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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1889

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.

SAMUEL FREEMAN MILLER, Associate Justice.

STEPHEN JOHNSON FIELD, Associate Justice.

JOSEPH P. BRADLEY, Associate Justice.

JOHN MARSHALL HARLAN, Associate Justice.

HORACE GRAY, Associate Justice.

SAMUEL BLATCHFORD, Associate Justice.

LUCIUS QUINTUS CINCINNATUS LAMAR, Associate Justice.

DAVID JOSIAH BREWER, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.

WILLIAM HOWARD TAFT, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1889.

HANS v. LOUISIANA.

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

No. 4. Argued and submitted January 22, 1890. — Decided March 3, 1890.

A State cannot, without its consent, be sued in a Circuit Court of the United States by one of its own citizens, upon a suggestion that the case is one that arises under the Constitution and laws of the United States.

Chisholm v. *Georgia*, 2 Dall. 419, questioned.

While a State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void, and powerless to affect their enjoyment.

THIS was an action brought in the Circuit Court of the United States, in December, 1884, against the State of Louisiana by Hans, a citizen of that State, to recover the amount of certain coupons annexed to bonds of the State, issued under the provisions of an act of the legislature approved January 24, 1874. The bonds were known and designated as the "consolidated bonds of the State of Louisiana," and the coupons sued on are for interest which accrued January 1, 1880. The grounds of the action were stated in the petition as follows:

"Your petitioner avers that by the issue of said bonds and

coupons said State contracted with and agreed to pay the bearer thereof the principal sum of said bonds forty years from the date thereof, to wit, the first day of January, 1874, and to pay the interest thereon represented by coupons as aforesaid, including the coupons held by your petitioner, semi-annually upon the maturity of said coupons; and said legislature, by an act approved January 24, 1874, proposed an amendment to the constitution of said State, which was afterwards duly adopted, and is as follows, to wit:

"'No. 1. The issue of consolidated bonds, authorized by the general assembly of the State at its regular session in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in nowise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor. To secure such levy, collection and payment the judicial power shall be exercised when necessary. The tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until said bonds shall be paid, principal and interest, and the proceeds shall be paid by the treasurer of the State to the holders of said bonds as the principal and interest shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection and for such payment from the treasury.'

"And petitioner further avers that, notwithstanding said solemn compact with the holders of said bonds, said State hath refused and still refuses to pay said coupons held by petitioner, and by its constitution, adopted in 1879, ordained as follows:

"'That the coupon of said consolidated bonds falling due the first of January, 1880, be, and the same is hereby, remitted, and any interest taxes collected to meet said coupons are hereby transferred to defray the expenses of the state government;' and by article 257 of said constitution also prescribed that 'the constitution of this state, adopted in eighteen hundred and sixty-eight, and all amendments thereto, is declared

to be superseded by this constitution;' and said State thereby undertook to repudiate her contract obligations aforesaid and to prohibit her officers and agents executing the same, and said State claims that, by said provisions of said constitution, she is relieved from the obligations of her aforesaid contract and from the payment of said coupons held by petitioner, and so refuses payment thereof and had prohibited her officers and agents making such payment.

"Petitioner also avers that taxes for the payment of the interest upon said bonds, due January 1, 1880, were levied, assessed and collected, but said State unlawfully and wrongfully diverted the money so collected, and appropriated the same to payment of the general expenses of the State, and has made no other provision for the payment of said interest.

"Petitioner also avers that said provisions of said constitution are in contravention of said contract, and their adoption was an active violation thereof, and that said State thereby sought to impair the validity thereof with your petitioner in violation of article 1, section 10, of the Constitution of the United States, and the effect so given to said state constitution does impair said contract.

"Wherefore petitioner prays that the State of Louisiana be cited to answer this demand, and that after due proceedings she be condemned to pay your petitioner said sum of ($87,500) eighty-seven thousand five hundred dollars, with legal interest from January 1, 1880, until paid, and all costs of suit; and petitioner prays for general relief."

A citation being issued, directed to the State, and served upon the governor thereof, the attorney general of the State filed an exception, of which the following is a copy, to wit:

"Now comes defendant, by the attorney general, and excepts to plaintiff's suit on the ground that this court is without jurisdiction *ratione personæ*. Plaintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state, and its jurisdiction is respectfully declined.

"Wherefore respondent prays to be hence dismissed, with costs and for general relief."

By the judgment of the court this exception was sustained, and the suit was dismissed. See *Hans* v. *Louisiana*, 24 Fed. Rep. 55. To this judgment the present writ of error was brought.

Mr. J. D. Rouse, (*Mr. William Grant* was also on the brief,) for plaintiff in error.

I. The sole question arising in this case, and now here presented for the first time, is: "Does the judicial power of the United States extend to a case arising under the Constitution or laws of the United States and originally brought against a State by one of its own citizens?"

The judicial power of the United States is established by the Constitution, and its extent is defined by section 2 of article 3, which is as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens or subjects."

The provision is mandatory, and has always been held to include all that the fullest scope given to the language requires. *Osborn* v. *United States Bank*, 9 Wheat. 738; *Cohens* v. *Virginia*, 6 Wheat. 264; *Tennessee* v. *Davis*, 100 U. S. 257; *Railroad Co.* v. *Mississippi*, 102 U. S. 135; *Mayor* v. *Cooper*, 6 Wall. 247; 3 Webster's Works, 334, 482.

II. But it is contended by the defendant that because of its sovereignty it is excepted from the operation of this general grant of judicial power. There is no warrant for the proposition either in the history of the constitution or in its judicial interpretation.

The sovereignty of the States is limited by the Constitution. No State can enter into any treaty, alliance or confederation; grant letters of marque, pass any bill of attainder, or grant any title of nobility. These and many other rights and powers inherent in sovereign States were surrendered to the federal government by the adoption of the Constitution.

Sovereign States may not be sued without their consent, but by the federal Constitution the States submitted themselves to the judicial power of the Union in many named cases. It was expressly extended to controversies between two or more States; between a State and citizens of another State, and between a State and foreign states, citizens or subjects.

