883, as to his service as an officer in the navy prior to the 14th of July, 1872. Section 15 of the act of 1862 provided that the "annual pay of the several ranks and grades of officers of the navy on the active list," thereinafter named, comprehending the nine grades mentioned in the first section of the same act, should be as thereinafter specified in the 15th section, and the last provision was this: "Midshipmen shall receive five hundred dollars."

It is impossible not to conclude that the claimant continued to be, after the passage of the act of 1870, as he was prior to its passage, an officer of the navy, on the active list, and serving as such an officer, by virtue of his having been appointed a midshipman and continuing to be a student in the naval academy, even though he might have been properly styled, after the passage of the act of 1870, a cadet midshipman.

The judgment of the Court of Claims is affirmed.

NUTT *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1380. Submitted April 2, 1888. — Decided April 16, 1888.

Congress enacted August 7, 1882, 22 Stat. 734, "that the Quartermaster General of the United States is hereby authorized to examine and adjust the claims of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, late of Natchez, in the State of Mississippi, growing out of the occupation and use by the United States Army during the late rebellion, of the property of said Haller Nutt during his lifetime, or of his estate after his decease, including live stock, goods, and moneys, taken and used by the United States or the armies thereof; and he may consider the evidence heretofore taken on said claim, as far as applicable, before the Commissioners of Claims, and such other evidence as may be adduced before him on behalf of the legal representatives of Haller Nutt or on behalf of the United States, and shall report the facts to Congress to be considered with other claims reported by the Quartermaster General." The Quartermaster General made the examination and reported to Con-

gress the aggregate value of the property taken. *Held*, that this reference of the claim did not constitute a submission to arbitration on the part of Congress, and that the finding of the Quartermaster General was neither an award, nor the equivalent of an account stated between private individuals.

Some time after this report of the Quartermaster General, Congress appropriated sundry amounts to various persons named in the bill as "an allowance of certain claims reported by the accounting officers of the United States Treasury Department," "the same being in full for, and the receipt for the same to be taken and accepted in each case as a full and final discharge of the several claims examined and allowed." Among these amounts was an appropriation to Mrs. Nutt of an amount much less than that reported by the Quartermaster General, which reduced amount she accepted. *Held*, that this did not amount to an adoption by Congress of the report of the Quartermaster General, and that there was no inference that the appropriation actually made was intended to be a recognition of a larger amount as due.

THE case is stated in the opinion of the court.

Mr. Martin F. Morris for appellant.

Mr. Attorney General and *Mr. Heber J. May* for appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

An act of Congress, approved August 7, 1882, for the relief of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, 22 Stat. 734, declared: "That the Quartermaster General of the United States is hereby authorized and directed to examine and adjust the claims of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, late of Natchez, in the State of Mississippi, growing out of the occupation and use by the United States Army, during the late rebellion, of the property of the said Haller Nutt during his lifetime, or of his estate after his decease, including live stock, goods, and moneys taken and used by the United States or the armies thereof; and he may consider the evidence heretofore taken on said claim, so far as applicable, before the Commissioners of Claims, and such other legal evidence as may be adduced before him in behalf of the legal representatives of Haller Nutt, deceased, or in behalf of the United States, and shall

report the facts to Congress to be considered with other claims reported by the Quartermaster General: *Provided*, That no part of said claims, upon which said Commissioners of Claims have passed on the merits, shall be considered by the Quartermaster General.

On December 22, 1882, the Quartermaster General, acting under and pursuant to this act, reported to Congress, through the Secretary of War, that he had examined the claims of Mrs. Julia A. Nutt, as widow and executrix, and the nature and manner of his investigation, and the circumstances and evidence relating to the same. He further reported as follows: "All the evidence considered, as well as the additional information I have been able to gather, warrants me in recommending that Julia A. Nutt be paid the following items, which, in my judgment, are sufficiently proved by the evidence, viz.:" He then states various items of property with their value, the total amounting to $256,884.05. This report was transmitted direct by the Secretary of War to Congress, but was not transmitted to or acted upon by the accounting officers of the Treasury. On July 5, 1884, Congress passed an act, 23 Stat. 552, "for the allowance of certain claims reported by the accounting officers of the United States Treasury Department, and for other purposes." This statute enacts: "That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any money in the Treasury not otherwise appropriated, to the several persons in this act named, the several sums mentioned herein, 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 examined and allowed by the proper accounting officers under the provisions of the act of July fourth, eighteen hundred and sixty-four, since January sixth, eighteen hundred and eighty-three, namely:" Then follows a list of the names of the persons, with the amount payable to each, under the head of the several States of Tennessee, Kentucky, West Virginia, Indiana, Pennsylvania, Ohio, Maryland, Missouri, District of Columbia, Colorado, Illinois, Indian Territory, Iowa, Kansas, and, finally, under the head of Mis-

sissippi, as follows: "To Julia A. Nutt, widow and executrix of Haller Nutt, deceased, of Adams County, the sum of $35,556.17." This amount was paid to and accepted by the claimant. The payment and receipt of this sum under the act of July 5, 1884, however, it is contended, does not operate as a full and final discharge of her claim against the government, because it is not within the description contained in the act of "claims examined and allowed by the proper accounting officers under the provisions of the act of July 4, 1864." The right to recover the full amount of the claim, after deducting this payment, is rested by counsel for the claimant upon the act of August 7, 1882, and is based upon the following propositions:

1st. The reference of the claim by Congress, with the consent of the claimant, to the Quartermaster General constituted, under the special provisions of the act of reference, a submission to arbitration, and the Quartermaster General's conclusion or finding was an award pursuant to arbitration, upon which suit can be maintained.

2d. If the reference to the Quartermaster General, and the finding by him, do not constitute an arbitration and award, they are at least the equivalent of an account stated between private individuals.

3d. Even if of itself the finding of the Quartermaster General did not constitute an account stated, it became such by its acceptance by Congress and the appellant.

There is nothing, however, in the language of the act of August 2, 1882, to justify the inference that the finding reported by the Quartermaster General is an award in pursuance of an arbitration. On the contrary, the terms of the act distinctly negative that idea. There is no recital of a mutual submission by the parties of any controversy to an arbitrator. The Quartermaster General was authorized and directed by Congress to examine and adjust the claims in question, but not for the purpose of settling and adjudging any controversy in relation thereto between the United States and the claimant. He was required to report the facts to Congress, not to publish an award to the parties; and the object for which his report

was required was that the claim should be "considered with other claims reported by the Quartermaster General." This report evidently is purely for the information of Congress itself, in order that it, being thus advised, might thereafter deal with the claim as in its judgment should seem best.

On this point the language of this court in *Gordon* v. *United States*, 7 Wall. 188, 195, is applicable. It was there said: "The various acts and resolutions of Congress in this case emanated from a desire to do justice and to obtain the proper information as a basis of action, and were not intended to be submissions to the arbitrament of the accounting officer. They were designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial, not a judicial, capacity."

To the same effect is the case of *Chorpenning* v. *United States*, 94 U. S. 397, 398. It was there said: "The resolution relied upon by the appellant was wholly unilateral. It contained no stipulation of payment, express or implied. Congress, for its own reasons, simply directed an examination and adjustment. It gave no promise, and came under no obligation to the other party, and asked and received none from him. The government and the claimant stood, and continued to stand, wholly independent of each other. The government could at any time before payment recall what it had done, and the claimant was at liberty up to the same period to refuse concurrence and assert *aliunde* his legal rights, if any he had. Prior to that time there could be no vested right and no commitment of either party, not subject to the exercise thereafter of such discretion, affirmative or negative, as might be deemed proper. The case presents the same legal aspect as if it were between individuals. If a merchant should direct his clerk or other agent to investigate and adjust the claim of a third party upon a prescribed basis, and the adjustment was made accordingly, can it be doubted that the merchant might thereafter, because he had come to the conclusion that the claim was

tainted with fraud, or had been already fully paid, or for any other reason, or as a matter of choice, without assigning any reason, decline to recognize what had been done as of any validity, and withdraw the authority under which the proceeding had been taken? The reason of the right would be that there was no binding mutuality of assent, no consideration, and hence no legal obligation resting upon either party."

The same reasons dispose of the second proposition, and show that the report of the Quartermaster General is no more an account stated between the parties than it is an arbitration and award. In order to constitute an account stated between individuals, the statement of the account must be adopted by one party and submitted as correct to the other. But here Congress did not adopt the report of the Quartermaster General as its statement of what was due from the United States; nor was the report submitted to the claimant as a correct statement of indebtedness.

The acceptance by Congress and the appellant, referred to in the third proposition, can only mean the appropriation made by Congress in the act of July 5, 1884, but certainly that cannot be considered an adoption of the report of the Quartermaster General. It does not purport to be an appropriation of a partial payment, as a credit upon a larger sum admitted to be due. Even though it be admitted that the language of the act in its first clause, declaring that the receipt of the money appropriated in each case shall be taken as a full and final discharge of the several claims, does not apply, yet there is no inference that the appropriation actually made was intended to be a recognition of a larger amount in fact due. The presumption is the other way; and the right conclusion is that Congress appropriated all that it meant to acknowledge.

The judgment of the Court of Claims dismissing the petition is therefore

Affirmed.

UNITED STATES *v.* STRONG.

APPEAL FROM THE COURT OF CLAIMS.

No. 1381. Submitted April 2, 1888. — Decided April 16, 1888.

Service, by order of the Secretary of the Navy, by an officer in the Navy as executive officer on a recruiting ship at anchor in port at a navy yard and not in commission for sea service, entitles him to receive pay for sea service. *United States* v. *Symonds*, 120 U. S. 46, affirmed and applied.

THE case is stated in the opinion of the court.

Mr. Attorney General, *Mr. Assistant Attorney General Howard*, and *F. P. Dewees* for appellant.

Mr. Linden Kent for appellee.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The claimant, Edward T. Strong, being a Lieutenant Commander in the United States Navy, by an order of the Secretary of the Navy of February 4, 1886, was directed to report for duty as executive officer on board the United States receiving ship Wabash at Boston, Massachusetts. The order designated his employment as "shore duty." In compliance with the order he reported for such duty on board the ship on February 20, 1886, and continued from that time to discharge the required duties on board such ship until May 11, 1886, when he was relieved from duty thereon. During that period he was allowed and paid only as for shore duty. He claimed to be entitled to receive pay for sea service. Judgment was rendered in his favor by the Court of Claims for $111.20 being the difference between shore pay and sea pay. From this judgment the United States prosecutes the present appeal.

From the findings of facts it appears that the Wabash is a receiving ship built of wood, about thirty-one years old, stationed at the navy yard in Boston for over twelve years past. The vessel is and has been used as a naval recruiting station

whilst at the Boston Navy Yard. There is a roof built over the deck. The ship is connected and communicates with shore by a rope. There is a large boat or scow that plies between the ship and the wharf by means of a crank and connected with the rope. Steam is used only for heating purposes and pumps. All the anchors have never been taken up at the same time. Row boats were also used in going to and from the ship. The Wabash has remained in the same place in which she was anchored since October 28, 1875, and has been and was, during the time of service thereon by the claimant, under the orders and direction of the Secretary of the Navy. During the period of the claimant's service thereon she was not in a safe condition for cruising. She is a sailing and steam vessel, and had on board sails, spars, and tackle; she was capable of being taken out to sea under steam, her machinery and boilers being sufficient for that purpose; she could have been taken out to sea under sail, but in the condition of her boilers and machinery and her sailing apparatus, without repairs, it would not have been, in either case, advisable or safe. The duties of executive officer of the vessel performed by the claimant were similar to those of executive officers on cruising ships. In addition to those he had other duties, which were more exacting and arduous than those on board cruising ships. During the time he was attached to the vessel the claimant was required to have his quarters on board, and was obliged to wear his uniform, to mess there, and was not permitted by the rules of the service to live with his family. The Wabash, during the time of the claimant's service thereon, was not in what was technically known as a commission for sea service. Duty on board a receiving ship since 1843, has not been regarded as sea service by the Navy Department. An order of the Department issued that year declared that "the receiving ships at the several stations are not to be considered vessels in commission for sea service, except, as may sometimes be the case, while going from one port to another."

In the case of *The United States* v. *Symonds*, 120 U. S. 46, 50, it was decided: "That the sea pay given in paragraph 1556 may be earned by services performed under the orders of

the Navy Department in a vessel employed, with authority of law, in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations and requirements that are incident or peculiar to service on the high sea. It is of no consequence in this case that the New Hampshire was not, during the period in question in such condition that she could be safely taken out to sea beyond the main land. She was a training ship, anchored in Narragansett Bay during the whole time covered by the claim of appellee, and was subject to such regulations as would have been enforced had she been put in order and used for purposes of cruising, or as a practice ship at sea. Within the meaning of the law, Symonds, when performing his duties as executive officer of the New Hampshire, was at 'sea.'"

We are unable to find any ground of distinction between the present case and that of Symonds. It results that the claimant was entitled by law to pay for sea service. The judgment of the Court of Claims is accordingly

Affirmed.

ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD COMPANY *v.* CLEVELAND, COLUMBUS, CINCINNATI, AND INDIANAPOLIS RAILWAY COMPANY.

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

No. 192. Argued March 22, 1888. — Decided April 16, 1888.

The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines, and, generally, debts created under special circumstances which make an equity in favor of the unsecured debtor, upon the gross income of the road before a fund arises for the payment of mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take prece-

dence over debts secured by prior and express liens, in the distribution of the proceeds of the sale of the mortgaged property.

The court holds on the proof in this case: (1) that no gross earnings which should have been applied to the payment of the rent due the appellant were diverted to the payment of interest upon bonds of mortgage bondholders represented in this suit and interested in the distribution of the fund; and (2) that the appellant has no equitable right, as against the appellees, to priority of payment out of the fund.

THE decree appealed from in this case was rendered upon an intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, filed October 30, 1882, in a suit then pending in the Circuit Court of the United States for the District of Indiana, wherein Hinman B. Hurlbut was complainant, and the Indianapolis and St. Louis Railroad Company defendant, the object of which suit was to foreclose the second and third mortgages, in which Hurlbut was the surviving trustee, upon the railroad and other property of the defendant. A decree of foreclosure and sale had been rendered therein on May 22, 1882, in pursuance of which the mortgaged premises were sold on July 28, 1882, for the sum of $1,396,000, subject to the outstanding first mortgage, and, at the date of the filing of the intervening petition of the present appellant, they had become by purchase the property of the Indianapolis and St. Louis Railway Company. The proceeds of the sale were under the control of the court for purposes of distribution; and the matter had been referred to a master in chancery to hear evidence in support of the claims of any creditor claiming the right to share in that distribution, and to make report thereon.

The petition alleged, and it so appeared, that by a decree of the Circuit Court of the United States for the District of Indiana, rendered July 26, 1882, in a certain suit in equity, in which said petitioner was complainant and the said Indianapolis and St. Louis Railroad Company and others were defendants, it obtained a decree against said Indianapolis and St. Louis Railroad Company for the payment of the sum of $664,874.70, besides costs, which decree remained unsatisfied and unreversed. This amount, it was claimed by the petitioner, was a lien upon the proceeds of the sale of the Indianapolis and

St. Louis Railroad, prior in equity to that of the bondholders secured by the second and third mortgages.

The indebtedness for which this decree was rendered arose under an agreement entered into between the petitioner and the Indianapolis and St. Louis Railroad Company on September 11, 1867, whereby it was provided that the Indianapolis and St. Louis Railroad Company should manage, operate, and carry on the business of that portion of petitioner's road known as its principal or main line, extending from Terre Haute, in the State of Indiana, to East St. Louis, in the State of Illinois, a distance of 189 miles, and of the Alton branch thereof, extending from Alton Junction, in the State of Illinois, to Alton, in said State, a distance of four miles, for the period of ninety-nine years from the 1st day of June, 1867; that said Indianapolis and St. Louis Railroad Company should pay annually during said term to the petitioner thirty per cent of the gross earnings of the said main line and Alton branch until such gross earnings for the year should amount to $2,000,000, and twenty-five per cent of any excess over $2,000,000 until the whole earnings for the year should amount to $3,000,000, and twenty per cent of any excess over $3,000,000 of gross earnings for such year; and, further, that the said payment should amount in each and every year to at least the sum of $450,000, which amount was agreed upon as a minimum rental, to be paid absolutely without reference to the percentage which it formed of the gross earnings of any year, and without leaving or creating any claim or charge upon the earnings of any future year. The petition further showed that at the time of the execution of the said operating contract, the Indianapolis and St. Louis Railroad was not built, and that the Indianapolis and St. Louis Railroad Company was organized and created for the express purpose of furnishing to the Cleveland, Columbus, Cincinnati and Indianapolis Railroad Company and the Pittsburg, Fort Wayne and Chicago Railway Company a through line to the Mississippi River by means of its connection with the petitioner's road, the St. Louis, Alton and Terre Haute Railroad, under the foregoing contract, and that while the Indianapolis and St. Louis Railroad Company

nominally under that contract was the lessee of the petitioner's road, yet in fact it was leased and operated for the benefit of the other two companies named, who furnished the money to build the said Indianapolis and St. Louis Railroad, and who entered into a contract with the petitioner, guaranteeing performance of said agreement on the part of the Indianapolis and St. Louis Railroad Company, and who had entered into a contract between themselves for the management and operation of the continuous line of railroad from Indianapolis, in the State of Indiana, to East St. Louis, in the State of Illinois, including the Indianapolis and St. Louis Railroad and the petitioner's road. It was further alleged in the petition that the Pennsylvania Railroad Company, which, together with the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, were made defendants to the petition, had succeeded to the rights and obligations under these several contracts and arrangements of the Pittsburg, Fort Wayne and Chicago Railway Company; and that the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company were equal owners of the capital stock of the Indianapolis and St. Louis Railroad Company, and that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company was the holder, substantially, of all the second mortgage bonds of the Indianapolis and St. Louis Railroad Company.