This was necessary for the establishment of justice, and to insure that domestic tranquillity which was among the chief objects of the Constitution; because controversies would inevitably arise between the States themselves, as well as between the States and citizens of sister or foreign states, which might not involve any question arising under the Constitution or laws of the United States, jurisdiction over which had already been given in all cases, without regard to parties, whether States or individuals.

In *Chisholm* v. *Georgia*, 2 Dall. 419, a citizen of South Carolina sued the State of Georgia, invoking jurisdiction under that clause of the Constitution extending the judicial power to controversies between States and citizens of other States. It was contended on behalf of the State of Georgia that while a State might sue a citizen of another State in the federal courts, the State could not there be sued; but this court held that it could be.

This decision was followed by the adoption of the Eleventh Amendment to the Constitution, declaring that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This is a limitation upon the exercise of judicial power in the cases named. Upon no principle of construction can the limitation be applied to other cases. No change in the Con-

stitution was made in any other respect. The judicial power still extends to all cases over which it was granted, excepting only suits in law or equity commenced or prosecuted *against* a State by a citizen of another State or of a foreign State. Suits may still be brought by a foreign State against a State of the Union, by one State against another or against the citizens of another State. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265.

III. The jurisdiction has been exercised in cases too numerous to mention. See, especially, *Rhode Island* v. *Massachusetts*, 12 Pet. 657; *New Hampshire* v. *Louisiana*, 108 U. S. 76, 90; *Tennessee* v. *Davis*, 100 U. S. 257, 266; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Cohens* v. *Virginia*, 6 Wheat. 264, 279; *Ames* v. *Kansas*, 111 U. S. 449; *Carter* v. *Greenhow*, 114 U. S. 317, 322; *Civil Rights Cases*, 109 U. S. 3, 12.

In *In re Ayers*, 123 U. S. 443, the contempt proceedings were in a suit instituted by aliens, and therefore held not to be within the jurisdiction of the court, because of the Eleventh Amendment. The cases of *Hagood* v. *Southern*, 117 U. S. 52, and *Louisiana* v. *Jumel*, 107 U. S. 711, were held to be in effect suits against a State within the prohibition of the amendment, the plaintiffs being citizens of another State.

IV. The third article of the constitution declares that "the judicial power of the United States shall be vested in one Supreme Court and in such other inferior courts as the Congress may from time to time ordain and establish." The language of this article is mandatory upon the legislature. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 334.

By the judiciary act of 1789, sec. 13, it is enacted that "the Supreme Court shall have *exclusive* jurisdiction of controversies of a civil nature where a State is a party, *except between a State and its citizens;* and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction," 1 Stat. 80, c. 20, § 13; thus clearly recognizing that controversies might arise between a State and its citizens within the judicial power of the United States.

The Constitution is the supreme law of the land, and upon

its adoption the sovereignty of the States ceased to exist as to all matters confided to the federal government. *Dodge* v. *Woolsey*, 18 How. 331. By their own consent the States submitted themselves to the judicial power of the United States in all cases to which that power extends. The submission of the original States was voluntary. The territory of Orleans possessed no sovereignty, but the act of Congress, authorizing the people thereof to form a constitution and state government, required the convention to adopt the Constitution of the United States, and to transmit to Congress the instrument by which its consent to said Constitution was given, 2 Stat. 641, c. 21; and the act admitting the State of Louisiana into the Union declared this condition, among others, a fundamental condition of such admission. 2 Stat. 701, c. 50.

V. The State of Louisiana, when it entered into the contract upon which the plaintiff sues, submitted itself to the judicial power for its enforcement.

Section 11 of the act under which the bonds were issued provided that each provision of the act should be a *contract* between the State of Louisiana and each and every holder of the bonds. A constitutional amendment further provided that no court should enjoin the payment of the principal, or the levy and collection of the tax therefor, and that the judicial power should be exercised, when necessary, to secure such levy, collection and payment. It was competent for the State to thus subject itself to suit in the state courts. *Curran* v. *Arkansas*, 15 How. 304; *Davis* v. *Gray*, 16 Wall. 203, 221.

By the submission of herself to the judicial power of her own courts the State submitted herself to the judicial power of the federal courts having jurisdiction *ratione materiæ*. She submitted herself to the jurisdiction of the court below, because she made no exception. Even the Supreme Court of Louisiana, in the case of the *State ex rel. Hart* v. *Burke*, put her exemption from suit to enforce this contract upon the ground that the constitutional amendment of 1874, which submitted the State of Louisiana to the judicial power, had been repealed by the Constitution of 1879 and that the power of submission was taken away.

The Supreme Court of Louisiana assumed, that, although the Constitution of the United States prohibited the State from passing any law impairing the validity of a contract, the State by the adoption of a constitution could avoid that prohibition. The court overlooked the numerous decisions of this court declaring that provision of the Constitution to be directed as well against impairing the obligation of a contract by constitutional amendment as by legislative authority; that in the meaning of the prohibition a constitution is a law. *Dodge* v. *Woolsey*, 18 How. 331; *Railroad Co.* v. *McClure*, 10 Wall. 511; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *White* v. *Hart*, 13 Wall. 646; *Gunn* v. *Barry*, 15 Wall. 610; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Providence Bank* v. *Billings*, 4 Pet. 514; *Green* v. *Biddle*, 8 Wheat. 1; *Woodruff* v. *Trapnall*, 10 How. 190; *Wolff* v. *New Orleans*, 103 U. S. 358; *Poindexter* v. *Greenhow*, 114 U. S. 270, 297; *Fletcher* v. *Peck*, 6 Cranch, 87.

VI. The Supreme Court of Louisiana holds that the Constitution of 1879 deprived the courts of the State of jurisdiction to enforce the contracts of the State in relation to these bonds. To take away all remedy for the enforcement of a right is to take away the right itself. But that is not in the power of the State. *Poindexter* v. *Greenhow*, 114 U. S. 270, 303; *Brown* v. *Kinzie*, 1 How. 311, 317; *McCracken* v. *Hayward*, 2 How. 608; *Louisiana* v. *New Orleans*, 102 U. S. 203, 206; *Seibert* v. *Lewis*, 122 U. S. 284, 295. The constitutional protection of contracts is judicially enforced in suits growing out of them. *In re Ayers*, *sup.*, 504; *Carter* v. *Greenhow*, 114 U. S. 317, 322.

The State, having consented to be sued, and having made such consent a matter of contract, upon which it had obtained a loan of money, cannot withdraw its consent to the injury of the party with whom it contracted. Such withdrawal would impair its contract in violation of the Constitution of the United States. *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Mr. Walter H. Rogers, Attorney General of the State of Louisiana, *Mr. M. J. Cunningham*, *Mr. B. J. Sage* and *Mr. Alexander Porter Morse*, for defendant in error, submitted on their briefs.

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

The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own

citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary

consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm* v. *Georgia*, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall *not be construed to extend* to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court itself so understood the effect of the amendment, for, after its adoption, Attorney General Lee, in the case of *Hollingsworth* v. *Virginia*, 3 Dall. 378, submitted this question to the court, "whether the amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?" *Tilghman* and *Rawle* argued in the negative, contending that the jurisdiction of the court was unimpaired in relation to all suits instituted previously to the adoption of the amendment. But, on the succeeding day, the court delivered a unanimous opinion, "that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign state."

This view of the force and meaning of the amendment is important. It shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm* v. *Georgia;* and this fact lends additional interest to the able opinion of Mr. Justice Iredell on that occasion. The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.

Looking back from our present standpoint at the decision in *Chisholm* v. *Georgia*, we do not greatly wonder at the effect which it had upon the country. Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people. As some of their utterances are directly pertinent to the question now under consideration, we deem it proper to quote them.

The eighty-first number of the Federalist, written by Hamilton, has the following profound remarks:

"It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.* This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the Supreme Court held in *Chisholm* v.

Georgia; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, — as the people of the United States in their sovereign capacity subsequently decided.

But Hamilton was not alone in protesting against the construction put upon the Constitution by its opponents. In the Virginia convention the same objections were raised by George Mason and Patrick Henry, and were met by Madison and Marshall as follows. Madison said: "Its jurisdiction [the federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the state courts. . . . It appears to me that this [clause] can have no operation but this — to give a citizen a right to be heard in the federal courts; and if a State should condescend to be a party, this court may take cognizance of it." 3 Elliott's Debates, 2d ed. 533. Marshall, in answer to the same objection, said: "With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff." Ib. 555.

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and

they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judicial solution. And yet the case of *Penn* v. *Lord Baltimore*, 1 Ves. Sen. 444, shows that some of these unusual subjects of litigation were not unknown to the courts even in colonial times; and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App. 1. The establishment of this new branch of jurisdiction seemed to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this court has often declined to take jurisdiction. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 288, 289, and cases there cited.

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in *Chisholm* v. *Georgia;* and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 109 U. S. 63; *Virginia Coupon Cases*, 114 U. S. 269. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained.

Mr. Webster stated the law with precision in his letter to Baring Brothers & Co., of October 16, 1839. Works, Vol. VI, 537, 539. "The security for state loans," he said, "is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfil its engagements."

In *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 321, Mr. Justice McLean, delivering the opinion of the court, said: "What means of enforcing payment from the State had the holder of a bill of credit? It is said by the counsel for the plaintiffs, that he could have sued the State. But was a State liable to be sued? . . . No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

"It may be accepted as a point of departure unquestioned," said Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 451, "that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution."

Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas et al.*, 15 How. 304, 309, and in *Clark* v. *Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the constitution of that state. But this court decided, in *Beers et al.* v. *Arkansas*, 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the constitution prohibiting the passage of state laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified, pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. . . . The prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were

necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties." The same doctrine was held in *Railroad Company* v. *Tennessee*, 101 U. S. 337, 339; *Railroad Company* v. *Alabama*, 101 U. S. 832; and *In re Ayers*, 123 U. S. 443, 505.

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution — anomalous and unheard of when the Constitution was adopted — an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," etc. — "Concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? It is true that the same qualification existed in the judiciary act of 1789, which was before the court in *Chisholm* v. *Georgia*, and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we

think we are at liberty to prefer Justice Iredell's views in this regard.

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United States. He also showed that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. "Where," said the Chief Justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far reëxamined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.

Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign state," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, that an action does not lie against the sovereign.

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its con-

tracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

The judgment of the Circuit Court is

Affirmed.

Mr. Justice Harlan concurring.

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm* v. *Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.

NORTH CAROLINA *v.* TEMPLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

No. 392. Argued January 22, 23, 1890. — Decided March 3, 1890.

This suit was commenced against the State of North Carolina and against the auditor of that State, as defendants, to compel the levying of a special tax for the benefit of certain holders of its bonds; *Held*,

(1) That the suit against the auditor was, under the circumstances, virtually a suit against the State;

(2) That, on the authority of *Hans* v. *Louisiana*, *ante*, 1, the suit could not be maintained against the State.

This suit was commenced in the Circuit Court of the United States for the Eastern District of North Carolina by bill in equity filed by Alfred H. Temple, a citizen of North Carolina, on behalf of himself and other bondholders in like interest, against the State of North Carolina and William P. Roberts, the auditor of said state. The object of the bill was to compel said state and its officials, including the auditor, to execute and carry into effect a certain statute of the State, passed January 29, 1869, which provided for raising taxes to pay the interest on certain bonds of the state, called "special tax bonds of the state of North Carolina," Laws of 1868–1869, 67, c. 21, issued under the provisions of said act, and held by the plaintiff and others. In other words, it was a suit, in the nature of a bill for a specific performance of a contract, brought to compel the State of North Carolina to raise a tax for the payment of the arrears of interest due on the state bonds held by the plaintiff and others.

The act referred to authorized a subscription on the part of the State of $4,000,000 of the capital stock of The Wilmington, Charlotte and Rutherford Railroad Company, and the issue of state bonds for the payment thereof, payable thirty years after date, with interest at six per cent per annum, payable semi-annually, to be represented by coupons. The subscription was made and 3000 of the bonds, for $1000 each,

were issued, of which the bonds of the plaintiff, which constitute the ground of the present suit, are a part.