The petition further alleged that the eastern terminus of the St. Louis, Alton and Terre Haute Railroad was the western terminus of the Indianapolis and St. Louis Railroad, the two thus forming a continuous line from Indianapolis to East St. Louis on the Mississippi River, the road of the petitioner being the only outlet for the Indianapolis and St. Louis Railroad west of Terre Haute; that a very large proportion of the earnings of the Indianapolis and St. Louis Railroad Company were derived from business received by it from the petitioner's leased line; and averred that the earnings of the leased road over and above the amount authorized to be retained by the Indianapolis and St. Louis Railroad Company for the purpose of operating the same at all times had been and were the property of the petitioner.

The petitioner further claimed that the rental for the use and occupation of said continuous line constituted a part of the operating expenses of the Indianapolis and St. Louis Railroad Company; that the operating contract was executed before any of the bonds of the Indianapolis and St. Louis Railroad Company were issued and sold; that it was the duty of the Indianapolis and St. Louis Railroad Company to pay all of its operating expenses, including the rental of the petitioner's road, out of its earnings before it paid any interest on said bonds; but that the said Indianapolis and St. Louis Railroad Company, instead of paying its operating expenses as thus defined, diverted and appropriated its earnings to improvements of its property in better equipment and new construction, and to the payment of interest upon its bonds, and neglected and refused to pay the rental accruing to the petitioner for which it had obtained a decree, as above stated. And the petition alleged that during the time the Indianapolis and St. Louis Railroad Company had been in possession of the petitioner's road the amount of such misappropriation and diversion of funds, that should have been applied to the payment of operating expenses, amounted to the sum of $1,000,000.

The petition further showed that on May 1, 1878, the Indianapolis and St. Louis Railroad Company made default in the payment to petitioner of the rental then due under the terms of said contract, and so continued to make default from and including April 1, 1878, up to and including October 26, 1878, during which time it was in possession and use of the leased road, receiving the profits and income thereof, and paid over no part of the gross earnings of said road to the petitioner whatever, but appropriated the whole of the same to its own use, thirty per cent whereof during said time amounted to the sum of $164,052.82, which, it was alleged, was appropriated by the Indianapolis and St. Louis Railroad Company to improvements, betterments, and new construction upon its own line of railroad, in the purchase of rolling stock and equipment, and in the payment of interest upon its bonds.

It was further alleged in the petition that when the Indianapolis and St. Louis Railroad Company took possession of the

leased road in 1867 it received from the petitioner supplies of the value of $91,860.05, which, by the terms of the lease, the lessee contracted and agreed to return or account for to the lessor at the termination of the lease; that said supplies had long since been consumed by the lessee; that by the terms of the decree and sale in the principal cause the lease had been assigned and transferred to the Indianapolis and St. Louis Railroad Company, and it was claimed that said amount was a charge upon the proceeds of the sale of the leased road in the possession of the court for distribution.

The petition therefore prayed for a decree awarding priority in payment in its favor out of the proceeds of the sale of the two sums of $664,874.70 and $91,860.05.

To this petition answers were filed by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, and by the Pennsylvania Railroad Company, in which the allegations of the petition in regard to the diversion of the earnings of the St. Louis, Alton, and Terre Haute Railroad Company to the purposes of the Indianapolis and St. Louis Railroad were denied, as well as the general equity set up by the petitioner.

On June 27, 1884, the cause having been fully heard upon the petition, and the answers and proofs, a final decree was rendered awarding to the petitioner an amount found due to it for rental accrued while the road was in the possession of the receiver appointed under the foreclosure proceedings, and directing payment thereof; but so far as the petition sought to establish a claim for rental prior to the date when the receiver took possession of the property, as against the proceeds arising from its sale, and so far as it sought to recover the value of the supplies turned over to the Indianapolis and St. Louis Railroad Company in 1867, at the time of the execution of the lease, the petition was dismissed. It was from that decree that this appeal was prosecuted.

Mr. John M. Butler, with whom was *Mr. Joseph E. McDonald* on the brief, for appellants.

I. The St. Louis, Alton, and Terre Haute Railroad Company is entitled to payment of the amount equitably due for the use

of its railroad and franchises by the Indianapolis and St. Louis Railroad Company, as upon *quantum meruit*, regardless of the lease of September 11, 1867. *Thomas* v. *Brownville &c. Railroad*, 109 U. S. 522, 526; *Gardner* v. *Butler*, 30 N. J. Eq. (3 Stewart), 702, 724; *Wardell* v. *Union Pacific Railroad*, 4 Dillon, 330, 339; *S. C.* on appeal, 103 U. S. 651, 656; *Pennsylvania Co.* v. *St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 309, 318.

II. The amount of compensation for the use of the railroad and franchises of the St. Louis, Alton and Terre Haute Railroad Company by the Indianapolis and St. Louis Railroad Company fixed by the lease of September 11, 1867, to wit: $450,000 per annum, in monthly payments of $37,500, is no more than a just and equitable compensation and should be allowed, as upon *quantum meruit*, regardless of the lease.

III. The St. Louis, Alton and Terre Haute Railroad Company is entitled to payment, out of the proceeds of the sale of the railroad and franchises of the Indianapolis and St. Louis Railroad Company, of the full amount of the $664,874.70 decreed due to it from the Indianapolis and St. Louis Railroad Company by the decree of July 26, 1882, together with interest thereon from date of said decree, before any distribution of said proceeds of sale is made upon the second and third mortgage bonds, in preference to payment upon said second and third mortgage bonds.

First. Because the amount justly due for the use by the Indianapolis and St. Louis Railroad Company of the railroad and franchises of the St. Louis, Alton and Terre Haute Railroad Company is a part of the operating expenses of the Indianapolis and St. Louis Railroad Company. *Fosdick* v. *Schall*, 99 U. S. 235, 252; *Union Pacific Railroad* v. *United States*, 99 U. S. 402, 422; *Union Trust Co.* v. *Walker*, 107 U. S. 596; *Union Trust Co.* v. *Souther*, 107 U. S. 591, 595; *Miltenberger* v. *Logansport Railway*, 106 U. S. 286, 313; *Sage* v. *Central Railroad Co.*, 99 U. S. 334, 336; *Burnham* v. *Bowen*, 111 U. S. 776. These authorities clearly decide the following points:

1. That all earnings are applicable, first, to operating ex-

penses until they are fully paid, and that there are no net earnings applicable to bond interest or improvement of the mortgaged estate while operating expenses remain unpaid.

2. That payment for the use of *rented track* is an operating expense, the same as payment for the use of rented cars, and payment for fuel, supplies and services of operatives.

3. That operating expenses incurred in keeping a railroad a "going concern," or in any other way tending to preserve the value of the mortgaged estate, are entitled to payment out of proceeds of sale in preference to mortgage bonds, even although the gross earnings are insufficient to pay all the operating expenses.

Second. The amount due to the St. Louis, Alton and Terre Haute Railroad Company for the use of its railroad, equipment and franchises by the Indianapolis and St. Louis Railroad Company should be paid out of the proceeds of sale in preference to the mortgage bonds, because it is a debt due to a connecting line. *Miltenberger* v. *Logansport Railway*, above cited; *Union Trust Co.* v. *Souther*, above cited; *Burnham* v. *Bowen*, above cited; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 458.

Third. The amount equitably due to the St. Louis, Alton and Terre Haute Railroad Company for the use of its railroad, equipment and franchises by the Indianapolis and St. Louis Railroad Company ought to be paid out of the proceeds of sale in preference to payment of the mortgage bonds, because gross earnings, out of which this debt ought to have been paid, have been diverted to payment of bond interest, and to payment for new construction and improvements to the railroad of the Indianapolis and St. Louis Railroad Company. *Fosdick* v. *Schall*, 99 U. S. 255; *Miltenberger* v. *Logansport Railway*, 106 U. S. 311; *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 457; *Burnham* v. *Bowen*, 111 U. S. 780; *Pennsylvania Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290, 317, 318. If the law now firmly established by these decisions is to remain the law, these diverted gross earnings must be restored out of the proceeds of the sale, so far as may be necessary to fully pay the debts that ought to have been paid out

of the gross earnings so diverted. The St. Louis, Alton and Terre Haute Railroad Company asks payment out of proceeds of sale of the debt decreed due it by the decree of July 26, 1882, for the use of its railroad and equipment by the Indianapolis and St. Louis Railroad Company:

1. Because this debt is an operating expense of the Indianapolis and St. Louis Railroad Company, payable out of the gross earnings of the entire line from Indianapolis to St. Louis, — the said gross earnings being sufficient to pay all operating expenses, including this debt as an operating expense.

2. Because this debt is a debt due to a connecting line, and, in common with all other dues to connecting lines, is an operating expense of the Indianapolis and St. Louis Railroad Company.

3. Because gross earnings received by the Indianapolis and St. Louis Railroad Company have been by it diverted to the benefit of its bondholders to such amounts as would have been far more than sufficient to have paid this debt.

IV. The Cleveland, Columbus, Cincinnati & Indianapolis Railway Co., in claiming the application of all the remaining proceeds of sale to the payment of the second and third mortgage bonds in preference to the payment of the debt due to the St. Louis, Alton & Terre Haute Railroad Co. for the use of its railroad and equipment, does not stand before a court of equity in the position of an ordinary bondholder. The peculiar relations existing between the Cleveland, Columbus &c. Railroad Co. and the Indianapolis and St. Louis Railroad Co. greatly strengthened the equity in favor of the St. Louis, Alton & Terre Haute Railroad Co. in its claim for preference in payment over the second and third mortgage bonds. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86.

V. The St. Louis, Alton & Terre Haute Railroad Co. is entitled to payment of $164,052.82, together with interest thereon from October 26, 1878, — the same being part of the aggregate amount decreed due by the decree of July 26, 1882, — out of the proceeds of sale of the railroad and property of the Indianapolis and St. Louis Railroad Company, because the said $164,052.82, and interest thereon, *is trust fund money*

belonging to the St. Louis, Alton & Terre Haute Railroad Co., collected, withheld and appropriated to its own use and benefit by the Indianapolis and St. Louis Railroad Company.

As against the Indianapolis and St. Louis Railroad Company the decree of July 26, 1882, stands affirmed and remains in full force. As between the St. Louis, Alton & Terre Haute Railroad Company and the Indianapolis and St. Louis Railroad Company the lease of September 11, 1867, stands as a valid contract. *Penn. Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 318.

That rents definitely ascertained and specifically reserved by lease never become the property of the lessee, but vest directly in the lessor, and are simply held *in trust* by the lessee for the lessor, seems to be a well-established principle in law. *Moulton* v. *Robinson*, 7 Foster (N. H.) 551; *Hatch* v. *Hart*, 40 N. H. 91; *Daniels* v. *Brown*, 34 N. H. 454; *S. C.* 69 Am. Dec. 505; *Hart* v. *Baker*, 29 Ind. 200; *Lindley* v. *Kelley*, 42 Ind. 294; *Parker* v. *Garrison*, 61 Ill. 250, 254.

Mr. Stevenson Burke and *Mr. John T. Dye* for appellees.

Mr. Justice Matthews delivered the opinion of the court.

At the time of the execution of the lease in 1867 of the St. Louis, Alton and Terre Haute Railroad to the Indianapolis and St. Louis Railroad Company, the railroad of the latter company was not in existence. It was subsequently constructed in order to form the connection which would give to the parties in interest the desired through line from Indianapolis to St. Louis. The capital stock of the Indianapolis and St. Louis Railroad Company was owned substantially by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company in equal parts. A portion of the funds necessary to construct and equip the road was represented by bonds secured by mortgages. Of these there were three; the first mortgage was for $2,000,000, the second for $1,000,000, and the third for $500,000. The first mortgage bonds, prior to the foreclosure and sale, had

been sold in the market, and were outstanding. The sale was made subject to the continued incumbrance of that mortgage, and of the bonds secured thereby. The holders of these bonds have, therefore, no interest in this controversy.

The second and third mortgage bonds were originally taken to account by the two companies interested in the construction of the road, but, prior to the foreclosure and sale, had become substantially the property of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, that company having acquired the entire interest of the Pennsylvania Railroad Company. As the owner of these bonds, the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company claims to be entitled to the whole amount of the proceeds of the sale of the road under the foreclosure, and is the only party in interest adverse to the petitioner.

The default in the payment of interest on the second and third mortgages dates from January 1, 1878. The decree of foreclosure finds the amount of interest in arrears on May 2, 1882, on the second mortgage bonds, to be $291,745.97, and the aggregate sum due on account of said mortgage, principal and interest, to be $1,197,745.97, with interest from May 2, 1882. The amount found due by the same decree, on account of the bonds secured by the third mortgage, including interest from January 1, 1878, is $699,164.76. The whole amount found due by the decree, including both sums, is $1,896,910.73, which is more than the amount of the proceeds of the sale of the road, which were $1,396,000.

Upon the bill of Hinman B. Hurlbut, as trustee, for the foreclosure and sale of the Indianapolis and St. Louis Railroad property, a receiver was appointed, and it was ordered that the St. Louis, Alton and Terre Haute Railroad Company should be entitled to require the payment of thirty per cent of the gross earning of its railroad to said lessor, according to the order of the court theretofore made and still in force in the suit of the St. Louis, Alton and Terre Haute Railroad Company against the Indianapolis and St. Louis Railroad Company, with the terms of which order the receiver was directed to comply. The order appointing the receiver also expressly reserved to

the court the right and power to make such orders and decrees touching the payment of the debts of the Indianapolis and St. Louis Railroad Company incurred in the management and operation of its railroad prior to the appointment of the receiver, as might be equitable and just. The decree of foreclosure and sale also contained a clause reserving to the court the right, by subsequent order or orders, to distribute the proceeds of the sale of the railroad and property connected therewith, and to make such further order and decree in regard to the distribution of the proceeds of sale as might to the court seem equitable and just; and a reference was made to the master to hear evidence in support of all claims or indebtedness in behalf of any creditor of the defendant company, whether secured or not.

The Indianapolis and St. Louis Railroad Company, from the date of the lease in 1867, continued to pay to the St. Louis, Alton and Terre Haute Railroad Company the rental reserved by the terms of the lease, viz., thirty per cent of the gross earnings of the leased road in each year until April 1, 1878. Prior to that time there had been no default in respect to the payment of the full amount of the rental as it accrued; the lessee ceased paying rent from that date.

On October 25, 1878, the St. Louis, Alton and Terre Haute Railroad Company filed its bill in equity in the Circuit Court of the United States for Indiana against the Indianapolis and St. Louis Railroad Company, to which also the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pennsylvania Railroad Company were made parties defendant. The object of that bill was specifically to enforce the performance of the covenants contained in the lease on the part of the lessee and of the other defendants as guarantors. It was in that suit that the order was made November 30, 1878, requiring the Indianapolis and St. Louis Railroad Company to pay into court, on account of the rental due the lessor, monthly, on the 15th day of each month, thirty per centum of the gross earnings for the preceding month of the leased road, calculating the gross earnings which had accrued since October 26, 1878.

The final decree of the Circuit Court in that cause declared that the lease and operating contract of September 11, 1867, was a valid obligation upon all the parties thereto, and established the amount of the indebtedness of the Indianapolis and St. Louis Railroad Company on account of the minimum rent reserved by said lease to July 1, 1882, at the sum of $541,358.23 principal, and $123,516.47 interest, making in all the sum of $664,874.70. It also found that thirty per cent of the gross earnings of the leased line collected and received by the Indianapolis and St. Louis Railroad Company, and withheld by it from April 1, 1878, until October 26, 1878, amounted to $164,052.82, which was part of said aggregate amount found due. The decree further declared the liability of the Pennsylvania Railroad Company and of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company as guarantors for their proportion of the said sum, and awarded payment accordingly.

From this decree appeals were taken and prosecuted to this court by the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the judgment in which was rendered at October Term, 1885, and is reported in 118 U. S. 290. It was there decided that the lease of 1867 was void for want of power on the part of the Indianapolis and St. Louis Railroad Company to enter into it, and that the guaranty of performance executed by the other defendant companies by reason thereof was also void. The decree of the Circuit Court was accordingly reversed, and the cause remanded with directions to dismiss the bill as to the Pennsylvania Railroad Company and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company; but that part of the decree which required the Indianapolis and St. Louis Railroad Company to pay the amount found due as rent was left standing, as no appeal from it had been prosecuted by the Indianapolis and St. Louis Railroad Company. Pending that litigation, the intervening petition of the St. Louis, Alton and Terre Haute Railroad Company, now under consideration, was filed in the foreclosure suit, in which Hurlbut, as trustee, was complainant.

The propositions on which counsel for the appellant bases its right to the relief prayed for in the intervening petition, and which was denied by the decree, are stated by it as follows:

First. That the petitioner is in equity entitled to just and fair compensation for the use of its railroad, equipment, and franchises as upon *quantum meruit*, even if the lease is entirely disregarded.

Second. That the minimum rent of $450,000 per annum, in monthly payments of $37,500, is no more than just, fair, and equitable compensation for the use of the leased line upon *quantum meruit*.

Third. That the petitioner is entitled to payment of the $664,874.70 decreed due it by the decree of July 20, 1882, with interest thereon, out of the proceeds of the sale of the railroad and property of the Indianapolis and St. Louis Railroad Company in preference to payment of the mortgage bonds:

1. Because it is an unpaid *operating expense of the Indianapolis and St. Louis Railroad Company*, there having been gross earnings abundant to pay all operating expenses, including rent of the leased line.

2. Because it is a debt justly due to the petitioner *as a connecting line.*

3. Because gross earnings lawfully applicable *only* to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the petitioner in payment of bond interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt now due to the petitioner many times.

Fourth. That the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, in resisting payment of the debt due the petitioner in preference to the payment of the second and third mortgage bonds, does not stand before a court of equity in the position of simply an ordinary bondholder; and that the peculiar relations existing between the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Indianapolis and St. Louis Railroad Company, as disclosed by this litigation, greatly strengthen the

equity in favor of the petitioner in its claim for preference in payment over the mortgage bonds.

Fifth. That the petitioner is entitled to payment of $164,052.82, with interest thereon from October 26, 1882, out of the proceeds of sale, because that amount is thirty per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to October 26, 1878, and *is trust money reserved by the lease* belonging to the petitioner, collected, withheld, and wrongfully appropriated to its own use and benefit by the Indianapolis and St. Louis Railroad Company.