By the sixth section of the act it was provided as follows:

"SEC. 6. For the purpose of providing for the payment of the interest upon the bonds hereby authorized and the principal at its maturity, an annual tax of one-eighth of one per cent is hereby imposed upon all the taxable property of the state, which shall be levied, collected, and paid into the state treasury as other public taxes, and the surplus, after paying the interest, shall be invested in securities of the United States or other safe securities and kept as a sinking fund for the payment of the principal money at maturity."

The bill alleged that the plaintiff was the *bona fide* holder of ten of said bonds, (giving their numbers,) and that the overdue coupons attached thereto, unpaid, amounted to $9900; that in the year 1869 the collection of the special tax was duly made, and a portion of the coupons was paid; but that in the month of January, 1870, and while large amounts of money arising from the collection of the special tax aforesaid remained in the hands of the state treasurer, applicable to the payment of said coupons, the State of North Carolina, in violation of the Constitution of the United States, did by legislative resolution direct the appropriation of the said moneys then in the hands of the treasurer to other purposes; and that, after all of said 3000 bonds had been issued according to law, the State of North Carolina undertook to impair the obligation of the contract, and to that end, on the 20th of January, 1870, formally enacted the following resolution:

"*Resolved*, That the treasurer be instructed and directed not to pay any more interest on the special tax bonds until authorized and directed so to do by this general assembly."

That to the same end, upon the 8th of March, 1870, Laws of 1869–1870, 119, c. 71, the State also passed an act declaring as follows:

"SECTION 1. *The General Assembly of North Carolina do enact*, That all acts passed at the last session of this legislature making appropriations to railroad companies be, and the same are hereby, repealed; that all bonds of the State which

have been issued under the said acts now in the hands of any president or other officer of the corporation be immediately returned to the treasurer.

"SEC. 2. The moneys in the state treasury which were levied and collected under the provisions of the acts mentioned in section one of this act are hereby appropriated to the use of the state government, and shall be credited to the counties of the State upon the tax to be assessed for the year one thousand eight hundred and seventy, in proportion to the amounts collected from them, respectively."

That with the same view, upon the 23d of November, 1874, Laws of 1874–1875, 2, c. 2, the general assembly passed an act containing the following provisions:

"SEC. 2. That the treasurer shall not pay or discharge any claim for interest upon any portion of the bonded debt of this State, except as hereinafter provided for by law.

"SEC. 3. That the auditor shall not audit or recognize any claim for principal or interest upon any portion of the bonded debt of this State heretofore made or pretended to be made by authority of this State, except as hereafter provided for by law.

"SEC. 4. That any money in or which may be paid into the treasury on account of special taxes heretofore levied for the payment of the interest on bonds or pretended bonds of this state is hereby transferred and appropriated to the general fund."

That in like connection, on the third day of November, 1880, the following constitutional amendment was adopted by the State:

"Nor shall the general assembly assume or pay or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred or issued by authority of the convention of the year 1868, or any debt or bond incurred or issued by the legislature of the year 1868, at its special session of 1868, and at its regular session of 1868 and 1869 and 1870, except the bonds issued to fund the interest of the public debt, unless the purposing to pay the same shall have been submitted to the people or by them ratified, by the vote

of a majority of qualified voters of the State at a regular election held for that purpose."

The bill further alleged that since the 20th day of January, 1870, none of the coupons belonging to said bonds, which had fallen due, had been paid, though payment of the same had been duly demanded; that the above-mentioned special taxes had not been collected; that none of the contracts performable under said act of January 29, 1869, had been performed, and that the government of the State had constantly enforced upon its officials compliance with the subsequent nullifying enactments above set forth.

The bill then averred that by virtue of the provisions of the constitution of North Carolina and of the said act of the general assembly of January, 1869, and of the issue of bonds thereunder, a contract was constituted between the State and the holders of said bonds, which was in the same connection a contract executed by said State, by the levying of the tax and the committing of its collection to state taxing officials and the direction to other state officials for the regular payment of the coupons and the investment of the surplus arising from the taxes in good securities, to be kept as a sinking fund for the payment of the principal.

It further averred that the statutes of North Carolina, hereinbefore set forth, which attempted to impair the contract in question, had not taken legal effect for the reason that the said laws were violations of the Constitution of the United States, both in its contract clause and in the Fourteenth Amendment thereto.

After showing the manner of levying taxes in North Carolina, and several matters as grounds of equitable jurisdiction, the bill prayed, amongst other things, that the respondents be perpetually enjoined from obstructing or impeding the collection and payment of the special tax in question; and that the respondent, the State of North Carolina, its executive agents and officials, and William P. Roberts, the auditor of the state, be decreed to execute the said act of January 29, 1869, and to cause the proper statutory lists to be sent to the boards of county commissioners containing provisions for the special tax above described; and for general relief.

Statement of the Case.

A subpœna was issued, and served upon the governor, attorney general, and auditor of the state. The attorney general, on behalf of the State, filed a motion to dismiss the bill as against the State, alleging that the State did not consent to be a party defendant. The auditor filed a demurrer to the bill, on the ground that by the showing of the bill itself he had no personal interest in the matters complained of, and that the bill was against him in his official capacity only, and required him as an officer of the state to act contrary to the commands of the legislature of the state, in raising money by taxation.

On the main question, the circuit judge and the district judge, who held the court, were opposed in opinion, the opinion of the former being in favor of the complainant; in pursuance of which the following decree was made, to wit:

"This cause coming on to be heard, the parties named as defendants thereto, by their counsel, announce to the court that they will not farther plead or answer thereto, but will abide, the one by its motion and the other by his demurrer; that they also waive the taking of any account in regard to the coupons alleged by the plaintiff to be by him held.

"Whereupon it is declared by the court that the said State of North Carolina is indebted to the said Alfred H. Temple for coupons held by him as in his bill alleged, and now by him deposited with the clerk of this court to the amount of nine thousand nine hundred dollars, principal money, together with five thousand five hundred and forty-five dollars for interest due thereon up to the present term of this court, and also for interest upon said principal money until paid, which amounts the said State is hereby adjudged and decreed to pay to the said Temple.