It may be admitted that the petitioner is entitled in equity to a just and fair compensation for the use of its railroad by the Indianapolis and St. Louis Railroad Company, without regard to the lease, as between it and the lessee, and also that the minimum rent of $450,000 per annum, in monthly payments of $37,500, is no more than that just and fair compensation that the lessor company would be entitled to receive for the use of its road upon a *quantum meruit*. As between the petitioner and the Indianapolis and St. Louis Railroad Company, the amount of the indebtedness on that account is conclusively established by the decree of July 26, 1882, which, as between these parties, stands unreversed and unsatisfied.

A different question, however, arises as between the petitioner and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, as the owner of the mortgage bonds, for the satisfaction of which the Indianapolis and St. Louis Railroad has been sold. It remains, as between these parties, for the petitioner to establish that the debt to it of the Indianapolis and St. Louis Railroad Company, on account of this use and occupation, is a prior lien and charge upon the proceeds of the sale of the Indianapolis and St. Louis Railroad, entitled to preference over that of the second and third mortgages. Among the reasons urged in support of this preference are these, — because the arrearage is an unpaid operating expense of the Indianapolis and St. Louis Railroad Company; because it is a debt due to the petitioner as a connecting line; and because it consists of a portion of the gross earnings earned on the track of the leased line received by the Indianapolis and

St. Louis Railroad Company, and held by it as trust money in equity belonging to the petitioner. This last reason, as formally presented, is limited to $164,052.82, being thirty per cent of the gross earnings earned on the track of the leased line from April 1, 1878, to October 26, 1878, but is applicable as well to all other amounts received by the lessee of the gross earnings of the leased line which have not been accounted for.

But none of these reasons, standing by themselves, are sufficient. It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on the mortgage bonds. But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus;* and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens.

There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are to be found in *Fosdick* v. *Schall*, 99 U. S. 235; *Miltenberger* v. *Logansport Railway Co.*, 106 U. S. 286; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Co.* v. *Illinois Midland Railway Co.*, 117 U. S. 434; *Dow* v. *Memphis and Little Rock Railroad Co.*, 124 U. S. 652; *Sage* v. *Memphis and Little Rock Railroad Co.*, ante, 361; and *Union Trust Co.* v. *Morrison*, ante, 591. The rule governing in all these cases was stated by Chief Justice Waite in *Burnham* v. *Bowen*, 111 U. S. 776, 783, as follows: "That if current earnings are used for the benefit of

mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all.

Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis and St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds, it must still be shown, to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment to the use and benefit of the mortgage bondholders. Counsel for the petitioner undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such a diversion and misappropriation have taken place to its injury and to the advantage and benefit of the bondholders claiming the fund in court for distribution.

This diversion and misappropriation are alleged to have occurred in two ways: 1st, by the payment of the interest on the mortgage bonds out of earnings which should have been paid to the petitioner on account of rent due to it as an operating expense; and, 2d, by the application of earnings to permanent improvements and betterments of the Indianapolis and St. Louis Railroad property, which have increased the value of that property as a mortgage security; an increased value which, it may be very fairly presumed, is represented in the proceeds of its sale.

The fact in issue, it is claimed, is shown by an exhibit, which in tabular form contains a statement of the earnings, expenses, rental, and interest on bonds of the Indianapolis and St. Louis Railroad Company, including the leased line as one of its divisions, from the date of the commencement of operations under the lease in 1867 to May 23, 1882. That statement shows: Gross earnings, $26,868,252.31; operating ex-

penses, including taxes, $19,417,078.26; leaving as net earnings, $7,451,174.05. During the same period the amount of rental paid for the leased lines was $6,464,869.19, and during the same period interest paid on bonds, $2,234,396.62, showing as the result of the operations for the entire period a deficit of $1,248,091.76. It thus appears that the payments made on account of the various items mentioned exceed by that sum the entire gross earnings received by the lessee from its own and the leased line. But inasmuch as during this period $2,234,396.62 out of the gross earnings were paid on account of interest on bonds, being $986,304.86 more than the entire apparent deficit, the inference is drawn that the deficit has arisen in consequence of the payment of interest on bonds, more than sufficient, if they had been so appropriated, to have paid the entire rental including the arrearage now due. This, it is claimed, establishes the fact to be proved, that gross earnings, which should have been applied to the payment of rent, have been diverted by the lessee to the payment of interest on bonds.

This statement, however, is deceptive. From the beginning of operations under the lease in 1867 until April 1, 1878, the Indianapolis and St. Louis Railroad Company paid in full, as it accrued, the whole amount of the rental called for by the lease. During that period, the lessee, being in no default at any time on account of rent, had a legal right to appropriate any surplus of its gross earnings to the payment of interest on bonds, or for the improvement and additional equipment of its road. It was not bound to accumulate, out of the surplus of gross earnings, prior to 1878, a fund to meet possible contingencies in respect to rent that might arise after that date. The petitioner, therefore, has no right to complain of any appropriation of the earnings of the leased line during the period in which it received the full amount due to it.

If now we turn to a statement of a similar account, beginning in 1878, when the default in the payment of interest began, to the close of the period, May 23, 1882, we are furnished with the following figures: Gross earnings, $7,443,894.43; operating expenses, including taxes, $6,253,819.53; leav-

ing net earnings, $1,190,074.90. During the same period there was paid on account of rent of the leased line to the petitioner $1,450,336.67, making a deficit of $260,261.77, without reference to anything paid during that period on account of interest on bonds. That is to say, during the period in which the arrearage on account of rent accrued, there was paid out on account of rent $260,261.77 in excess of the entire earnings of the whole line, after deducting the ordinary expenses of operation. During the same period there was paid on account of interest on bonds the sum of $490,105 making the entire deficit during that period $750,366.77. But it is admitted that during the same period the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pennsylvania Railroad Company made advances in cash to the Indianapolis and St. Louis Railroad Company to the amount of $510,306.24, a sum greater than the whole amount of the interest paid during the same period on bonds. Even if we should treat the payment on account of interest on bonds during that period of $490,105 as taken from the earnings, which should have been applied to the payment of the rental, it is to be considered that the payment was made on account of the interest accruing during that period on the first mortgage bonds alone. No interest whatever was paid from January 1, 1878, on account of the interest accruing on the second and third mortgage bonds. It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds ; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of the rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds, who have actually received the money to which it claims to be equitably entitled.

It is further insisted, however, on behalf of the petitioner, that there has been a diversion of earnings to its detriment by payments made for additions and improvements to the

mortgaged property during the years 1878, 1879, 1880, and 1881, amounting to $256,501.05; but if we exclude from the account the payments made during that period on account of interest on the first mortgage bonds, as should be done, the amount of these betterments of the mortgage security is much more than made up by the cash advances during that period made by the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Pennsylvania Railroad Company, which, as we have stated, were $510,306.24.

A special equity is urged as to the unpaid rent of the leased line for the seven months from April 1 to November 1, 1878, during which nothing whatever was paid on that account, amounting, as found by the decree of July 26, 1882, to $164,052.82, on the ground that the gross earnings of the leased line during that period were received by the Indianapolis and St. Louis Railroad Company clothed with a trust, and were diverted from their legitimate application to the benefit of the bondholders. As we have already stated, no equity can arise upon the alleged breach of trust unless the second and third mortgage bondholders participated in it, or have been benefited by it. The alleged diversion of this amount is covered by the statements that have been already adverted to. It consists in payments on account of interest on the first mortgage bonds, which must be excluded from the account for reasons already given, and payments made on account of new construction, additions, new equipment, and improvements, more than covered by the cash advances made by the owners of the second and third mortgage bonds. An effort is made in the argument to swell the amount chargeable to permanent improvements by pointing out that from January 1, 1881, to May 23, 1882, more than all of the gross earnings of the entire line were charged up to the operating expense account, without counting anything for rent of the leased line as an operating expense. The witness who tabulated the schedules in which these statements appear stated that, during the months covered by these charges for excessive operating expenses, large improvements were being made to the property, but no details were brought out on the exami-

nation, and the witness qualified his statement by saying that he did not mean to be understood that the improvements were more than such as were necessary to the proper repair and restoration of the property. We cannot assume by way of conjecture or mere inference that the items referred to were not properly charged as operating expenses. On this branch of the case we conclude that the petitioner has failed to establish any diversion and misappropriation of the earnings applicable to the payment of rent of the leased line to entitle him in equity to charge the fund in court for the payment of the arrearage in preference to the second and third mortgage bondholders.

Independently of the equity growing out of the alleged diversion and misappropriation of earnings properly applicable to the payment of rent, it is claimed on behalf of the petitioner that it has an equitable right to a priority of payment out of the fund in court growing out of the peculiar relations existing between it and the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company and the Indianapolis and St. Louis Railroad Company, as disclosed in the transactions out of which this litigation has grown. It is alleged, in substance, that the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company is the real debtor for this arrearage of rent; that it with the Pennsylvania Railroad Company were in fact the owners of the Indianapolis and St. Louis Railroad, which was built with their money, and for the promotion of their interests, in order, by means of the lease of the petitioner's road, to create a through line from Indianapolis to St. Louis for business between the East and the West, the establishment and operation of which have contributed largely to swell the business upon their own previously existing lines. Having thus induced the petitioner to enter into the arrangement for their benefit, and having secured and actually enjoyed its advantages and profits, the argument now is that good faith, by an equitable estoppel, forbids the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company from now asserting a claim which will deprive the petitioner of the compensation agreed to be paid

for the use of its road. But this is the very equity which the petitioner sought to enforce by its bill filed October 25, 1878, in which it sought to obtain a decree against its lessee and the guarantors in the lease for the specific performance of the covenant to pay the reserved rent. In that bill reliance was placed, it is true, upon the express covenants which were held finally to be void; but every equitable ground upon the existing facts was invoked in support of the validity of the covenants. The facts supposed to constitute the equity now insisted on were urged then as sufficient to support the obligation based upon the terms of the operating contract and lease. If this equity was not sufficient then to sustain an express promise to pay the rent, it certainly is not strong enough now to justify a decree for its payment standing by itself. To enforce the present claim of the petitioner on this ground would be simply to reinstate as valid the covenants of the lease and guaranty which between the same parties have already been finally decided to be void.

It has already been stated that no default occurred in the payment of the rent by the Indianapolis and St. Louis Railroad Company until April 1, 1878. After that default occurred, no step was taken by the petitioner by any legal proceeding to forfeit the lease and re-possess itself of its road. Nothing was done until the filing of its bill, October 25, 1878, to compel the specific performance of the covenants of the lease and operating contract, when the order was made requiring payment to it, pending the proceeding, of thirty per cent of the gross earnings of its road; and an analysis of the tabular statements, already referred to as in evidence, shows that the arrearage of rent, for which payment is now sought, can be recovered only upon the basis of the minimum rental fixed by the lease by the enforcement of the covenants of guaranty declared to be void.

The minimum fixed by the lease for the rental of the leased line from June 1, 1867, to May 23, 1882, at $450,000 per annum, is $6,750,000; thirty per cent of the gross earnings of the leased road for the same period is $6,031,465.61, being less than the guaranteed rent by $718,534.39. In point of fact, the

condition of the petitioner, upon the facts as they now stand, without payment of any arrearage of rent, is demonstrably better than it would have been if no lease had been made, and the road had been operated by its own proprietors, independently but as part of a connected through line. This is shown by the fact that the lessor received as rent during the whole period of the lease $6,464,869.19, while the total net earnings of the leased property during the same period are shown to have been only $5,290,783.02. Presumably these net earnings are as large as they would have been if the road had been operated by its own proprietor. The volume of its business, and the corresponding amount of its gross receipts, were certainly swelled beyond what they would have been if the Indianapolis and St. Louis Railroad had not been built, or had not been operated in connection with it. It follows, therefore, upon the basis of the figures shown in the proofs, that the lessor has actually received, since the lease was made, in excess of the entire net earnings of the leased property, $1,174,086.17. Indeed, it is further shown, that during the period commencing with 1878, when the default began, the net earnings of the entire line, including the Indianapolis and St. Louis Railroad, as well as the leased road, amounted to $1,190,074.90, and that during the same period the lessor received on account of rent $1,450,336.67, being in excess of the net earnings of the two roads.

Upon these facts, we are unable to discover any equitable ground for the relief prayed for by the petitioner.

The decree of the Circuit Court is, therefore, affirmed.

DOW *v.* BEIDELMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 1001. Submitted November 21, 1887. — Decided April 16, 1888.

A statute of a State, fixing at three cents a mile the maximum fare that any railroad corporation may take for carrying a passenger within the State, is not, as applied to a corporation reorganized by the purchasers at the

Statement of the Case.

sale of a railroad under a decree of foreclosure, shown to be a taking of property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, by evidence that under that restriction, and with its existing traffic, its net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of the bonded debt, without any proof of the cost of the bonded debt, or the amount of the capital stock of the reorganized corporation, or the price paid by this corporation for the road.

A statute of a State, classifying its railroad corporations by the length of their lines, and fixing a different limit of the rate of passenger fares in each class, does not deny to any corporation the equal protection of the laws, within the Fourteenth Amendment to the Constitution of the United States.

The original action was brought in an inferior court of the State of Arkansas by Beidelman against Dow, Matthews and Moran, Trustees, alleging that the defendants were the legal owners and in possession of the Memphis and Little Rock Railroad, in that State, more than a hundred miles long, and charged and took of the plaintiff more than three cents a mile for a ticket between two stations twenty-three miles apart on that road, in violation of a statute of the State of April 4, 1887, the material provisions of which were as follows:

Sec. 1. "The maximum sum which any corporation, officer of court, trustee, person or association of persons, operating a line of railroad in this state, shall be authorized to charge and collect for carrying each passenger over such line within this state, in the manner known as first class passage is hereby fixed at the following named rates: On lines of railroad fifteen miles or less in length, eight cents per mile. On lines over fifteen miles in length, and less than seventy-five miles in length, five cents. On lines over seventy-five miles in length, three cents per mile."

Sec. 3. "Any of the persons or corporations mentioned in section one that shall charge, demand, take or receive, from any person or persons aforesaid any greater compensation for the transportation of passengers than is in this act allowed or prescribed, shall forfeit or pay for every such offence any sum not less than fifty dollars nor more than three hundred dollars, and costs of suit, including a reasonable attorney's fee, to be

taxed by the court where the same is heard, on original action, by appeal or otherwise, to be recovered in a suit at law by the party aggrieved in any court of competent jurisdiction." Acts of 1887, p. 227.

At the trial before the court, a jury having been waived, the parties agreed upon the following statement of facts:

"The Memphis and Little Rock Railroad Company was incorporated under the act of the General Assembly of the State of Arkansas, approved January 11, 1853, which act is taken as a part hereof. See acts of 1852, p. 130.

"On May 1, 1860, it mortgaged its property to Samuel Tate, Robert C. Brinckley, and George C. Watkins, trustees. On March 1, 1871, it executed a second mortgage on its property and charter to Henry F. Vail, as trustee. On March 17, 1873, this second mortgage was foreclosed by sale under the power, and the purchasers, on November 17, 1873, organized a new company under the charter, which they called the Memphis and Little Rock Railway Company.

"On December 1, 1873, the Memphis and Little Rock Railway Company mortgaged its charter and property to certain trustees. This mortgage not being paid at maturity, the trustees thereunder brought suit in the United States Circuit Court for the Eastern District of Arkansas for its foreclosure, and the trustees in the mortgage of May 1, 1860, were, on their own application, made parties complainant; and on November 21, 1876, a final decree was entered in the cause, directing the foreclosure of both mortgages and a sale for their satisfaction.

"On April 27, 1877, the mortgaged property was sold under the decree, including the charter, and the purchasers at the sale organized under the charter, and called the new company the Memphis and Little Rock Railroad Company, as reorganized. On May 1 and 2, 1877, the said last-named company issued bonds and executed to the defendants its mortgage upon its property and charter, and, default having been made in their payment, the defendants are in possession as trustees for the mortgage bondholders.

"The legal right of the successive companies to organize under the old charter is not admitted.

Statement of the Case.

"The railroad was built, prior to 1868, from Memphis to Madison and from Little Rock to Du Vall's Bluff. It was built through the intervening distance in 1869. The expense of constructing the Memphis and Little Rock Railroad was $4,000,000, and the railroad company has a bonded indebtedness of $2,850,000, bearing interest at eight per cent per annum; and the defendants are in possession as the representatives of the mortgage bondholders, default having been made in the payment of interest on the bonds. The net income of the road for the year 1886 was $162,000, earned principally from passenger traffic, the charge for transportation having been five cents per mile; and this has been about the average for recent past years. With the same traffic that the road has now, and charging for transportation at the rate of three cents per mile, the net income will only be $58,000, which will pay less than one and one-half per cent on the cost of the road, and only a little over two per cent on its bonded indebtedness. The defendants do not anticipate any increase of traffic on account of the reduction, for the reason that the St. Louis, Iron Mountain and Southern Railway, from which the Memphis and Little Rock Railroad derives nearly all of its through business, is building a parallel branch from Bald Knob in the State of Arkansas to the city of Memphis, and, being a hostile and rival line to that of these defendants, will carry over that branch the through passengers who would otherwise go over the road of the defendants. The most profitable traffic has been the through traffic, and the defendants anticipate a great diminution in their present traffic when said branch is completed, and it will, to all appearances, be completed during the summer of 1887.

"The length of the defendant's road is one hundred and thirty-five miles. Forty miles of that distance, from Madison to Memphis, is through a swamp in which there are virtually no inhabitants and which is subject to overflow.

"Either party may refer to the statements in reference to the railroads in Arkansas contained in Poor's Railroad Manual for 1886, and the same shall be taken as evidence of the facts therein stated.

"The cost of constructing the Batesville and Brinkley Railroad from Brinkley to Newport, a distance of sixty miles, has been $375,000. Its rate of transportation before the act of 1887 was five cents per mile. Its length is sixty miles. The Arkansas and Louisiana Railroad is twenty-five miles long and its cost is $180,000.

"It is further agreed that in Arkansas money is now and has been for twenty years past lending currently at interest from six to ten per cent per annum."

Some statements in Poor's Railroad Manual for 1886, were introduced in evidence under the agreed statement of facts, and are copied in the margin.[1] No other evidence was introduced. The court, therefore, found the facts to be as above agreed and as shown in the extracts from Poor's Manual.

The defendants asked the court to make the following declarations of law:

"First. The act of the General Assembly of the State of Arkansas, approved April 4, 1887, in so far as it relates to the present proceeding, is unconstitutional, null and void, because, under the guise of regulating charges for the carriage of passengers on railroads, it amounts virtually to the confiscation of the property of the railroad in the hands of said defendants,

---

[1] Net earnings of Batesville and Brinkley Railroad for 1885, $29,163.25.

Net earnings of the Arkansas and Louisiana Railroad for 1855, $34,429.88.

Length of St. Louis, Iron Mountain and Southern Railway, 923 miles. Mortgaged for $35,564,352.61; 5, 7, and 8 per cent. Net earnings, $3,619,416.63. Rate of charges has been three cents per mile.

Length of the Little Rock and Fort Smith Railroad, 165 miles. Mortgaged for $2,379,500; 7 per cent. Net profits, $225,910.31. Rate of charges has been five cents per mile.

Length of the Little Rock, Mississippi River and Texas Railway, 162 miles. Mortgaged for $2,977,500; 7 per cent. Net earnings, $99,604.44. Rate of charges has been five cents per mile.

Length of the St. Louis, Arkansas and Texas Railway, 735.21 miles. Mortgaged for $18,375,000; 6 per cent. Net earnings, $67,644.30.

Length of St. Louis and San Francisco Railroad, 814.88 miles. Mortgaged for $26,026,000. Net earnings, $2,573,772.70.

Length of Kansas City, Springfield and Memphis Railway, 281.94 miles. Mortgaged for $7,800,000; 6 per cent. Net earnings, $365,160.88.

Citations for Plaintiff in Error.

and is an unreasonable, unjust, and oppressive taking of private property for public uses without compensation in violation of the Constitution of the State of Arkansas and that of the United States.

"Second. The said act of the General Assembly is unconstitutional, because it is special legislation and makes arbitrary discriminations between different railroads, not based either upon their value, their earnings, or other valid grounds, but based simply on the respective lengths of the several railroads."

The court refused to make either of those declarations of law, and gave judgment for the plaintiff for a penalty of fifty dollars and a counsel fee of twenty-five dollars. The defendants excepted to the refusal, and appealed to the Supreme Court of the State, which affirmed the judgment.

The defendants sued out this writ of error, and assigned for error that the court erred in holding that the statute of Arkansas of April 4, 1887, was not repugnant to the clause of the Fourteenth Amendment to the Constitution of the United States which provides that no State shall deprive any person of life, liberty or property, without due process of law; and in holding that that statute was not repugnant to the clause of that Amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Mr. U. M. Rose for plaintiff in error cited: Constitution of Arkansas, 1874, Art. xii, § 6; Art. xix, § 13; *Railroad Commission Cases*, 116 U. S. 307, 331; *Ex parte Koehler*, 23 Fed. Rep. 529; Cooley Const. Lim. 578; *Miller* v. *New York & Erie Railroad Co.*, 21 Barb. 513, 519; 2 Morawetz Corp. § 1075; *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *United States* v. *Cruikshank*, 92 U. S. 542, 555; *Missouri* v. *Lewis*, 101 U. S. 22, 31; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368; *Chicago, Burlington &c. Railroad* v. *Quincy*, 94 U. S. 155; *Van Riper* v. *Parsons*, 40 N. J. L. 1; *Freeholders* v. *Stevenson*, 46 N. J. L. 173; *Gibbs* v. *Morgan*, 39 N. J. Eq. 126; *Ernst* v. *Morgan*, 39 N. J. Eq. 391; *Woodard* v. *Brien*, 14 Lea, 520; *Smith* v. *Warden*, 80 Ky. 608;

State v. *Herrmann*, 75 Missouri, 340; *Commonwealth* v. *Patton*, 88 Penn. St. 258; *Devine* v. *Commissioners*, 84 Ill. 590; *County of Dougherty* v. *Boyt*, 71 Georgia, 484.

Mr. John H. Rogers for defendant in error cited: *Memphis & Little Rock Railroad Co.* v. *Railroad Commissioners*, 112 U. S. 609; *McCulloch* v. *Maryland*, 4 Wheat. 316; Constitution Ark. 1874, Art. xvii, § 10; *Stone* v. *Wisconsin*, 94 U. S. 181; *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington &c. Railroad* v. *Iowa*, 94 U. S. 155; *Devine* v. *Commissioners*, 84 Illinois, 590; 1 Rev. Stat. Missouri, 1879, 146; Howell's Ann. Stat. Mich. 1882, p. 840, § 3323, sub. secs. 7 and 9; Laws of Penn. 1876, No. 87, p. 116; Hittell's Code and Statutes of California, § 5489; Comp. Laws of Kansas, 1879, p. 225, § 57; Acts of Wisconsin, 1874, p. 600, § 4; *Wheeler* v. *Philadelphia*, 77 Penn. St. 338; *Kilgore* v. *Magee*, 85 Penn. St. 401; *Morrison* v. *Bachert*, 112 Penn. St. 322; *Davis* v. *Clark*, 106 Penn. St. 377; *Van Riper* v. *Parsons*, 40 N. J. L. 1.

Mr. Justice Gray delivered the opinion of the court.

The general rule of law that governs this case has been clearly stated and developed in opinions of this court, delivered by the late Chief Justice.

In *Munn* v. *Illinois*, 94 U. S. 113, decided at October Term, 1876, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." 94 U. S. 133, 134.

In *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94

U. S. 155, decided at the same time, a corporation having a perpetual lease of the railroad of another organized under the general corporation law of Iowa of 1851, c. 43, with the same powers as private individuals to make contracts, as well as the power to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs, in accordance with law, was held to be bound by the subsequent statute of Iowa of 1874, c. 68, entitled "An act to establish reasonable maximum rates of charges for transportation of freight and passengers on the different railroads of this state," by which those railroads were classified according to the gross amount of their earnings per mile for the preceding year; and the compensation per mile, which those of each class might receive for the transportation of a passenger with ordinary baggage, was limited to three cents, three cents and a half, and four cents, respectively. Iowa Laws of 1874, p. 61. The Chief Justice said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn* v. *Illinois*, 94 U. S. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters." "This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business." 94 U. S. 161, 162.

The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the Chief Justice, in answering "the claim that the courts must decide what is reasonable, and not the legislature," said: "Where

property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164, 178; *Chicago, Milwaukee & St. Paul Railroad* v. *Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad* v. *Blake*, 94 U. S. 180; *Stone* v. *Wisconsin*, 94 U. S. 181.

Upon like grounds, in *Ruggles* v. *Illinois*, 108 U. S. 526, and *Illinois Central Railroad* v. *Illinois*, 108 U. S. 541, decided at October Term, 1882, the statute of Illinois of April 15, 1871, (Illinois Laws of 1871, p. 640,) which classified the railroads in the State according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, was adjudged, in opinions delivered by the Chief Justice, to be constitutional and valid, in restricting to the limit of three cents a mile existing corporations, whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and gave their directors power to establish such rates of toll as they should by their by-laws determine. And two Justices who did not assent to those opinions concurred in the judgments, because it was not shown that the rate prescribed by the legislature was unreasonable.

In *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, decided at October Term, 1885, the obligation of a contract, created by a charter granting similar powers to a railroad corporation and its directors, was held not to be impaired by a statute of Mississippi, establishing a board of railroad commissioners charged with the duty of preventing the exaction of unreasonable or discriminating rates upon transportation done within the limits of the State; and the Chief Justice said: "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 interstate

commerce." 116 U. S. 325. He added, however: "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 company to carry persons and 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." 116 U. S. 331. The opinions of the two dissenting Justices were grounded upon the provisions of the charter, and upon its not having been expressly made subject to alteration or repeal by the legislature. The cases, decided at the same time, of *Stone* v. *Illinois Central Railroad*, 116 U. S. 347, and *Stone* v. *New Orleans & Northeastern Railroad*, 116 U. S. 352, were substantially similar.

As applied to freights and fares for transportation not extending beyond the limits of the State by which the railroad company is incorporated, the authority of the legislature is not affected by the later decision in *Wabash, St. Louis & Pacific Railway* v. *Illinois*, 118 U. S. 557.

The case at bar is quite clear of any of the questions upon which the members of the court have heretofore differed in opinion.

If the Memphis and Little Rock Railroad Company, as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the legislature in 1853, but was a new corporation, subject to the provisions of the Constitution and laws in force when it first came into existence, that is to say, in 1877. *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609.

The Constitution of Arkansas of 1874 contains the following provisions:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The general assembly shall have power to alter, revoke or annul

any charter of incorporation now existing and revocable at the adoption of this constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators. Art. 12, § 6.

"The general assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroad, canal and turnpike companies, for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures." Art. 17, § 10.

The legislature of Arkansas, by the statute of April 4, 1887, fixed the maximum fare that any corporation, trustees, or persons, operating a line of railroad, might charge and collect for carrying a passenger within the State, at eight cents a mile on a line fifteen miles long or less, five cents a mile on a line more than fifteen and less than seventy-five miles long, and three cents a mile on a line more than seventy-five miles long. The line of the road of the plaintiffs in error is more than seventy-five miles long, and they charged more than three cents a mile, and were therefore held to be subject to the penalty imposed by the statute for any violation of its provisions.

The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case, by reason of the admitted fact, that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if

it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.

It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws.

The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

A similar question was presented and decided in *Chicago, Burlington & Quincy Railroad* v. *Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, sec. 4, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." In answering that objection, the Chief Justice said: "The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires." "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the general assembly, in the exercise of its legislative discretion, has seen fit to do this by a system

of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." 94 U. S. 163, 164.

Judgment affirmed.

BONAHAN *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 501. Submitted October 11, 1887. — Decided October 17, 1887.

A person convicted of crime in the court below having sued out a writ of error which was docketed here, and having escaped from the jurisdiction of the court below, this court declines to hear the case, and orders it removed from the docket unless the plaintiff in error comes within the jurisdiction of the court below on or before the last day of this term.

THE case is stated in the opinion.

Mr. Charles O. Wheedon and *Mr. C. E. Magoon* for plaintiff in error.

Mr. William Leese for defendant in error.

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

It appearing that during the pendency of this writ the plaintiff in error has escaped, and is not now within the control of the court below, either actually, by being in custody, or constructively, by being out on bail, it is ordered that the submission of the cause be set aside and that unless the plaintiff in error is brought or comes within the jurisdiction and under the control of the court below on or before the last day of this term the cause be thereafter left off the docket until directions to the contrary. *Smith* v. *United States*, 94 U. S. 97.

ADDINGTON *v.* BURKE.

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

No. 3. Submitted October 13, 1887.— Decided October 17, 1887.

The parties having compromised the suit and stipulated that the plaintiff in error shall dismiss it, the court makes an order to enforce the stipulation, unless cause to the contrary be shown.

THE case is stated in the opinion.

Mr. S. Robertson for plaintiffs in error.

Mr. M. L. Crawford for defendants in error.

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

It having been suggested that this cause has been compromised and the debt paid, and that a stipulation has been entered into by the parties to the effect that the plaintiffs in error shall dismiss the suit,

It is ordered that unless the plaintiffs in error show cause to the contrary, on or before the fourth Monday in November, the writ be dismissed.

The Clerk will serve a copy of this order at once on the counsel for the plaintiffs in error of record, through the mail.

This order having been duly served, and return thereof made, on the 5th of December, 1887,

MR. CHIEF JUSTICE WAITE announced the following order.

This cause is dismissed under the order made October 17, 1887, no cause having been shown to the contrary as then required.

The Clerk will preserve as part of the record the evidence of service of the order of October 17.

SHREVEPORT *v.* HOLMES.

SHREVEPORT *v.* CROOKS.

SHREVEPORT *v.* CARTER.

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

Nos. 1121, 1122, 1123. Submitted October 17, 1887. — Decided November 14, 1887. — Rehearing refused January 9, 1888.

A petition for a rehearing of a case decided by a divided court is denied on the ground that no important constitutional question is involved.

THESE cases, which were all submitted together, were all affirmed by a divided court on the 14th day of November, 1887. The plaintiff in error petitioned for a rehearing, citing *Home Ins. Co.* v. *New York*, 119 U. S. 129.

Mr. N. C. Blanchard and *Mr. T. Alexander* for plaintiff in error and for petitioner.

Mr. A. H. Leonard for defendant in error on the submission of the cases.

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

These petitions are denied. The rehearing was granted in *Home Insurance Co.* v. *New York*, 119 U. S. 129, after a decision by a divided court, because an important constitutional question was involved. The questions in these cases are not of that character.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY *v.* SOUTHERN TELEGRAPH COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 107. Submitted December 13, 1887. — Argued March 20, 1888. — Decided April 9, 1888.

It being made to appear that one party to this suit had sold out to the other, and that the suit was prosecuted by the purchasing party for his own benefit, the court of its own motion, after notice and hearing, dismissed the case.

Mr. Gaylord B. Clark for plaintiff in error submitted on his brief.

No appearance by counsel for defendant in error. *Mr. W. A. Gunter* was attorney of record for it.

Mr. Chief Justice Waite on the 9th of January, 1888, announced the following order:

It having been suggested to us that there is no longer any real controversy between the parties to this suit about the matters therein originally involved, and that The Western Union Telegraph Company is at this time practically both plaintiff and defendant, it is ordered that this writ of error be dismissed unless the plaintiff in error show cause to the contrary on or before the 17th day of February. The Clerk will serve a copy of this order at once on the counsel of record for the plaintiff in error through the mail.

Due service of this order was made, and on the 20th of February, 1888

The Chief Justice made the following announcement:

The showing in this case against the order to dismiss does not satisfy us that there exists any longer a real controversy in the suit. It is conceded that the Western Union Telegraph

Company is now occupying the line under a contract with the railroad company, which gives it an exclusive right in that behalf, and it is not denied that some arrangement has been made with the Southern Telegraph Company by which that company no longer is a contestant in the cause. Time is given the railroad company until the 19th day of March next to make a further showing in the premises if it desires to do so.

Mr. Justice Miller, on the 9th of April, 1888, delivered the opinion of the court.

It was suggested by a letter from counsel employed on one side of this suit that his party had sold out the interest which it had to the other party, who was prosecuting it now and was *dominus litis* on both sides. A ruling was made some time ago, before the death of the late Chief Justice, in effect that there was sufficient evidence to that effect to require the case to be dismissed unless the side now prosecuting it for decision would show satisfactory evidence that it was a *bona fide* suit. Two attempts have been made, and we are agreed in the opinion that they are both failures and that the original order should now be carried out, dismissing the case on the grounds set forth in the opinion of the Chief Justice, delivered at the time.

IN RE ROYALL.

ORIGINAL MOTION IN A CAUSE ADJUDGED AT THE LAST TERM OF THIS COURT.

No. 1351 of October Term, 1886. Submitted February 17, 1888. — Decided February 20, 1888.

The court denies a motion to take action to cause the judgment of a state court to be reversed in obedience to the mandate of this court, on the ground that it did not appear that the petitioner had applied to the highest court of the State to carry the mandate of this court into effect.

Mr. Leigh Robinson, on behalf of Mr. William L. Royall, the plaintiff in *Royall* v. *Virginia*, decided at the last term and reported in 121 U. S. at page 102, presented the following petition.

To the Honorable Judges of the Supreme Court of the United States:

Your petitioner, William L. Royall, would respectfully show that in a prosecution against him in the Hustings court of the city of Richmond, by the Commonwealth of Virginia, he was convicted and sentenced to pay a fine of fifty dollars. Your petitioner applied to the supreme court of appeals of said State for a writ of error to reverse this judgment, but that court refused to award the same. Your petitioner then applied to this Honorable Court for a writ of error, which was awarded, and the judgment of the supreme court of appeals of Virginia was reversed at the last term of this court, and this court's mandate was sent to said supreme court of appeals, directing it to reverse the judgment of said Hustings court.

Your petitioner placed the mandate of this court in the hands of Hon. L. L. Lewis, president of the supreme court of appeals of the State of Virginia, in the month of June, 1887, and prayed that such proceedings might be taken as would cause the judgment of said Hustings court to be reversed. Nevertheless, up to this day said supreme court of appeals of the State of Virginia has taken no action in the matter, and the judgment and sentence of said Hustings court of the city of Richmond against your petitioner remain in full force and unreversed. Your petitioner prays, therefore, that this Honorable Court will take such action in the premises as will cause said judgment to be reversed. The said supreme court of appeals and the said Hustings court are both in session at this time.

WM. L. ROYALL.

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

This motion is denied. It does not appear that the petitioner has ever applied to the supreme court of appeals of Virginia to carry the mandate of this court into effect.

LYON *v.* PERIN AND GAFF MANUFACTURING COMPANY.

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

No. 201. Argued April 2, 1888. — Decided April 16, 1888.

A final decree in a suit in Equity that "the cause being submitted to the court upon bill, answer and replication, and having been duly considered, the court finds, adjudges and decrees that the equities are with the defendant" and dismissing the bill, is an adjudication on the merits of the controversy and constitutes a bar to further litigation on the same subject between the parties; and it is not open to the complainant to show in a subsequent suit in equity between the same parties, on the same cause of action, that the decree was made in his absence and default, and that no proof had been filed in the cause on either side.

THE following is the case, as stated by the court.

This is a suit in equity brought in the Circuit Court of the United States for the District of Indiana by Nelson Lyon against The Perin and Gaff Manufacturing Company, praying an injunction and damages for an alleged infringement of reissued letters-patent No. 9198, dated May 11, 1880, owned by complainant, for an improvement in "metallic stiffeners for boot and shoe heels."