"And it is further ordered that the said William P. Roberts, as auditor of the State of North Carolina, proceed in due course of his office to execute the provisions of the act passed by said State on the 29th of January, 1869, entitled 'An act to amend the charter of the Wilmington, Charlotte and Rutherford Railroad Company, to provide for the completion of said road, and to secure for the State a representation in this

company,' so far as such execution may be necessary to satisfy this decree."

The point on which the judges differed was stated as follows:

"It appearing to the court that the case made in the record against Roberts as auditor, etc., was merely incidental to that against the State of North Carolina, it occurred as a question —

"Whether such suit could be maintained in this court against said State by the complainant, he being one of the citizens thereof.

"Upon which question the opinions of the judges were opposed, His Honor Judge Bond being of opinion that it was so maintainable, and His Honor Judge Seymour being of opinion to the contrary.

"Whereupon the above question was, during the same term stated as above, under the direction of the judges, and certified, and such certificate ordered to be entered of record."

Mr. R. H. Battle and *Mr. John W. Graham* for appellants. *Mr. T. F. Davidson*, Attorney General of the State of North Carolina, and *Mr. Thomas Ruffin* were with them on the brief.

Mr. S. F. Phillips for appellee. It is not practicable to give more than the points of Mr. Phillips's argument, with the citations.

I. By the common law the English Crown is obliged, at the instance of a subject or an alien friend, to refer to the regular courts for hearing and determination whatever issues upon rights of property may have been raised on behalf of such parties by its own act, in case these issues would have been so referable if raised by act of a private person.

Such instance is by means of a petition of right by which the suppliant sues to the Crown for such an endorsement thereupon as will allow his case a hearing and determination in the regular courts of justice, in the same manner as (at first in fact; and so long as original writs were used, in

theory) he would have sued to him for process allowing like hearing and determination against a private person, supposing his cause of action had been against the latter, such favorable endorsement being at the same time as much *ex debito justitiæ* in the one case as the original writ would have been in the other.

The practical operation of that proceeding is such that if the coupons now in suit had been taken from bonds issued in 1869 by the British government, and payment thereof had been refused, the Crown would be obliged by the common law, upon application of this citizen of North Carolina, to allow to him the right of a suit in its regular courts against itself to enforce his claim. If the common law be otherwise in America the general belief that our citizens are in matters of right more upon an equality with their own governments than English subjects (or indeed than such citizens themselves) are with the English Crown may require revision. *The Queen* v. *Von Frantzin*, 2 DeG. & J. 126; *Windsor & Annapolis Railway* v. *The Queen*, 11 App. Cas. 607; *The Queen* v. *Doutre*, 9 App. Cas. 745; *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; *Tobin* v. *The Queen*, 16 C. B. (N. S.) 310; *Feather* v. *The Queen*, 6 B. & S. 257; *Canterbury* v. *The Attorney General*, 1 Phillips, Ch. 306; *Monckton* v. *The Attorney General*, 2 Macn. & Gord. 402; *De Bode* v. *The Queen*, 3 H. L. Cas. 449; *Frith* v. *The Queen*, L. R. 7 Ex. 365; *Rustomjee* v. *The Queen*, 2 Q. B. D. 69; *Kirk* v. *The Queen*, L. R. 14 Eq. 558. See, also, Chitty's Prerogatives of the Crown, 345; 2 Inst. 269; 3 Inst. 31; 4 Inst. 21; 3 Bl. Com. 49; Bowyer Const. Law Eng. 141; Broom Const. Law, 509; Daniell Ch. Pl. and Pr. ed. 1846, c. 84, § 2; Manning, Exch. Pr. 84, ed. 1827; *Banker's Case*, 14 State Trials, 1; 2 Stubbs' Const. Hist. 555, 557; *Petition of Right*, 3 State Trials, 60 to 230; *Ashby* v. *White*, 14 State Trials, 695; *Smith* v. *Upton*, 6 M. & G. 251; Mirror of Justices, 4, 10, 225.

II. The forms by which creditors of the Crown are referred to courts of justice correspond substantially with those of the like reference in cases betwixt subjects.

Petition of Right is sometimes spoken of as if it were a form of proceeding that in point of principle is entirely unlike

those ordinarily in use by litigants in England; *ex. gr.*, that by original writ. It is submitted that this assumption is not correct.

In the same way application to the king for justice against himself is a "petition," a short endorsement upon which opens the courts to the plaintiff for the case to which that endorsement refers, substantially in the same manner as is done in ordinary cases, either by the king's original writ in answer to an oral application or "petition" or by a bill and subpœna.

That the application, or supplication, by petition of right is made to the king in person, whereas ordinary applications for original process are to his subordinates (the allowance in all cases being equally *ex debito justitiæ*) is explained by the circumstance that the class of cases in which he himself was to be defendant has never been so large as to prevent his personal attention to applications for original process in that. So that the issue of such process in that class is seen to be a survival from the time when the king issued all process, and not as sometimes, and perhaps without much consideration suggested, an abnormal provision of English law. Thus it is seen that the proceeding by petition of right is, even in point of form, analogous to the ordinary methods of beginning suits, and that it is in his character as the original Fountain of Justice, and by way of mere survival from his former vast duties, in that character and of the same sort, that the king acts therein.

III. By passing a law which impairs the obligation of a contract of its own, or by depriving the other party of his property therein without due process, a State becomes subject to the judicial power of the United States for whatever relief judicial power ordinarily exerts to establish and give effect to violated contracts.

IV. The act of 1875, c. 137, investing circuit courts with jurisdiction over "all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and arising under the Constitution or laws of the United States" has

thereby conferred upon these courts judicial power to enforce the obligation of contracts of a State of that value when impaired by its own laws.

V. Inasmuch as laws passed by the State of North Carolina, Resolution of Jan. 20, 1870; Act of 1870, c. 71, March 8; Act of 1874, c. 2, Nov. 23, and a constitutional amendment adopted in 1880; Const. art. 1, sec. 6; impair obligations of that State created in 1869, by issuing the coupons now in suit, and deprive the holders of such coupons of property without due process of law, the opinion of the presiding judge below was correct.

Mr. Edward L. Andrews also argued for appellee.

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

We think it perfectly clear that the suit against the auditor in this case was virtually a suit against the State of North Carolina. In this regard it comes within the principle of the cases of *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; and *In re Ayers*, 123 U. S. 443. We do not think it necessary to consider that question anew.

The other point, the suability of the State, is settled by the decision just rendered in *Hans* v. *The State of Louisiana*, *ante*, 1.

To the question on which the judges of the Circuit Court were opposed in opinion, our answer is in the negative, namely, that the suit could not be maintained in the Circuit Court against the State of North Carolina by the plaintiff, a citizen thereof.

The decree of the Circuit Court is

Reversed and the cause remanded with instructions to dismiss the bill of complaint.

Mr. Justice Harlan dissenting.

I dissent from so much of the judgment in this case as holds that this suit cannot be maintained against the auditor of

Syllabus.

the State of North Carolina. The legislation of which complaint is here made impaired the obligation of the State's contract, and was therefore unconstitutional and void. It did not, in law, affect the existence or operation of the previous statutes out of which the contract in question arose. So that the court was at liberty to compel the officer of the State to perform the duties which the statutes, constituting the contract, imposed upon him. A suit against him for such a purpose is not, in my judgment, one against the State. It is a suit to compel the performance of ministerial duties, from the performance of which the state's officer was not, and could not be, relieved by unconstitutional and void legislative enactments.

EILENBECKER *v.* DISTRICT COURT OF PLYMOUTH COUNTY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 101. Submitted January 8, 1890. — Decided March 3, 1890.

The first eight of the Articles of Amendment to the Constitution of the United States have reference only to powers exercised by the United States, and not to those exercised by the States.

The provision in Article III of the Constitution of the United States respecting the trial of crimes by jury relates to the judicial power of the United States.

Article VI of the Amendments to the Constitution of the United States respecting a speedy and public trial by jury; Articles V and VI respecting the right of persons accused of crime to be confronted with the witnesses; Article VIII respecting excessive fines, and cruel and unusual punishments; and Article XIV respecting the abridgment of privileges, the deprivation of liberty or property without due process of law, and the denial of the equal protection of the laws, are not infringed by the statutes of Iowa authorizing its courts, when a person violates an injunction restraining him from selling intoxicating liquors, to punish him as for contempt by fine or imprisonment or both.

Proceedings according to the common law for contempt of court are not subject to the right of trial by jury, and are "due process of law," within the meaning of the Fourteenth Amendment to the Constitution.

All the powers of courts whether at common law or in chancery may be

called into play by the legislature of a State, for the purpose of suppressing the manufacture and sale of intoxicating liquors when they are prohibited by law, and to abate a nuisance declared by law to be such; and the Constitution of the United States interposes no hindrance.

A District Court of a county in Iowa is empowered to enjoin and restrain a person from selling or keeping for sale intoxicating liquors, including ale, wine and beer, in the county, and disobedience of the order subjects the guilty party to proceedings for contempt and punishment thereunder.

THE case is stated in the opinion.

Mr. William A. McKenney for plaintiffs in error.

Mr. J. S. Struble, *Mr. S. M. Marsh* and *Mr. A. J. Baker*, attorney general of Iowa, for defendant in error.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Iowa.

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that State. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were

served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

Each plaintiff obtained from the Supreme Court of the State of Iowa, upon petition, a writ of *certiorari*, in which it was alleged that the District Court of Plymouth County had acted without jurisdiction and illegally in rendering this judgment, and by agreement of counsel, and with the consent of the Supreme Court of Iowa, the cases of the six appellants in this court were submitted together and tried on one transcript of record. That court affirmed the judgment of the District Court of Plymouth County, and to that judgment of affirmance this writ of error is prosecuted.

The errors assigned here are that the Supreme Court of Iowa failed to give effect to clause 3 of section 2 of Article III of the Constitution of the United States, which provides that the trial of all crimes, except in cases of impeachment, shall be by jury, and also to the provisions of Article VI of the amendments to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The second assignment is, that the Supreme Court of Iowa erred in holding that plaintiffs could be fined and imprisoned without first being presented by a grand jury, and could be tried on *ex parte* affidavits, which decision, it is said, is in con-

flict with and contrary to the provisions of both Articles V and VI of the amendments to the Constitution of the United States, the latter of which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him.

The fourth assignment is, that the Supreme Court erred in not holding that section 12 of chapter 143 of the acts of the twentieth general assembly of Iowa is in conflict with Article VIII of the amendments to the Constitution of the United States, which provides that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted. These three assignments, as will be presently seen, may be disposed of together.

The third assignment is, that the Supreme Court of Iowa erred in not holding that said chapter 143 of the acts of the twentieth general assembly of Iowa, and especially section 12 of said chapter, is void, and in conflict with section 1 of Article XIV of the amendments to the Constitution of the United States, in this, that it deprives persons charged with selling intoxicating liquors of the equal protection of the laws, and it prejudices the rights and privileges of that particular class of persons, and denies to them the right of trial by jury, while in all other prosecutions the accused must first be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. *Livingston* v. *Moore*, 7 Pet. 469; *The Justices* v. *Murray*, 9 Wall. 274; *Edwards* v. *Elliott*, 21 Wall. 532; *United States* v. *Cruikshank*, 92 U. S. 542; *Walker* v. *Sauvinet*, 92 U. S. 90; *Fox* v. *Ohio*, 5 How. 410; *Holmes* v. *Jennison*, 14 Pet. 540; *Presser* v. *Illinois*, 116 U. S. 252.

The limitation, therefore, of Articles V and VI and VIII

of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States, can have no application to the present case, and the same observation is more obviously true in regard to clause 3 of section 2 of Article III of the original Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury. This Article III of the Constitution is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that the trial of all crimes, except in cases of impeachment, shall be by jury. It is impossible to examine the accompanying provisions of the Constitution without seeing very clearly that this provision was not intended to be applied to trials in the state courts.