The bill of complainant, after the usual recitals necessary in a suit of this character, among other things, sets forth that before the commencement of this action, to wit, in September, 1881, complainant having been informed and believing that the defendant was manufacturing an instrument which infringed said reissued letters-patent, filed his bill in equity against the said defendant in the United States Circuit Court for the Southern District of Ohio to restrain said defendant from further infringement; that the company appeared therein and answered, setting forth, among other things, the defence that said reissued letters-patent was invalid for want of novelty in the invention, and was not granted in accordance with law, denying also that the instrument used infringed the said

reissued letters-patent, and denying that complainant was entitled to any of the relief therein prayed, to which answer complainant filed his replication; that the statutory time for taking testimony having expired, and an extension thereof not having been granted, and the complainant not having been able to get the proof of the infringement in time, no evidence of the facts, matters, or things alleged in his complaint was offered or taken, and upon the call of the case before the court, counsel for complainant not appearing, a decree was entered, dismissing the bill; and that none of the issues were tried, and no decision rendered on the merits thereof, the suit having been dismissed merely for want of prosecution.

The defendants interposed a plea that the prior adjudication and decree of the suit mentioned in said plea (which is the same suit set forth in said bill of complaint) is a bar to the present suit. The court below found the plea to be good and sufficient; thereupon complainant filed his replication. The cause being at issue was referred to a master in chancery to take testimony, and to return the same into court with his conclusion of law thereon. Testimony was taken, and the master made and filed his report, in and by which said master concluded, as a matter of law, that the decree mentioned in said plea stands as an absolute adjudication of the rights of the parties upon the merits, and reported and found that the averments of the plea were sustained by the evidence.

Exceptions to said master's report having been overruled by the court and the report confirmed, a decree was entered that the defendants' plea was well taken in law and sustained by the proofs, and the bill was dismissed. An appeal from this decree brings the case here.

Mr. William H. King for appellant cited: *Allen* v. *Blunt*, 2 Robb Pat. Cas. 288; *S. C.* 3 Story, 742; 1 Greenleaf Ev., Redfield's ed. 563, § 528; *Cromwell* v. *Sac County*, 94 U. S. 351; *Buerk* v. *Imhaeuser*, 10 O. G. 907; *De Florez* v. *Raynolds*, 16 Blatchford, 397, 408; *Rumford Chemical Works* v. *Hecker*, 2 Bann. & Ard. Pat. Cas. 351; *American Diamond Rock Boring Co.* v. *Sheldon*, 4 Ban. & Ard. Pat. Cas. 551; *Car-*

rington v. *Holly*, 1 Dickens, 280; *Rosse* v. *Rust*, 4 Johns. Ch. 299; *Badger* v. *Badger*, 1 Cliff. 237; *Porter* v. *Vaughn*, 26 Vermont, 624; *Russell* v. *Place*, 94 U. S. 606; *Bank of the United States* v. *Beverly*, 1 How. 134; *Hughes* v. *United States*, 4 Wall. 232; *Walden* v. *Bodley*, 14 Pet. 156; *Oscanyan* v. *Winchester Arms Co.*, 103 U. S. 261.

No appearance for appellee.

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

The only material question for consideration is as to the effect of the decree of the Circuit Court of the United States for the Southern District of Ohio, rendered May 4, 1882, which is correctly found to be still in full force, as a bar to the prosecution of this suit.

It is well settled that, in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz.: (1) *Identity in the thing sued for;* (2) *Identity of the cause of action;* (3) *Identity of persons and parties to the action;* and (4) *Identity of the quality in the persons* for or against whom the claim is made. 2 Bouv. 467. All these elements or conditions exist in this case, as shown by the master's report, which was to the effect that the averments of said plea were sustained by the evidence; that there was no controversy as to the identity of the cause of action, or of the identity of the parties in the two suits; that the bill was sworn to by the complainant, and the answer was sworn to by the defendants, and the cause submitted in due course; and that the decree rendered in the suit, pending in the court of Ohio was, as it professed to be, an absolute adjudication of the rights of the parties upon the merits, without any qualifying clause, and was conclusive of the rights attempted to be litigated in this case.

The dispute, however, seems to be as to the *nature* of the former judgment — that is, whether it is a final judgment or decree. It is contended on the part of appellant that such

judgment was merely one of *nol. pros.* — a decree entered by default — and is, therefore, not a bar to the prosecution of this suit. To sustain this view of the case he has recourse to a statement by the clerk of the Circuit Court of the United States for the Southern District of Ohio, (wherein the decree was rendered,) under his hand and seal, dated nearly two years after said decree was rendered, to the effect that no proof or testimony was filed in said cause in his office either for the complainant or the defendant; that at the time of the granting of said decree, May 4, 1882, the complainant did not appear, nor was he represented by counsel; and that said decree dismissing the complainant's bill was granted on default of the complainant.

The decree itself is in the words and figures following, to wit:

"The United States of America,
Western Division of the Southern District of Ohio, } *ss:*

"At a stated term of the Circuit Court of the Western Division of the Southern District of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being the fourth day of that month, in the year of our Lord one thousand eight hundred and eighty-two, and of the independence of the United States of America the one hundred and sixth.

"Present: The Hon. John Baxter, Circuit Judge, and Hon. Philip B. Swing, District Judge.

"On Thursday, the fourth day of May, 1882, among the proceedings had were the following, to wit:

"Nelson Lyon
v. } 3180. In Equity.
The Perin and Gaff Manufacturing Co.

"This cause coming on for hearing, and, being submitted to the court upon bill, answer, and replication, and having been duly considered, the court finds, adjudges, and decrees *that the equities are with the defendant;* that the bill of complaint be dismissed, and that defendant recover its costs, to be taxed."

This is the record to which the court must look, and not to the statement of the clerk of the court made two years afterwards. This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy, and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant* v. *Essex Company*, 7 Wall. 107, 109, "A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits."

To the same effect see *Bigelow* v. *Windsor*, 1 Gray, 299, 301, where it is said: "Sometimes, indeed, a party plaintiff in equity, who, because he is not prepared with his proofs, or for other reasons, desires not to go into a hearing, but rather to have his bill dismissed, in the nature of a discontinuance or non-suit in an action at law, may be allowed to do so; but we believe the uniform practice in such case is to enter 'dismissed without prejudice.'"

Likewise Cooper Eq. Pl. 270, as follows: "A plea in bar, stating a dismissal of a former bill, is conclusive against a new bill, if the dismissal was upon hearing, and if that dismissal be not, in direct terms, 'without prejudice.'" See also Story's Eq. Pl. § 793, and authorities there cited.

The authorities to sustain this view of the case might be multiplied, but those cited are sufficient, and demonstrate the uniformity of the rule. It is clear to this court that the decree below dismissing the bill is in harmony with the law, and it is, therefore,

Affirmed.

INDEX.

ACCORD AND SATISFACTION.

ACTION.

See PUBLIC LAND, 1.

ADMIRALTY.

See COURTS OF THE UNITED STATES, 1.

AGENT.

From the evidence in this case it is clear that the assignor of the defendants in error employed the plaintiffs in error as their agents to enter at the Custom House in New York importations of sugar imported by them, and, after protest, to commence suits to recover an excess of duty imposed upon the importations, and that the plaintiffs in error undertook to perform those services; and, it being settled in actions brought by other persons under similar circumstances and on like importations, that such duties were illegally exacted, and the plaintiffs in error having failed to commence suits within the period limited by law to recover such as were illegally exacted from the assignor of the defendants in error, *Held*, that the judgment of the court below for their recovery must be affirmed. *Bowerman* v. *Rogers*, 585.

See POWER.

ANCIENT DEED.

See EVIDENCE, 7, 8;
RES JUDICATA.

APPEAL.

An appeal, docketed here January 7, 1888, from a judgment of the Court of Claims which was entered February 4, 1884, is dismissed for want of due prosecution. *United States* v. *Burchard*, 176.

ARKANSAS.

See RAILROAD.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See INSOLVENT DEBTOR.

ASSIGNMENT OF ERROR.

An assignment, as error, that the court below rejected certain patents of land offered in evidence by the plaintiff is fatally defective, if the record does not contain copies of the patents. *Clement* v. *Packer*, 309.

ATTORNEY GENERAL.

See PUBLIC LAND, 2.

BILL OF EXCEPTIONS.

A paper headed "Bill of Exceptions" not bearing the signature of the judge, but containing at its foot these words, "Allowed and ordered on file November 22, '83, A. B.," the trial having taken place in June, 1883, cannot be regarded as a bill of exceptions, because not signed by the judge, as required by § 953 of the Revised Statutes. *Origet* v. *United States*, 240.

BILL OF REVIEW.

On a pure bill of review nothing will avail for a reversal of the decree but errors of law apparent on the record. *Willamette Iron Bridge Co.* v. *Hatch*, 1.

BRIDGES OVER NAVIGABLE STREAMS.

See CONSTITUTIONAL LAW, A, 1, 2, 3;
JURISDICTION, A, 7;
NAVIGABLE STREAMS.

CASES AFFIRMED OR APPLIED.

Passaic Bridge Cases, 3 Wall. 782, applied. *Willamette Iron Bridge Co.* v. *Hatch*, 1.

Potts v. *United States*, *ante*, 173, affirmed and applied to the case. *Burchard* v. *United States*, 176.

United States v. *Symonds*, 120 U. S. 46, affirmed and applied. *United States* v. *Strong*, 656.

CASES DISTINGUISHED.

State of Pennsylvania v. *Wheeling & Belmont Bridge Co.*, 13 How. 518, distinguished. *Willamette Iron Bridge Co.* v. *Hatch*, 1.

Hunnicutt v. *Peyton*, 102 U. S. 333, distinguished. *Clement* v. *Packer*, 309.
Ellicott v. *Pearl*, 10 Pet. 412, distinguished. *Clement* v. *Packer*, 309.
Hall v. *Wisconsin*, 103 U. S. 5, distinguished. *Missouri ex rel. Walker* v. *Walker*, 339.
Jeffries v. *Mutual Life Ins. Co.*, 110 U. S. 305, distinguished. *Missouri ex rel. Walker* v. *Walker*, 339.

CITIZEN.

See CONSTITUTIONAL LAW, A, 9.

CLAIMS AGAINST THE UNITED STATES.

Congress enacted August 7, 1882, 22 Stat. 734, "that the Quartermaster General of the United States is hereby authorized to examine and adjust the claims of Julia A. Nutt, widow and executrix of Haller Nutt, deceased, late of Natchez, in the State of Mississippi, growing out of the occupation and use by the United States Army during the late rebellion, of the property of said Haller Nutt during his lifetime, or of his estate after his decease, including live stock, goods and moneys taken and used by the United States or the armies thereof; and he may consider the evidence heretofore taken on said claims, as far as applicable, before the Commissioners of Claims, and such other evidence as may be adduced before him on behalf of the legal representatives of Haller Nutt or on behalf of the United States, and shall report the facts to Congress to be considered with other claims reported by the Quartermaster General." The Quartermaster General made the examination and reported to Congress the aggregate value of the property taken. *Held*, that this reference of the claim did not constitute a submission to arbitration on the part of Congress, and that the finding of the Quartermaster General was neither an award, nor the equivalent of an account stated between private individuals. *Nutt* v. *United States*, 650.

Some time after this report of the Quartermaster General, Congress appropriated sundry amounts to various persons named in the bill as "an allowance of certain claims reported by the accounting officers of the United States Treasury Department," "the same being in full for, and the receipt for the same to be taken and accepted in each case as a full and final discharge of the several claims examined and allowed." Among these amounts was an appropriation to Mrs. Nutt of an amount much less than that reported by the Quartermaster General, which reduced amount she accepted. *Held*, that this did not amount to an adoption by Congress of the report of the Quartermaster General, and that there was no inference that the appropriation actually made was intended to be a recognition of a larger amount as due. *Ib.*

CONSTITUTIONAL LAW.

A. Of the United States.

1. There must be a direct statute of the United States in order to bring within the scope of its laws obstructions and nuisances in navigable streams within a State; such obstructions and nuisances being offences against the laws of the States within which the navigable waters lie, but no offence against the United States in the absence of a statute. *Willamette Iron Bridge Co.* v. *Hatch*, 1.

2. The provision in the "act for the admission of Oregon into the Union," 11 Stat. 383, c. 33, § 2, that "all the navigable waters of said State shall be common highways and forever free, as well to the inhabitants of said State as to all other citizens of the United States, without any tax, duty, impost, or toll therefor," does not refer to physical obstructions of those waters, but to political regulations which would hamper the freedom of commerce. *Ib.*

3. Until Congress acts respecting navigable streams entirely within a State, the State has plenary power; but Congress is not concluded by anything that the State or individuals by its authority or acquiescence may have done, from assuming entire control, and abating any erections that may have been made, and preventing any other from being made except in conformity with such regulations as it may impose. *Ib.*

4. The appropriation by Congress of money to be expended in improving the navigation of the Willamette River was no assumption of police power over it. *Ib.*

5. Congress by conferring the privilege of a port of entry upon a municipality, does not come in conflict with the police power of a State exercised in bridging its own navigable rivers below such port. *Ib.*

6. The provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, is aimed at the legislative power of the State, and not at decisions of its courts, or acts of executive or administrative boards or officers, or doings of corporations or individuals. *New Orleans Water Works* v. *Louisiana Sugar Refining Co.*, 18.

7. This court has no jurisdiction of a writ of error to the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State is upheld by the judgment sought to be reviewed; and when the state court gives no effect to a law of the State subsequent to the contract, but holds, upon grounds independent of that law, that the right claimed was not conferred by the contract, the writ of error must be dismissed for want of jurisdiction. *Ib.*

8. The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employés of the corporation, does not impinge upon the commercial clause of the

Federal Constitution (Article I, section VIII, clause 3), provided the corporation is neither engaged in carrying on foreign or interstate commerce, nor employed by the government of the United States. *Pembina Mining Co.* v. *Pennsylvania*, 181.

9. Corporations are not citizens within the meaning of the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, Article IV, section II, clause 1. *Ib.*
10. A private corporation is included under the designation of "person" in the Fourteenth Amendment to the Constitution, section I. *Ib.*
11. The provisions in the Fourteenth Amendment to the Constitution, section 1, that "no State shall deny to any person within its jurisdiction the equal protection of the laws," do not prohibit a State from requiring for the admission within its limits of a corporation of another State such conditions as it chooses. *Ib.*
12. The only limitation upon the power of a State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporations to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. *Ib.*
13. A judgment of the highest court of a State, sustaining the validity of an assessment upon lands under a statute of the State, which was alleged to be unconstitutional and void because it afforded to the owners no opportunity to be heard upon the whole amount of the assessment, involves a decision against a right claimed under the provision of the Fourteenth Amendment to the Constitution of the United States prohibiting the taking of property without due process of law, and may be reviewed by this court on writ of error, although the Constitution of the State contains a similar provision, and no constitutional provision is specifically mentioned in the record of the state court. *Spencer* v. *Merchant*, 345.
14. If the legislature of a State, in the exercise of its power of taxation, directs the expense of laying out, grading or repairing a street to be assessed upon the owners of lands benefited thereby; and determines the whole amount of the tax, and what lands, which might be so benefited, are in fact benefited; and provides for notice to and hearing of each owner, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land; there is no taking of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Ib.*
15. Pursuant to an act of the legislature of New York, the expense of grading a street was assessed by commissioners upon the lands lying within three hundred feet on either side of the street, and which would, in the judgment of commissioners, be benefited. After the sums so assessed upon some lots had been paid, the Court of Appeals

of the State adjudged the assessment to be void, because the act made no provision for notice to or hearing of the land-owners. The legislature then passed another act, directing a sum equal to so much of the first assessment as had not been paid, adding a proportional part of the expenses of making that assessment, and interest since, to be assessed upon and equitably apportioned among the lots, the former assessment on which had not been paid, first giving notice to all parties interested to appear and be heard upon the question of the apportionment of this sum among these lots, but not as to any apportionment between them and those lots, the former assessments upon which had been paid. *Held*, that an assessment laid under the latter statute was not a taking of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Ib.*

16. The question whether, when Congress fails to provide a regulation by law as to any particular subject of commerce among the States is conclusive of its intention that that subject shall be free from positive regulation, or that, until Congress intervenes, it shall be left to be dealt with by the States, is one to be determined from the circumstances of each case as it arises. *Bowman* v. *Chicago & Northwestern Railway Co.*, 465.

17. So far as the will of Congress respecting commerce among the States by means of railroads can be determined from its enactment of the provisions of law found in Rev. Stat. § 5258, and Rev. Stat. c. 6, Title 48, §§ 4252–4289, they are indications of an intention that such transportation of commodities between the States shall be free except when restricted by Congress, or by a State with the express permission of Congress. *Ib.*

18. A State cannot, for the purpose of protecting its people against the evils of intemperance, enact laws which regulate commerce between its people and those of other States of the Union, unless the consent of Congress, express or implied, is first obtained. *Ib.*

19. Section 1553 of the Code of the State of Iowa, as amended by c. 143 of the acts of the 20th General Assembly in 1886, (forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a certificate, under the seal of the auditor of the county to which it is to be transported or consigned, certifying that the consignee or person to whom it is to be transported or delivered is authorized to sell intoxicating liquors in the county,) although adopted without a purpose of affecting interstate commerce, but as a part of the general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the State, is neither an inspection law, nor a quarantine law, but is essentially a regulation of commerce among the States, affecting interstate commerce in an essential and vital part; and, not being

sanctioned by the authority, express or implied, of Congress, is repugnant to the Constitution of the United States. *Ib.*

20. Whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates, *quære*. *Ib.*

21. A state statute which authorizes an injunction to be issued to restrain a corporation organized under the laws of another State, whose taxes are in arrear, from prosecuting its business within the State until the taxes are paid, is void so far as it assumes to confer power upon a court to so restrain a telegraph company which has accepted the provisions of Rev. Stat. § 5263 from operating its lines over military and post roads of the United States. *Western Union Telegraph Co.* v. *Massachusetts*, 530.

22. A statute of a State fixing at three cents a mile the maximum price that any railroad corporation may take for carrying a passenger within the State, is not, as applied to a corporation reorganized by the purchasers at the sale of a railroad under a decree of foreclosure, shown to be a taking of property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, by evidence that under that restriction, and with its existing traffic, its net yearly income will pay less than one and a half per cent on the original cost of the road, and only a little more than two per cent on the amount of the bonded debt, without any proof of the cost of its bonded debt, or the amount of the capital stock of the reorganized corporation, or the price paid by this corporation for the road. *Dow* v. *Beidelman*, 680.