This leaves us alone the assignment of error that the Supreme Court of Iowa disregarded the provisions of section 1 of Article XIV of the amendments to the Constitution of the United States, because it upheld the statute of Iowa,[1] which it

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[1] Section 1543 of the Code of Iowa, as amended by c. 143 of the Acts of the twentieth general assembly, is as follows:

Sec. 1543. In case of violation of the provisions of either of the three preceding sections or of section fifteen hundred and twenty-five of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping, with intent to sell, use or give away, of any intoxicating liquors, is carried on or continued or exists, and the furniture, fixture, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided, and whoever shall erect or establish, or continue, or use any building, erection or place for any of the purposes prohibited in said sections, shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction, shall pay a fine of not exceeding one thousand dollars and costs of prosecution, and stand committed until the fine and costs are paid; and the provisions of chapter 47, title 25 of this Code, shall not be applicable to persons committed under this section. Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity, to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceeding shall be punished as for contempt, by fine of not less than five hundred nor more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment in the discretion of the court.

is supposed by counsel deprives persons charged with selling intoxicating liquors of the equal protection of the law, abridges their rights and privileges, and denies to them the right of trial by jury, while in all other criminal prosecutions the accused must be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes — one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of *Ex parte Terry*, 128 U. S. 289, this doctrine is fully asserted and enforced; quoting the language of the court in the case of *Anderson* v. *Dunn*, 6 Wheat. 204, 227, where it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with

power to impose silence, respect and decorum in their presence, and submission to their lawful mandates;" citing also with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238, that "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights."

And this court, in Terry's case, held that a summary proceeding of the Circuit Court of the United States without a jury, imposing upon Terry imprisonment for the term of six months, was a valid exercise of the powers of the court, and that the action of the Circuit Court was also without error in refusing to grant him a writ of *habeas corpus*. The case of Terry came into this court upon application for a writ of *habeas corpus*, and presented, as the case now before us does, the question of the authority of the Circuit Court to impose this imprisonment on a summary hearing without those regular proceedings which include a trial by jury — which was affirmed. The still more recent cases of *Ex parte Savin*, 131 U. S. 267, and *Ex parte Cuddy*, 131 U. S. 280, assert very strongly the same principle. In *Ex parte Robinson*, 19 Wall. 505, 510, this court speaks in the following language:

"The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings, and the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831. 4 Stat. 487."

The statute, now embodied in § 725 of the Revised Statutes, reads as follows: "The power of the several courts of the United States to issue attachments and inflict summary pun-

ishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, *and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts.*"

It will thus be seen that even in the act of Congress, intended to limit the power of the courts to punish for contempts of its authority by summary proceedings, there is expressly left the power to punish in this summary manner the disobedience of any party, to any lawful writ, process, order, rule, decree or command of said court. This statute was only designed for the government of the courts of the United States, and the opinions of this court in the cases we have already referred to show conclusively what was the nature and extent of the power inherent in the courts of the states by virtue of their organization, and that the punishments which they were authorized to inflict for a disobedience to their writs and orders were ample and summary, and did not require the interposition of a jury to find the facts or assess the punishment. This, then, is due process of law in regard to contempts of courts; was due process of law at the time the Fourteenth Amendment of the federal Constitution was adopted; and nothing has ever changed it except such statutes as Congress may have enacted for the courts of the United States, and as each State may have enacted for the government of its own courts.

So far from any statute on this subject limiting the power of the courts of Iowa, the act of the legislature of that state, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the dis-

cretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury ; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit.

We might rest the case here; but the plaintiffs in error fall back upon the proposition that the statute of the Iowa legislature concerning the sale of liquors, under which this injunction was issued, is itself void, as depriving the parties of their property and of their liberty without due process of law. We are not prepared to say that this question arises in the present case. The principal suit in which the injunction was issued, for the contempt of which these parties have

been sentenced to imprisonment and to pay a fine, has never been tried so far as this record shows. We do not know whether the parties demanded a trial by jury on the question of their guilty violation of that statute. We do not know that they would have been refused a trial by jury if they had demanded it. Until the trial of that case has been had they are not injured by a refusal to grant them a jury trial. It is the well-settled doctrine of this court that a part of a statute may be void and the remainder may be valid. That part of this statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquors with intent to sell the same within this State, and all the prohibitory clauses of the statute, have been held by this court to be within the constitutional powers of the state legislature, in the cases of *Mugler* v. *Kansas*, 123 U. S. 623, and *Powell* v. *Pennsylvania*, 127 U. S. 678.

If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offence as a crime after it has been committed.

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is

Affirmed.

McCORMICK HARVESTING MACHINE COMPANY *v.* WALTHERS.

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

No. 1402. Submitted January 27, 1890.— Decided March 3, 1890.

When the jurisdiction of a Circuit Court of the United States is founded upon any of the causes specially mentioned in section 1 of the act of March 3, 1887, as amended by the act of August 13, 1888, 25 Stat. 433, c. 866, (except the citizenship of the parties,) the action must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides.

MOTION TO DISMISS OR AFFIRM. The case is stated in the opinion.

Mr. N. S. Harwood and *Mr. John H. Ames* for the motion.

Mr. Walter J. Lamb, Mr. Arnott C. Ricketts and *Mr. Henry H. Wilson* opposing.

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

Walthers brought his action on the 21st day of July, 1887, in the Circuit Court of the United States for the District of Nebraska, against The McCormick Harvesting Machine Company, alleging that he was a citizen and resident of the State of Nebraska, and that the defendant was a corporation duly incorporated and existing under the laws of the State of Illinois, "but having a local habitation and managing agent in Nebraska," for falsely and maliciously, and without probable or reasonable cause, suing out two attachments against him, and placed his damages at $10,500, for which he asked judgment and costs. The defendant answered, justifying the issuing of the writs of attachment and denying any liability by reason thereof; and also pleaded in set-off and counter-claim two judgments

against Walthers, one for $957.93 and $28 costs, and one for $2894.01 and $26 costs, both bearing interest at ten per centum per annum from June, 1887; and prayed judgment against the plaintiff for said several sums and for interest and costs. Subsequently leave was granted to the McCormick Company to withdraw its answer and to file a plea, which averred "that now and at the commencement of this action the said Charles W. Walthers was a citizen and inhabitant of the State of Nebraska, and this defendant was a corporation duly organized under the laws of the State of Illinois, and was and is a citizen, resident and inhabitant of the State of Illinois, and was not and is not a citizen, resident or inhabitant of the State or District of Nebraska; that a summons in this action was served on this defendant's agent in the State of Nebraska, where this defendant has an office, said agent being only its local managing agent for its business in Nebraska; and this defendant says that this action was brought since the 15th day of March, 1887; and this defendant says that it is not subject to be sued or to be summoned by original process out of this court in this cause in this judicial district;" and defendant prayed judgment that the action might be abated.