23. A statute of a State classifying its railroad corporations by the length of their lines, and fixing a different limit of the rate of passenger fares in each class, does not deny to any corporation the equal protection of the laws, within the Fourteenth Amendment to the Constitution of the United States. *Ib.*

See Husband and Wife, 4;
Jurisdiction, A, 1;
National Bank, 2.

B. Of a State.

Under the provision in the constitution of the State of Illinois adopted in 1870 that "private property shall not be taken or *damaged* for public use without just compensation," a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of an improvement that is public in its character; whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential as in a diminution of its market value. *Chicago* v. *Taylor*, 161.

CONTRACT.

The court holds as the result of the transactions between the parties which are recited in its opinion, that, each being a holder of shares in a railroad company, they agreed that their respective interests should be joint and equal, and that the appellant should pay to the appellee the sum necessary to equalize the difference in cost between them; and that, this agreement not being carried out by the appellant, the parties substituted a new agreement, based upon the principal feature of the old one (that the appellee should sell to the appellant enough of his stock to make the holdings equal), but that each holding under the new agreement was to be in severalty and free from conditions. *Davison* v. *Davis*, 90.

See EQUITY, 3;
FRAUDULENT REPRESENTATIONS;
POWERS;
SALE.

CORPORATION.

See CONSTITUTIONAL LAW, A, 8, 9, 10, 11, 12.

COUNTER CLAIM.

In an action in the Court of Claims by an officer to recover a balance claimed to be due him on pay account, the United States can set up as a counter-claim an alleged overpayment to him on that account, and can have judgment for it if established. *United States* v. *Burchard*, 176.

COURT AND JURY.

1. A charge in an action to try title to real estate which instructed the jury that if they believe that a paper offered in evidence containing a signature of a party under whom both parties' claim was as old as its date imported, and that it had been preserved in the public archives as the initial paper in the grant, they might give to these circumstances the weight of direct testimony to the genuineness of the signature, and if the other proof did not in their judgment overbear its weight, might find the signature to be proved, neither takes from the jury the determination of the weight of evidence, nor submits to it a question that should be decided by the court. *Williams* v. *Conger*, 397.
2. In the courts of the United States it is competent for the court to give to the jury its opinion upon the weight of evidence, leaving the jury to determine upon the testimony. *Ib.*

COURT OF CLAIMS.

See APPEAL;
COUNTER-CLAIM.

COURTS OF A STATE.

See COURTS OF THE UNITED STATES, 2, 3;
JURISDICTION, A, 8.

COURTS OF THE UNITED STATES.

1 The provision in Rev. Stat. § 721 that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply" is not applicable to proceedings in equity, or in admiralty, or to criminal offences against the United States. *Bucher* v. *Cheshire Railroad Co.*, 555.

2. The courts of the United States adopt and follow the decisions of the highest court of a State in questions which concern merely the constitution or laws of that State; also where a course of those decisions, whether founded on statutes or not, have become rules of property within the State; also in regard to rules of evidence in actions at law; and also in reference to the common law of the State, and its laws and customs of a local character, when established by repeated decisions. *Ib.*

3. The Supreme Judicial Court of Massachusetts having, in a cause between the same parties litigating in this action, arising out of the transaction herein litigated, and on facts herein established, *Held;* (1) that the plaintiff when injured by the negligence of the defendants' servants was not travelling "for necessity or charity" within the meaning of those terms as used in the General Statutes of Massachusetts, c. 84, § 2; (2) that the provision in those statutes, c. 84, § 2, that whoever travels on the Lord's Day except for necessity or charity shall be punished by a fine not exceeding ten dollars is a bar to recovery in an action against a railroad company by a person injured through the negligence of its servants while travelling on its railroad on Sunday, not for necessity or charity; and (3) that the act of the Massachusetts legislature of May 15, 1877, that this prohibition against travelling on the Lord's Day shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by the person so travelling, does not apply to a case happening before the passage of the act; *Held*, that these adjudications are sustained by a long line of numerous decisions, which establish a local rule of law within the State of Massachusetts, binding upon this court, though not meeting its approval. *Ib.*

See COURT AND JURY, 2;
JURISDICTION, A, B;
RES JUDICATA.

CRIMINAL LAW.

See JURISDICTION, A, 8.

CRIMINAL OFFENCES.

See COURTS OF THE UNITED STATES.

CUSTOMS DUTY.

1. "Goat's hair goods," composed of 80 per cent of goat's hair and 20 per cent of cotton, used chiefly for women's dresses, and which were imported into the United States between January 24, 1874, and June 25, 1874, were subject to the duty imposed by the act of July 14, 1870, 16 Stat. 264, c. 255, § 21, upon "manufactures of hair not otherwise herein provided for," as modified by the act of June 6, 1872, 17 Stat. 231, and not to the duty imposed by the act of March 2, 1867, 14 Stat. 561, c. 197, § 2, upon "women's and children's dress goods and real or imitation Italian cloths, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other like animals"—it being found by the jury that they were not known in commerce among merchants and importers as "women's and children's dress goods." *Arthur* v. *Butterfield*, 70.
2. In the absence of a settled designation of a cloth by merchants and importers, its designation as hair, silk, cotton, or woollen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material. *Ib.*
3. The words "not otherwise herein provided for" in a section in a customs revenue act, mean not otherwise provided for in that act. *Ib.*
4. To place an article among those designated as "enumerated," so as to take it out of the operation of the similitude clause of the customs revenue laws, Rev. Stat. § 2499, it is not necessary that it should be specifically mentioned. *Ib.*
5. The words "manufactures of hair" are a sufficient designation to place such manufactures among the enumerated articles. *Ib.*
6. Velvet ribbons made of silk and cotton, silk being the material of chief value, known as "trimmings," chiefly used for making or ornamenting hats, bonnets, and hoods, but sometimes used for trimming dresses, being imported into the United States, are subject to a duty of twenty per centum *ad valorem* under Schedule M of the act of March 3, 1883, 22 Stat. 512, as "hats and so forth, materials for . . . trimmings;" and not to a duty of fifty per centum *ad valorem* under Schedule L of that act, Ib. 510, as "goods, wares, and merchandise not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value." *Hartranft* v. *Langfeld*, 128.
7. Quilts composed of cotton or silk and eider-down, eider-down being in each case the component material of chief value, are subject to a duty, on importation into the United States, of twenty per cent *ad valorem* as manufactured articles not enumerated. *Hartranft* v. *Shepard*, 337.
8. A vessel arrived at a port of the United States from a foreign port on

the 30th of June, 1883, and was entered at the custom-house on that day. A custom-house inspector took charge of it, and the vessel remained with unbroken hatches until after the following 1st of July. *Held*, that the goods on board, being in the custody and under the control of officers of the customs, were in "a public store," or "bonded warehouse," within the meaning of those terms as used in § 10 of the act of March 3, 1883, 22 Stat. 488, 525, and were subject to the duty imposed by the provisions of that act. *Hartranft* v. *Oliver*, 525.

See EVIDENCE, 1;
INFORMATION;
REVENUE LAWS.

DAMAGES.

See PATENT, 3, 4, 5, 6, 7;
REPLEVIN BOND.

DEED.

See EVIDENCE, 7, 8;
INSOLVENT DEBTOR, 1, 2, 3, 4;
RES JUDICATA.

DIVORCE.

See HUSBAND AND WIFE.

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 4.

EQUITY.

1. The conclusions of a master in chancery, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside unless there clearly appears to have been error or mistake on his part. *Tilgman* v. *Proctor*, 136.
2. The general rule that when the answer of the defendant in a cause in equity is direct, positive, and unequivocal in its denial of the allegations in the bill, and an answer on oath is not waived, the complainant will not be entitled to a decree unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, applies when the equity of the complainant's bill is the allegation of fraud. *Southern Development Co.* v. *Silva*, 247.
3. In order to rescind a contract for the purchase of real estate on the ground of fraudulent representation by the seller, it must be established by clear and decisive proof that the alleged representation was made in regard to a material fact; that it was false; that the maker knew that it was not true; that he made it in order to have it acted on by the other party; and that it was so acted upon by the other

party to his damage, and in ignorance of its falsity and with a reasonable belief that it was true. *Ib.*

4. Whether a receiver of the property of a railroad company shall be appointed by a court of equity, is a matter within the discretion of the court, and this discretion is to be exercised sparingly, and with great caution, and with reference to the special circumstances of each case as it arises. *Sage* v. *Memphis & Little Rock Railroad*, 361.

5. A bill in equity, brought by a judgment creditor of a railroad company against the company, which alleges in substance that the property of the company is so heavily mortgaged that if the plaintiff should attempt to enforce payment of his debt by seizure and sale on execution there would be no bidders at more than a nominal amount, while, if the property were placed in the hands of a receiver by the court, and held together and carefully used in transporting passengers and freight, there would be a large surplus each year for the payment of the plaintiff's debt, contains ample averments to give a court of equity jurisdiction to appoint a receiver of the property: but this point is decided on the facts of the present case, and the court does not mean to say that one or more of the judgment creditors of a railroad company can, as a matter of right, require such a property to be put in the hands of a receiver merely because the company fails or refuses to pay its debts. *Ib.*

6. The fact that a judgment creditor filing a bill in equity to obtain the appointment of a receiver of the debtor's property did not first sue out execution and have a return of *nulla bona* is immaterial, if not objected to by the debtor, and if it appears on the admitted facts that so doing would have been an idle ceremony. *Ib.*

7. If a court of equity is induced by imposition to appoint a receiver of the property of a railroad company when one would not have been appointed had the court been aware of the exact situation, and the receiver is discharged on learning of the imposition, and during the receivership a fund has accumulated from surplus earnings, trustees, representing mortgage creditors of the corporation, who did not intervene in the suit pending the receivership and set up no claim to the fund during the receivership, and had no claim to it except as mortgage trustees out of possession, are not entitled to the fund. *Ib.*

8. It is again held that the mortgagor of a railroad is not required to account to the mortgagee for earnings, even though the mortgage covers income, while the mortgaged property remains in the mortgagor's possession, and no demand has been made for it or for surrender of its possession under the provisions of the mortgage. *Ib.*

9. Mortgage bondholders of a railroad company who obtain judgment on their bonds or coupons and intervene individually and without the appearance of their trustees in a suit brought by a judgment creditor of the company whose debt is not secured by the mortgage, in which a receiver has been appointed, do not thereby deprive the plaintiff credi-

tor of his priority of right in the accumulating income from the property in the hands of the receiver. *Ib.*

See COURTS OF THE UNITED STATES,
JUDGMENT;
LACHES;
MORTGAGE;
PATENT FOR INVENTION, 2, 3, 4;
RAILROAD, 2, 3, 4, 5.

ESTOPPEL.

1. When the plaintiff and the defendant both claim title under the same original application, and one introduces it in evidence and establishes its identity, the other is estopped from denying the genuineness of the signature to it of the party under whom both claim. *Williams* v. *Conger*, 397.
2. The plaintiff sued the defendants in a state court and recovered judgment. The highest appellate court of the State, reviewing the case, decided the points of law involved in it against the plaintiff, set aside the judgment for error in the ruling of the court below, and sent the case back for a new trial. The plaintiff then became non-suit, and brought the present suit in the Circuit Court of the United States on the same cause of action. *Held*, that he was not estopped. *Bucher* v. *Cheshire Railroad Co.*, 555.

See JUDGMENT.

EVIDENC

1. In a suit *in rem* against certain diamonds seized as forfeited for a violation of the customs revenue laws, it was competent for the United States to give in evidence the declarations of S., not the claimant, who was intrusted by the latter with the custody of the diamonds for sale, such declarations having been made to a customs officer who took the diamonds from a person with whom S. had deposited them, and in the course of an investigation by the officer to determine whether he should seize them, and having been part of the *res gestæ*. *Friedenstein* v. *United States*, 224.
2. It was also competent for the officer to testify that he did not seize the diamonds till after the declarations were made. *Ib.*
3. In an action of ejectment in the Circuit Court of the United States, sitting in the State of Pennsylvania, which involves a question concerning the location of the boundary of a private estate, that rule of evidence respecting the admission of declarations of deceased persons touching the disputed boundary which is laid down by the highest court of that State is the rule to govern the action of the Circuit Court at the trial; and it is well settled in that State that declarations of a deceased person touching the locality of a boundary which was

surveyed and located by him, which declarations were made to the witness in pointing out that locality, are admissible in evidence. *Clement* v. *Packer*, 309.

4. If the removal of a public record from its place of deposit is not prohibited by reason of public policy, it constitutes, when legitimately removed, the best evidence of its contents and of its authenticity. *Williams* v. *Conger*, 397.
5. An original muniment of title produced from the public archives in which it is required by law to be deposited, certified by the public officer who has custody of it, and identified by him as a witness, sufficiently authenticated to authorize it to be offered in evidence.
6. Papers not otherwise competent cannot be introduced in evidence for the mere purpose of enabling a jury to institute a comparison of handwriting; but where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. *Ib.*
7. One claiming under a deed forty years old, through several mesne conveyances, may offer the deed in evidence as an ancient deed, though never seen by any but the first grantee to whom it was given. *Ib.*
8. A copy made in 1837 of a lost certified copy of a power of attorney is admissible in evidence to show that the original power, found and produced in court, was an ancient instrument. *Ib.*
9. A recital in an ancient power of attorney that the donor is a citizen raises a presumption of the truth of that fact which can be overthrown only by positive proof. *Ib.*
10. Want of power in an officer of the Land Office to issue a land-patent may be shown in an action at law by extrinsic evidence, although the patent may be issued with all the forms of law required for a patent of public land. *Doolan* v. *Carr*, 618.
11. Official documentary evidence of a Mexican grant, which has been confirmed by the proper authorities of the United States, is admissible in the trial of an action of ejectment, to show a want of power in the Land Office to issue a patent for the same land as "public land" under the statute granting "public land" to aid in the construction of the Pacific Railroad. *Ib.*
12. It would seem that parol testimony is admissible to identify the land as coming within the terms of the grant. *Ib.*

See COURT AND JURY;
ESTOPPEL;
RES JUDICATA.

EXCEPTION.

See BILL OF EXCEPTIONS.

EXECUTOR AND ADMINISTRATOR.

See LOCAL LAW, 5.

FRAUDULENT REPRESENTATION.

1. Statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale. *Southern Development Co.* v. *Silva*, 247.
2. The fact that a representation made by a seller was false raises no presumption that he knew that it was false. *Ib.*
3. When the purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase, and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser cannot afterwards allege that the vendor made representations respecting the subject investigated which were false. *Ib.*

See EQUITY, 3.

FORGERY.

In this case this court reversed the decree of the general term of the Supreme Court of the District of Columbia, on a question of fact as to whether a deed of trust and a promissory note secured thereby were forgeries. *Cissel* v. *Dutch*, 171.

GRADUATED PAY.

See SALARY, 2.

HUSBAND AND WIFE.

1. A territorial statute of Oregon, passed in 1852, dissolving the bonds of matrimony between husband and wife, the husband being at the time a resident of the Territory, was an exercise of "the legislative power of the Territory upon a rightful subject of legislation," according to the prevailing judicial opinion of the country and the understanding of the legal profession at the time when the act of Congress establishing the territorial government was passed, August 14, 1848, 9 Stat. 323. *Maynard* v. *Hill*, 190.
2. The general practice in this country of legislative bodies to grant divorces stated. *Ib.*
3. The granting of divorces being within the competency of the legislature of the Territory, its motives in passing the act in question cannot be inquired into. Having jurisdiction to legislate upon the status of the husband, he being a resident of the Territory at the time, the validity

of the act is not affected by the fact that it was passed upon his application, without notice to or knowledge by his wife; who, with their children, had been left by him two years before in Ohio, under promise that he would return or send for them within two years. *Ib.*

4. Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution and annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts by state legislation. *Ib.*
5. Nor is such legislation prohibited by the last clause of Article 2 of the Ordinance of the Northwest Territory, declaring that "no law ought ever to be made or have force in said Territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed;" which clause was, by the organic act of Oregon, enacted and made applicable to the inhabitants of that Territory. *Ib.*
6. Under the Oregon Donation Act, 9 Stat. 496, c. 76, the statutory grant took effect as a complete grant only on the termination of the four years' term of residence and cultivation; and the wife of a resident settling under the act as a married man, who was divorced from him after the commencement of his settlement, but before its completion, took no interest under the act in the title subsequently acquired by him. He had, previous to that time, no vested interest in the land, only a possessory right, — a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. *Ib.*

INFORMATION.

1. The jury having found, in compliance with § 16 of the act of June 22, 1874, c. 391, 18 Stat. 189, that the acts complained of in an information *in rem* were done with intent to defraud the United States, and no motion to dismiss the cause for any defect in the information, and no motion in arrest of judgment having been made, any such defect which could have been availed of by demurrer, or exception, or motion in arrest of judgment, must be regarded as having been waived or as having been cured by the verdict. *Friedenstein* v. *United States*, 224.
2. An information under the revenue laws for the forfeiture of goods, which seeks no judgment of fine or imprisonment against any person, is a civil action. *Ib.*
3. Yet it is so far in the nature of a criminal proceeding that a general verdict on several counts in the information is upheld if one count is good. *Ib.*

4. Where the sections of the Revised Statutes on which the counts of the information are founded do not prescribe any intent to defraud as an element of the forfeitures they denounce, said § 16 does not make it necessary, in an information filed since its enactment, to aver that the alleged acts were done with an actual intention to defraud the United States. *Ib.*

5. It is not necessary that the judgment should recite the finding by the jury that the acts complained of in the information were done with intent to defraud the United States. *Ib.*

6. An information in a suit *in rem* against certain imported goods seized as forfeited for a violation of the customs revenue laws, alleged an entry of the goods, which were subject to duties, with intent to defraud the revenue by false and fraudulent invoices, by means whereof the United States were deprived of the lawful duties accruing upon the goods embraced in the invoices. The answer of the claimant denied that the goods became "forfeited in manner and form as in said information is alleged." At the trial the jury rendered "a verdict for the informants, and against the claimant for the condemnation of the goods mentioned in the information, and that the goods were brought in with intent to defraud the United States." The decree set forth that the jury having "by their verdict found for the United States, condemning the said goods," they were "accordingly condemned as forfeited to the United States"; *Held*,

   (1) The verdict was a sufficient compliance with the requirement of § 16 of the act of June 22, 1874, c. 391, (18 Stat. 189,) that, in order to a forfeiture the jury should find that "the alleged acts were done with an actual intention to defraud the United States";

   (2) The judgment was sufficient without reciting any special finding by the jury as to an intent to defraud. *Origet* v. *United States*, 240.

ILLINOIS.

See CONSTITUTIONAL LAW, B.

INDIANA.

See LOCAL LAW, 5.

INSOLVENT DEBTOR.

1. Whether, in a deed of assignment by a debtor for the benefit of creditors made under a state statute, a disregard of and departure from some directions of the statute shall invalidate the assignment or only make the varying provision in it void, will depend upon the general policy of the statute — whether it is intended to restrain or to favor such assignments. *Cunningham* v. *Norton*, 77.

2. A provision in an assignment by a debtor for the benefit of his creditors

under the statute of the State of Texas of March 24, 1879, Rev. Stat. Texas, 1879, App. 5, that any surplus shall be paid to the debtor, made in violation of the direction in § 16 of the statute that such surplus shall be paid into court, does not affect the validity of the assignment, but only invalidates the violating provision. *Ib.*

3. The words "all his lands, tenements, hereditaments, goods, chattels, property, and choses in action of every name, nature, and description, wheresoever the same may be, except such property as may be by the constitution and laws of the State exempt from forced sale," are a sufficient description to convey all the debtor's estate, under the Texas statute of March 24, 1879, regulating assignments by insolvent debtors. *Ib.*

4. A statement in a deed of assignment by a debtor for the benefit of his creditors, that he "is indebted to divers persons in considerable sums of money which he is at present unable to pay in full" is a declaration of the insolvency of the grantor. *Ib.*

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, A, 16–20

JUDGMENT.

A final decree in a suit in equity that "the cause being submitted to the court upon bill, answer, and replication, and having been duly considered, the court finds, adjudges, and decrees that the equities are with the defendant," and dismissing the bill, is an adjudication upon the merits of the controversy, and constitutes a bar to further litigation upon the same subject between the parties; and it is not open to the complainant to show, in a subsequent suit in equity between the same parties, on the same cause of action, that the decree was made in his absence and default, and that no proof had been filed in the cause on either side. *Lyon* v. *Perin and Gaff Manufacturing Co.*, 698.

See ESTOPPEL, 2.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. The legislature of Louisiana in 1877 having granted to a corporation the exclusive right of constructing waterworks to supply the city of New Orleans and its inhabitants with water, provided that nothing in this charter should prevent the city council from granting to any person, contiguous to the Mississippi River, permission to lay water pipes exclusively for its own use, an ordinance of the city council in 1883, granting such permission to a corporation whose property is separated from the river by a street and a broad quay or levee owned by the city, is but a license from the city council exercising an administra-

tive power, and not a law of the State; and if the highest court of the State, in a suit between the waterworks company and the licensee, gives judgment for the latter, upon the construction and effect of the charter and the license, and not because of the provision of the state constitution of 1879 abolishing monopolies, this court has no jurisdiction on writ of error, although the question whether the licensee's property was contiguous to the river was in controversy. *New Orleans Waterworks* v. *Louisiana Sugar Refining Co.*, 18.

2. Upon a writ of error to the highest court of a State, under Rev. Stat. § 709, the opinion of that court, recorded as required by the statutes of the State, may be examined by this court to ascertain the ground of the judgment. *Kreiger* v. *Shelby Railroad Co.*, 39.
3. Statutes of a State authorized a district in a county, defined by exact boundaries, to determine by the vote of its inhabitants to subscribe for stock in a railroad company, and required bonds to be executed in its name by the county judge to the railroad company for the amount of stock so subscribed for. By later statutes, it was enacted that this district should be entitled to vote on the amount of its stock, and in so doing be represented by certain magistrates of the county; and that it should have a certain corporate name, and by that name might sue and be sued. The highest court of the State held that by the earlier statutes the district was made a corporation, and entitled to vote and to receive dividends on its stock in the railroad company, and that the later statutes made no change in the contract created by the earlier statutes. *Held*, that this court had no jurisdiction on writ of error. *Ib.*
4. An action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain reissues thereof, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts; and the correctness of a decision of the highest court of a State upon the merits of the case, based upon the effect of the agreement, without passing upon the validity of a reissue, or any other question under those laws, cannot be reviewed by this court on writ of error. *Dale Tile Mfg. Co.* v. *Hyatt*, 46.
5. At the time of an action in a state court upon an agreement to pay royalties for making and selling a patented machine, evidence that the plaintiff afterwards made improvements in the machine, and that machines made and sold by the defendant upon a later model furnished by a third person were substantially like that mentioned in the agreement, was admitted, notwithstanding the defendant objected to it as going to show that the plaintiff invented the new machine, and as collaterally attacking a patent to the third person. No patent had then been introduced; and no ruling was requested or made upon the

validity or construction of any patent, or upon the legal effect of the evidence. The jury were instructed that the plaintiff was entitled to recover royalties only upon machines substantially like that mentioned in the agreement. A verdict was returned for the plaintiff, and judgment recorded thereon, which was affirmed by the highest court of the State. *Held*, that the record presented no federal question within the jurisdiction of this court on writ of error. *Felix* v. *Scharnweber*, 54.

6. A federal question, within the jurisdiction of this court on writ of error to the highest court of a State, cannot be originated by a certificate of the chief justice of that court, if no such question appears by the record to have been involved in the judgment. *Ib.*

7. A decision by the highest court of a State upon the question whether the mere fact that a bridge, constructed under authority derived from the act of Congress of July 25, 1866, 14 Stat. 244, had not been constructed as required by the statute rendered the owner liable for injuries happening by reason of its existence to a steamboat navigating the river, irrespective of the question whether the accident was the result of the improper construction, presents no federal question for the decision of this court. *Hannibal & St. Jo. Railroad* v. *Missouri River Packet Co.*, 260.

8. A person convicted of crime in the court below having sued out a writ of error which was docketed here, and having escaped from the jurisdiction of the court below, this court declines to hear the case, and orders it removed from the docket unless the plaintiff in error comes within the jurisdiction of the court below on or before the last day of this term. *Bonahan* v. *Nebraska*, 692.

9. The court denies a motion to take action to cause the judgment of a state court to be reversed in obedience to the mandate of this court on the ground that it did not appear that the petitioner had applied to the highest court of the State to carry the mandate of this court into effect. *In re Royall*, 696.

See COURTS OF THE UNITED STATES.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

1. The proper Circuit Court of the United States has jurisdiction, irrespective of the citizenship of the parties, of an action of ejectment in which the controversy turns upon the validity of a patent of land from the United States. *Doolan* v. *Carr*, 618.

2. In a suit in equity in a Circuit Court of the United States to obtain a release of land from liability under a deed of trust, the plaintiff had a decree. On an appeal to this court by the defendant, no evidence on the ground of citizenship was found in the record. This court reversed the decree with costs, and remanded the case for further proceedings; but, as a further examination of the record showed that the suit was brought to restrain the enforcement of a judgment in

ejectment recovered in the same Circuit Court, this court vacated its decree reversing the decree of the court below. *Johnson* v. *Christian*, 642.

See COURTS OF THE UNITED STATES.

C. JURISDICTION OF THE COURT OF CLAIMS.

See APPEAL;
COUNTERCLAIM;
COURTS OF THE UNITED STATES.

LACHES.

The remedy by bill in equity to compel a specific performance of a contract to sell personal property upon the payment of a promissory note given by the other party, payable at a date after the making of the contract, is lost through the laches of the complainant, if he wait five years after the maturity of the note before filing his bill, and the property meanwhile greatly increases in value. *Davison* v. *Davis*, 90.

LICENSE FEE.

See CONSTITUTIONAL LAW, A, 8, 9, 10, 11, 12.

LIEN.

See RAILROAD, 1.

LOCAL LAW.

1. In Pennsylvania, original marks and living monuments are the highest proof of the location of a survey; the calls for adjoining surveys are the next most important evidence of it; and it is only in the absence of both that corners and distances returned by the surveyor to the land office determine it. *Clement* v. *Packer*, 309.
2. Surveys constituting a block are not treated in Pennsylvania as separate and individual surveys, but are to be located together as a block on one large tract; and if the lines and corners of the block can be found, this fixes its location, as they belong to each and every tract of the block as much as they do to the particular tract which they adjoin. *Ib.*
3. When the location of a survey in Pennsylvania can be determined by its own marks upon the ground, or by its own calls, courses, and distances, it cannot be changed or controlled by the marks or lines of an adjoining junior survey; but when, by reason of the disappearance of these original landmarks from the senior survey, the location of a line or the identity of a corner is uncertain and is drawn in controversy, then original and well established marks found upon a later survey, made by the same surveyor about the same time, and adjoining the one in dispute, are admissible — not to contest or control the

matter — but to elucidate it and thus aid the jury in discovering the location of the senior survey. *Ib.*

4. After the lapse of twenty-one years from the return of a survey in Pennsylvania, the presumption is that the warrant was located as returned by the surveyor to the land office, and in the absence of rebutting facts, the official courses and distances determine the location of the tract; but this presumption is not conclusive, and may be rebutted by proof of the existence of marked lines and monuments, and other facts tending to show that the actual location on the ground was different from the official courses and distances. *Ib.*

5. *It seems*, that under the statutes of Indiana an executor named in a will, who has never qualified, or been appointed by the Court of Probate, or taken out letters testamentary, has no power to redeem a mortgage of real estate, either as an executor, or as trustee under the will. *Wall* v. *Bissell*, 382.

6. In Texas in the year 1833, a power of attorney to take possession of and convey real estate which was not acknowledged, witnessed, certified to, written on sealed paper, nor proved before a notary, was nevertheless a valid instrument, those formalities merely affecting the mode of authenticating it. *Williams* v. *Conger*, 397.

7. The English rule as to the requisites of a power to execute sealed instruments was not in force in Texas when the transactions here in controversy took place. *Ib.*

See CONSTITUTIONAL LAW, B;
COURTS OF THE UNITED STATES;
EVIDENCE, 3;
INSOLVENT DEBTOR;
JURISDICTION, A, 1, 3;
PRACTICE, 1;
RAILROAD, 1;
REPLEVIN BOND;
RES JUDICATA.

LONGEVITY PAY.

See SALARY, 2.

LORD'S DAY.

See COURTS OF THE UNITED STATES, 3.

LOUISIANA.

See JURISDICTION, A, 1;
PRACTICE, 1.

MAINE.

See REPLEVIN BOND.

MANDATE.

See JURISDICTION, A, 9.

MARRIAGE.

See HUSBAND AND WIFE.

MASSACHUSETTS.

See COURTS OF THE UNITED STATES;
NATIONAL BANK;
TAX AND TAXATION.

MEXICAN GRANT.

See EVIDENCE, 11;
PUBLIC LAND, 10.

MISSOURI RIVER.

See NAVIGABLE STREAMS.

MORTGAGE.

In equity, a mortgage of real estate, made to one of two creditors to secure the payment of a debt due to them jointly, is incident to the debt, and may be released, after the death of the mortgagee, by the surviving creditor; and a release, made in good faith by the survivor, of part of the land from any and all lien by reason of the mortgage, is valid against himself and the representatives of the deceased, although he is in fact executor of the latter, and describes himself as such in the last clause and the signature of the release, and has by law no authority to enter the release as executor, for want of letters testamentary. *Wall* v. *Bissell*, 382.

See EQUITY, 8, 9;
LOCAL LAW, 5;
RAILROAD, 2, 3, 4, 5.

NATIONAL BANK.

The question of exemption from taxation of deposits in savings banks, as affecting the rule for the state taxation of national bank shares, was very deliberately considered by this court in *Mercantile Bank* v. *New York*, 121 U. S. 138; and the conclusion reached in that case was reaffirmed in *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83; and it is impossible to distinguish this case from those cases. *Bank of Redemption* v. *Boston*, 60.

The laws for the taxation of national banks in Massachusetts, Mass. Pub. Stats. c. 13, §§ 8, 9, 10, do not deny to the banks as taxpayers the equal protection of the laws, in violation of the Fourteenth Amendment to the

Constitution of the United States; and do not impose a disproportionate and unequal tax upon them in violation of the provisions of the constitution of that State. *Ib.*

It is the manifest intent of Rev. Stat. § 5219, to permit the State in which a national bank is located to tax all the shares in its capital stock without regard to ownership, subject only to the limitations prescribed in that section; and in this case the law permits the taxation of the shares in the bank of the plaintiff in error which are owned by other national banks, on the same footing with all other shares. *Ib.*

NAVIGABLE STREAMS.

The act of Congress of July 25, 1866, 14 Stat. 244, § 10 of which authorized a bridge to be constructed across the Missouri River at the city of Kansas, required that the distance of one hundred and sixty feet between the piers of the bridge, which were called for by the act, should be obtained by measuring along a line between said piers drawn perpendicularly to the faces of the piers and the current of the river; and as such a line drawn between the piers of the bridge of the plaintiff in error measures only one hundred and fifty-three feet and a fraction of a foot, instead of the required one hundred and sixty feet, it is not a lawful structure within the meaning of that act. *Hannibal & St. Joseph Railroad* v. *Missouri River Packet Co.*, 260.

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

NONSUIT.

See ESTOPPEL, 2.

OFFICER IN THE NAVY.

See SALARY, 1, 2, 3;
STATUTE, A, 1.

OREGON.

See CONSTITUTIONAL LAW, 2;
HUSBAND AND WIFE.

PARTIES.

See PATENT FOR INVENTION, 2.

PARTNERSHIP.

See MORTGAGE.

PATENT FOR INVENTION.

1. The second claim in reissued letters-patent No. 8914, dated September 30, 1879, to Frederick W. Weir, for an improvement in railroad frogs,

(the original patent being No. 215,548, dated May 20, 1879,) whether construed by itself, or with reference to the state of the art at the time of the alleged invention, is a claim for a combination of parts, viz.: (1) two centre rails B B joined to form the V-shaped point; (2) the outside diverging or wing rails; (3) the channel irons of a U shape uniting the centre rails together, and also to the outside or wing rails, so that the whole shall constitute a frog with the characteristics imparted by the features of this combination: and no invention was required to divide the U iron, shown in patent No. 173,804, issued to William J. Morden, February 22, 1876, so as to connect the centre rails with the outer rail. *Weir* v. *Morden*, 98.

2. One having an interest in all fees and other sums to be recovered under a patent, but not shown to have any interest, legal or equitable, in the patent itself, need not be made a party to a bill in equity for its infringement. *Tilghman* v. *Proctor*, 136.
3. Upon a bill in equity by the owner against infringers of a patent, the plaintiff, although he has established license fees, is not limited to the amount of such fees, as damages; but may, instead of damages, recover the amount of gains and profits that the defendants have made by the use of his invention, over what they would have had in using other means then open to the public and inadequate to enable them to obtain an equally beneficial result. *Ib.*
4. Upon a bill in equity for infringing a patent, if the defendants have gained an advantage by using the plaintiff's invention, that advantage is the measure of the profits to be accounted for, even if from other causes the business in which the invention was employed by the defendants did not result in profits; and if the use of a patented process produced a definite saving in the cost of manufacture, they must account to the patentee for the amount so saved. *Ib.*
5. The liability of infringers of a patent to account to the patentee for all the profits, gains and savings, which they have made by the use of his invention during the whole period of their infringement, is not affected by the fact that in the midst of that period an erroneous decision was made in favor of a distinct infringer, in no way connected with these defendants. *Ib.*
6. In determining the amount of gains and profits derived by infringers of a patent from the use of the invention, over what they would have made in using an old process open to the public, the expense of using the new process is to be ascertained by the manner in which they have conducted their business, and not by the manner in which they might have conducted it; but the cost at which they used the old process is not conclusive against them, if other manufacturers used that process at less cost. *Ib.*
7. As a general rule, in taking an account of profits against an infringer of a patent, interest is not to be allowed before the date of the submission of the master's report, but only after that date and upon the amount shown to be due by his report and the accompanying evidence. *Ib.*

8. The other questions decided were questions of fact. *Ib.*

9. Claims 2 and 3 of reissued letters patent No. 8876, granted to Frank H. Fisher September 2, 1879, on an application filed March 29, 1879, for an "improvement in hydraulic mining apparatus," the original patent No. 110,222, having been granted to Fisher December 20, 1870, namely, "2. A ball-and-socket joint for connecting the discharge pipe of a hydraulic mining apparatus with the end of a swivel section, B, substantially as above described. 3. The discharge pipe, E, having a semi-cylindrical or ball-shaped enlargement at its base, in combination with a corresponding cup-shaped socket, D, on the end of the horizontally swivelling section, B, substantially as, and for the purpose described," are invalid. *Hoskin* v. *Fisher*, 217.

10. A copy of the original patent being found in the record under a proper certificate from the clerk of the court below, and there being a stipulation under which it might have been introduced in evidence from the proceedings in another case, it is to be considered, although there is no separate memorandum of its introduction in evidence. *Ib.*

11. There was a first reissue of the patent, granted as No. 5193, December 17, 1872, but no copy of it being found in the record, it cannot be presumed that claims 2 and 3 of the second reissue were found in the first reissue. *Ib.*

12. The plaintiffs having stated in their bill that the first reissue or a copy of it was ready in court to be produced, it was for them to put it in evidence, if they desired to excuse the delay of more than eight years and three months in applying for the second reissue by showing that the first reissue, granted a little less than two years after the date of the original patent, contained claims 2 and 3 of the second reissue. *Ib.*

13. The question of such delay is to be considered as if there never had been any first reissue. *Ib.*

14. Claims 2 and 3 of the second reissue being claims to sub-combinations less than the whole combination covered by the single claim of the original patent, and the descriptive parts and drawings of the two specifications being alike, and it not being indicated in the original that the invention consisted in anything less than a combination of all the elements embraced in such single claim, and the delay not being explained, such claims were unlawful expansions of the original patent. *Ib.*

15. A patent granted in 1871, for an improvement in post-office boxes was reissued in 1872, and again in 1877, and again in 1879. The original patent limited the invention to a metallic frontage made continuous by connecting the adjoining frames to each other, and not merely to the woodwork. There was no mistake, and the original patent was not defective or insufficient, in either the descriptive portion or the claims. In the progress of the first reissue through the Patent Office, the applicant, on its requirement, struck out of the proposed specifica-

tion everything which suggested any other mode of fastening than one by which the frames were to be fastened to each other: *Held*, that the first reissue could not have been construed as claiming any other mode of fastening; that therefore the third reissue could not be construed as claiming any other mode of fastening; and that, as the defendant's structures would not have infringed any claim of the original patent, they could not be held to infringe any claim of the third reissue. *Yale Lock Manufacturing Co.* v. *James*, 447.

See JURISDICTION, A, 4, 5, 6.

PENNSYLVANIA.

See LOCAL LAW, 1, 2, 3, 4.

PERSON.

See CONSTITUTIONAL LAW, 10.

PETITION FOR REHEARING.

A petition for a rehearing of a case decided by a divided court is denied on the ground that no important constitutional question is involved. *Shreveport* v. *Holmes*, 694.

POLICE POWER.

See CONSTITUTIONAL LAW, 4, 5.

POWER.

A contract, made under authority of a statute, by a State with an individual to prosecute at his own expense before Congress and the Departments certain specified claims of the State against the United States, and to receive as full compensation for his services a certain rate of commission on the amounts collected by him, does not confer upon the agent a power, coupled with an interest in the subject of the contract, which will make the contract of agency irrevocable. *Missouri ex rel. Walker* v. *Walker*, 339.

POWER OF ATTORNEY.

A power of attorney authorized the donee to take possession of real estate by himself or by a person in his confidence, to cultivate it, to sell it, to exchange it or to alienate it. He indorsed it to A by a writing stating: "I transfer all my powers in favor of A, in order that in my name and as my attorney he may take possession," &c. *Held*, that the indorsement only gave it power to take possession, but no power to sell. *Williams* v. *Conger*, 397.

See EVIDENCE, 8, 9;
LOCAL LAW, 6, 7.

PRACTICE.

1. The opinion of the Supreme Court of Louisiana is strictly part of the record, and is so considered on writ of error from this court. *New Orleans Waterworks* v. *Louisiana Sugar Refining Co.*, 18.
2. The parties having compromised the suit, and stipulated that the plaintiff in error shall dismiss it, the court makes an order to enforce the stipulation, unless cause to the contrary be shown. *Addington* v. *Burke*, 693.
3. It being made to appear that one party to this suit had sold out to the other, and that the suit was prosecuted by the purchasing party for his own benefit, the court of its own motion, after notice and hearing, dismissed the case. *East Tennessee, Virginia & Georgia Railroad Co.* v. *Southern Telegraph Co.*, 695.

See APPEAL;
BILL OF EXCEPTIONS;
BILL OF REVIEW;
JURISDICTION, A, 2, 6, 8, 9;
PETITION FOR REHEARING.

PRESUMPTION.

See EVIDENCE, 9.

PUBLIC LAND.

1. A suit may be brought by the United States in any court of competent jurisdiction to set aside, cancel, or annul a patent for land issued in its name, on the ground that it was obtained by fraud or mistake. *United States* v. *San Jacinto Tin Co.*, 273.
2. The initiation and control of such a suit lies with the Attorney General as the head of one of the Executive Departments. *Ib.*
3. But the right to bring such a suit exists only when the government has an interest in the remedy sought by reason of its interest in the land, or the fraud has been practised on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action. *Ib.*
4. When it is apparent that the only purpose of bringing the suit is to benefit one of the two claimants to the land, and the government has no interest in the matter, the suit must fail. *Ib.*
5. In the case before us the alleged fraud, for which it is sought to annul the patent, is in the survey of a confirmed Mexican grant, on which the patent was issued; and it is charged that at the time the survey was made the Commissioner of the General Land Office, the Surveyor General for California, the chief clerk of the latter's office, and the deputy who made the survey, were interested in the ownership of the

grant, and by fraud made a false location of the land to make it contain valuable ores of tin not within its limits if fairly surveyed. *Ib.*

6. Of all the officers here charged, only Conway, the chief clerk, had any real interest in the claim, and he notified the Surveyor General of his interest, and refused to have anything to do with the survey; it is nowhere shown that he in any manner influenced the location of the survey, and it is denied under oath by all who took part in making it. *Ib.*

7. The fact is much relied on that some of these officers, after the patent was issued, took shares in a joint stock corporation organized to work the mine, but there is no proof that the shares were a voluntary gift or were for services rendered in locating the survey, and the fairness of the purchase of these shares after the patent issued is sustained by affirmative testimony. *Ib.*

8. The fact that this survey was contested at every step by interested parties, and was returned to the surveyor's office for correction, was twice before that office and twice before the Commissioner in Washington, and finally decided after six months' consideration by the Secretary of the Interior, confirming the decision of the Land Office, affords very strong evidence of the correctness and honesty of the survey. *Ib.*

9. In the *Maxwell Land Grant Case*, 121 U. S. 325, we expressed ourselves fully in regard to the testimony necessary to enable a court of chancery to set aside such a solemn instrument as a patent of the United States. It was there said, "that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt." There is no such convincing evidence of fraud in the present case. *Ib.*

10. Land within the limits of a valid Mexican grant (which grant was *sub judice* when the grant of public land in aid of the Pacific Railroads was made by the act of July 1, 1862, as amended July 2, 1864, and March 3, 1865), if found after the location of the railroads to be within the prescribed limits on either side of them, did not pass to the corporations as "public land," if it was described by specific boundaries; or if it was known or described by a name by which it could be identified; but if it was described as a specific quantity, within designated outboundaries containing a greater area, only so much land within the outboundaries as is necessary to cover the specific quantity granted is excluded from the grant to the railroad companies. *Doolan* v. *Carr*, 618.

See ASSIGNMENT OF ERROR;
EVIDENCE, 10, 11, 12.

PUBLIC RECORD.

See EVIDENCE, 4, 5.

RAILROAD.

1. The statute of the State of Arkansas of July 21, 1868, to aid in the construction of railroads, and the statute of that State of April 10, 1869, to provide for payment of interest upon the bonds of the State issued in aid of such construction, created no lien upon the property of a railroad company for whose benefit such state bonds were issued, in favor of the holder of the bonds, which, after a sale under foreclosure of a mortgage upon the property remained a lien upon it in the hands of the purchaser at the foreclosure sale. *Tompkins* v. *Little Rock & Fort Smith Railway*, 109.

2. The entire rolling stock of a railway company in Illinois was covered, as well as all its other property, by a mortgage to trustees to secure an issue of outstanding bonds. A judgment creditor of the company being about to levy upon some of the rolling stock, the company filed a bill in equity to restrain the levy and to set aside the judgment as obtained by fraud, and an injunction issued restraining the creditor from making the levy, a bond with surety being first filed, conditioned to pay the judgment debt if the injunction should be dissolved. The surety in that bond took as security a chattel mortgage of four locomotives. Proceedings were then taken for the foreclosure of the mortgage, and a receiver of all the property covered by the mortgage was appointed. Several suits against the company were then pending in which appeal had been taken and appeal bonds given, in order to protect the rolling stock. The receiver then suggested, making special mention of the above recited case, that the sureties should be protected in the event of adverse decisions, and the court authorized him in his discretion to protect such sureties as ought to be protected, by reason of the protection afforded to the property and assets of the company, by the giving of their bonds; and an order was made that all persons having claims or liens against the property or its proceeds should file intervening petitions on or before a day named. The surety in the injunction bond intervened within the time fixed, setting forth the facts, and that judgment had been recorded against him, and asking to be protected from the consequences of signing the bond, as the receiver had not been able to pay the debt of the judgment creditor. The property covered by the mortgage was then sold, and purchased by persons representing the bondholders, and it was referred to a master to report upon the intervening claims. The trustee and the receiver objected to the allowance of the claims of the surety on the injunction bond, on the ground that the execution in the original suit could not become a lien upon the property as against the mortgage bondholders, and on the further ground that the surety

had not paid the judgment debt. The surety then paid the judgment debt, and filed a supplemental petition, setting that fact forth and repeating this original application, but the master rejected the claim on the ground that the payment was not made when he filed his original claim, nor until the time had expired for claims to be presented. *Held:* (1) That the claim was presented in time; and that although the surety had not paid the judgment when the claim was presented, he was entitled in equity to be protected from making the payment; (2) That the purchaser at the foreclosure sale, having been represented in the foreclosure proceedings by the trustees of the mortgage were bound by whatever bound the trustees, including the orders of the court respecting the paramount liens of the intervening claimants; (3) That as, until the mortgage was enforced by entry or judicial claim, the personal property of the company was subject to its disposal in the ordinary course of its business, and to be seized and taken on execution for its debts, subject, however, to the contentions of the mortgage trustees, the act of the surety on the injunction bond had operated to keep the property together, and to keep up the railroad as a going concern; (4) That the taking of the chattel mortgage by him showed that he intended to look to the property, and not alone to the personal security of the company; (5) That the evidence referred to in the opinion showed that the receiver received moneys from which he might have paid the judgment debt; (6) That the purchasers of the property accepted a deed, executed under order of court, in which they recognized the right of the surety as an intervenor. *Union Trust Company* v. *Morrison*, 591.

3. The court does not intend, in this case, to decide anything in conflict with *Burnham* v. *Bowen*, 111 U. S. 776, and only decides that this claim, being based upon a *bona fide* effort by the intervenor to preserve the fund from spoliation after the mortgage debt was in arrear, and the right to reduce to possession had accrued, the claimant can pursue earnings which had been appropriated to the purchase of property that had been added to the fund. *Ib.*

4. The action of the intervenor not being taken for the purpose of being subrogated to the questionable rights of a judgment creditor, the court expresses no opinion upon the rights of an execution creditor, levying on the personal property of a railroad company in Illinois, as against those of a mortgagee. *Ib.*

5. The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines, and, generally, debts created under special circumstances which make an equity in favor of the unsecured debtor upon the gross income of the road before a fund arises for the payment of mortgage interest is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take prece-

dence over debts secured by prior and express liens in the distribution of the proceeds of the sale of the mortgaged property. *St. Louis, Alton &c. Railroad* v. *Cleveland, Columbus &c. Railway*, 658.

6. The court holds on the proof in this case: (1) that no gross earnings which should have been applied to the payment of the rent due the appellant were diverted to the payment of interest upon bonds of mortgage bondholders represented in this suit and interested in the distribution of the fund; and (2) that the appellant has no equitable right, as against the appellees, to priority of payment out of the fund. *Ib.*

See CONSTITUTIONAL LAW, 22, 23;
EQUITY, 7, 8, 9.

RECEIVER.

See EQUITY, 4, 5, 6, 7,
RAILROAD, 2.

REPLEVIN BOND.

In Maine, the plaintiff in a replevin suit for ice, gave a bond, with sureties, to the defendant, in the penalty of $30,000, conditioned to prosecute the suit to final judgments, and pay such damages and costs as the defendant should recover against them, "and also return and restore the same goods and chattels in like good order and condition as when taken, in case such shall be the final judgment." The ice was stated in the bond to be of the value of $15,000. In the suit there was a judgment for the return of the ice to the defendant, and for an amount of damages ascertained by the jury by allowing interest from the time the ice was taken, on a sum found to have been its value where and when it was taken, and also allowing the expenses of the defendant in preparing to remove the ice. The damages were paid but the ice was not returned. In a suit on the bond, *Held*, (1) The plaintiff in that suit was entitled to recover what the jury in the replevin suit had found to have been the value of the ice where and when it was taken, with interest thereon from the date of the verdict in the replevin suit; (2) It was not competent for the obligors in the bond to show that the ice was of less value than the amount stated in the suit of replevin and the bond; but it was competent for the obligee to show that such value was greater; (3) The finding of the jury in the replevin suits as to the value of the ice where and when it was taken, was competent and conclusive evidence, as against the obligors, of such value. *Washington Ice Co.* v. *Webster*, 426.

RES JUDICATA.

A cause was tried before a jury in a state court, and being taken to the highest court of the State, that court ordered a new trial, deciding that a certain document was admissible in evidence as an ancient deed.

After the cause was remanded to the trial court it was removed to the Circuit Court of the United States. *Held*, that its decision on that question was binding on the courts of the United States. *Williams* v. *Conger*, 397.

RETIRED PAY LIST.

See SALARY, 1;
STATUTE, A, 1.

RETIRING BOARDS OF THE NAVY.

See STATUTE, A, 1.

REVENUE LAWS.

Under § 12 of the act of June 22, 1874, c. 391, (18 Stat. 188,) merchandise can be forfeited independently of the imposition of the fine mentioned in that section. *Origet* v. *United States*, 240.

See EVIDENCE, 1, 2;
INFORMATION.

REVIEW.

See BILL OF REVIEW.

SALARY.

1. A naval officer being retired on furlough pay, under Rev. Stat. § 1454, for incapacity not the result of any incident of the service, and being subsequently transferred by the President, by and with the consent of the Senate, from the furlough to the retired pay list under Rev. Stat. § 1594, is entitled thereafter, under the second clause of Rev. Stat. § 1588, when not on active duty, to one-half the sea pay provided for the grade or rank held by him at the time of his retirement. *Potts* v. *United States*, 173.
2. A person who was appointed a midshipman in the navy in September, 1867, and an ensign in July, 1872, and as to whom the lowest grade having graduated pay held by him since last entering the service was, under the act of July 15, 1870, c. 295, 16 Stat. 330, § 3, that of ensign, is entitled to be credited, under the act of March 3, 1883, c. 97, 22 Stat. 473, with the time he so served as a midshipman, on the ground that service as a midshipman, at the naval academy, was service as an officer of the navy. *United States* v. *Baker*, 646.
3. Service by order of the Secretary of the Navy by an officer in the navy as executive officer on a recruiting ship at anchor in port at a navy-yard, and not in commission for sea service entitles him to receive pay for sea service. *United States* v. *Strong*, 656.

SALE.

The payee of a promissory note gave to the promisor a receipt acknowledging it as given for the purchase of personal property to be delivered

to the promisor on payment of his note. The note not being paid at maturity, the payee notified the promisor that he should not recognize his further claim to the property, and, after a further lapse of time without hearing from him, destroyed the note. *Held*, that the sale was conditional, not to be completed until payment of the note. *Davison* v. *Davis*, 90.

STATE.

See POWER.

STATUTE.

See TABLE OF STATUTES, CITED IN OPINIONS.

A. CONSTRUCTION OF STATUTES.

1. Section 1594, Rev. Stat. authorizing the transfer of a retired officer of the navy from the furlough to the retired pay list being intended to afford relief from the consequences of the findings of retiring boards, should be construed liberally: and being so construed, it is held that the President has power under it, with the advice and consent of the Senate, to make the transfer relate back to a time when, in his judgment, it ought to have been granted. *United States* v. *Burchard*, 176.
2. When there is any doubt as to the proper construction of a statute granting a privilege, that construction should be adopted which is most advantageous to the interests of the government, the grantor. *Hannibal & St. Jo. Railroad* v. *Missouri River Packet Co.*, 260.

See CLAIMS AGAINST THE UNITED STATES, 1;
COURTS OF THE UNITED STATES, 1, 2, 3;
CUSTOMS DUTY, 2, 3, 4, 5;
INSOLVENT DEBTOR, 1;
REVENUE LAWS.

B. STATUTES OF THE UNITED STATES.

See BILL OF EXCEPTIONS;
CONSTITUTIONAL LAW, A, 2, 17, 21;
COURTS OF THE UNITED STATES;
CUSTOMS DUTY, 1, 4, 6, 8;
HUSBAND AND WIFE, 6;
INFORMATION, 1, 4, 6;
JURISDICTION, A, 2, 7;
NATIONAL BANK, 2, 3;
NAVIGABLE STREAMS;
REVENUE LAWS;
SALARY;
STATUTE, A, 1;
TAX AND TAXATION, 1, 2.

C. STATUTES OF STATES AND TERRITORIES.

Arkansas. *See* RAILROAD, 1.
Iowa. *See* CONSTITUTIONAL LAW, 19.
Massachusetts. *See* COURTS OF THE UNITED STATES, 3;
NATIONAL BANK;
TAX AND TAXATION, 2, 3.
Texas. *See* INSOLVENT DEBTOR, 2, 3.

SUNDAY.

See COURTS OF THE UNITED STATES, 3.

TAX AND TAXATION.

1. The privilege conferred upon telegraph companies by Rev. Stat. § 5263 carries with it no exemption from the ordinary burdens of taxation in a State within which they may own or operate lines of telegraph. *Western Union Telegraph Co.* v. *Massachusetts*, 530.
2. The laws of Massachusetts impose a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that State, the value of which is to be ascertained by comparing the length of its lines in that State with the length of its entire lines; and such a tax is essentially an excise tax, and is not forbidden by the fact of the acceptance on the part of the company of the rights conferred on telegraph companies by Rev. Stat. § 5263, nor by the commerce clause of the Constitution. *Ib.*
3. The principles established by the statutes of Massachusetts for regulating the taxation of corporations doing business within its limits, whether domestic or foreign, do not appear to be unfair or unjust. *Ib.*

See CONSTITUTIONAL LAW, 13, 14, 15, 21;
NATIONAL BANK.

TELEGRAPH COMPANIES.

See TAX AND TAXATION.

TEXAS.

See INSOLVENT DEBTOR;
LOCAL LAW, 6, 7.

WILLAMETTE RIVER.

See CONSTITUTIONAL LAW, 4.

UNITED STATES.

See PUBLIC LAND.