This plea was upon hearing overruled, and the defendant ruled to answer in thirty days, and plaintiff to reply in forty-five days, and a reply in general denial of the answer was filed, the answer being treated as if still a pending pleading. The case came on for trial and resulted in a verdict for the plaintiff, assessing his damages in the sum of $1338.57, upon which judgment was entered. A motion for a new trial was made and denied, and a writ of error sued out from this court, which the defendant in error now moves to dismiss, uniting with that motion a motion to affirm.

No bill of exceptions was taken, and the denial of the jurisdiction of the Circuit Court is the only question which can be raised upon the record. And this has no relation to the mode of service. The defendant was a foreign corporation, and the statute of Nebraska provided that "when the defendant is a foreign corporation, having a managing agent in this State, the service may be upon such agent." Code Civ. Proc. Ne-

braska, 75; Comp. Stats. Neb. 1881, 539; 1885, 637. The plea admits service upon the company's local managing agent, and as the defendant entered full appearance and answer, and, after the withdrawal of the answer and the filing of the plea and its disposition, went to trial on the merits upon issue joined on that answer, the objection to the jurisdiction, if it can be urged at all, must be confined to want of power to entertain the suit outside of defendant's own district.

By section 1 of the act of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, to amend the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from the state courts and for other purposes, it was provided: "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." The jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought. Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides. "The concluding lines," said Mr. Justice Field in *Wilson* v. *Western Union Telegraph Co.*, 34 Fed. Rep. 561, "are to be read as a proviso to the general provision that no civil suit shall be brought except in the district whereof the defendant is an inhabitant." This conclusion was reached

and announced by many of the Circuit Courts, and there can be no doubt of its correctness. *Fales* v. *Chicago, Milwaukee &c. Railway*, 32 Fed. Rep. 673; *St. Louis &c. Railroad* v. *Terre Haute &c. Railroad*, 33 Fed. Rep. 385; *Loomis* v. *N. Y. & Cleveland Gas Co.*, 33 Fed. Rep. 353; *Gavin* v. *Vance*, 33 Fed. Rep. 84; *Swayne* v. *Boylston Insurance Co.*, 35 Fed. Rep. 1.

The judiciary act of 1789 provided that no civil suit should be brought before the Circuit or District Courts against an inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he should be found at the time of serving the writ, 1 Stat. 79, c. 20, § 12, and the act of 1875, 18 Stat. 470, c. 137, § 1, contained a similar provision. This liability of the defendant to be sued in a district where he might be found at the time of serving process was omitted in the act of 1887, but he still remained liable to suit in the district of the residence of the plaintiff as well as in his own district; and as he could not be sued anywhere else, we held in *Smith* v. *Lyon*, 133 U. S. 315, that where there were two plaintiffs, citizens of different States, the defendant, being a citizen of another State, could not be sued in the State of either of the plaintiffs. Mr. Justice Miller points out, in delivering the opinion of the court, that the evident purpose of Congress in the act of 1887 was to restrict rather than enlarge the jurisdiction of the Circuit Court, "while," he says, "at the same time a suit is permitted to be brought in any district where either plaintiff or defendant resides."

The defendant answered to the merits in this case, and was then permitted to file the plea in question for the purpose of insisting that it was not subject to suit in a United States court in the district of the plaintiff's residence. Upon the overruling of this plea, the cause proceeded to trial on the merits upon the issues made up on the complaint, answer and replication, the trial continuing for several days, both parties appearing by their attorneys, adducing testimony, and arguing the case to the jury. Under these circumstances, there being no question whatever presented by the record, except whether the

defendant was liable to be sued in the Circuit Court of the United States for the District of Nebraska, and it being clear that it was, and there being color for the motion to dismiss, we sustain the motion to affirm, as we do not need further argument on that question.

Judgment affirmed.

RICHMOND AND DANVILLE RAILROAD COMPANY *v.* THOURON.

RICHMOND AND WEST POINT TERMINAL RAILWAY AND WAREHOUSE CO. *v.* THOURON.

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

Nos. 1262, 1263. Submitted February 3, 1890. — Decided March 10, 1890.

An order remanding a cause from a circuit court of the United States to the state court from which it was removed is not a final judgment or decree, and this court has no jurisdiction to review it.

MOTIONS TO DISMISS for want of jurisdiction. The case is stated in the opinion.

Mr. Charles M. DaCosta and *Mr. Samuel Dickson* for the motions.

Mr. Pope Barrow opposing.

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

These are appeals from orders of the Circuit Court remanding the above-entitled cases to the state court, which appeals the records show were "granted under the provisions of the act of February 25, 1889, on the ground that the court has no jurisdiction of the cause."

Before the act of 1875, c. 137, 18 Stat. 470, we held that an order by the Circuit Court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was then, by *mandamus*, to compel the Circuit Court to hear and decide. *Babbitt* v. *Clark*, 103 U. S. 606, 609; *Turner* v. *Farmer's Loan and Trust Company*, 106 U. S. 552, 555; *Railroad Company* v. *Wiswall*, 23 Wall. 507. The act of 1875 made such order reviewable (without regard to the pecuniary value of the matter in dispute); but by the act of March 3, 1887, 24 Stat. 552, 555, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, the provision to that effect was repealed, and it was also provided that no appeal or writ of error should be allowed from the decision of the Circuit Court remanding a cause. In *Morey* v. *Lockhart*, 123 U. S. 56, 57, Mr. Chief Justice Waite, speaking for the court, said: "It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed." And the court held that the language of the act was broad enough to cover all cases, and also that an appeal or writ of error would not lie under § 693 of the Revised Statutes, because that section applied only to final judgments or decrees, and an order remanding was not a final judgment.

The act of February 25, 1889, 25 Stat. 693, c. 236, provides that "in all cases where a final judgment or decree shall be rendered in a Circuit Court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the Supreme Court shall not re-

view any question raised upon the record except such question of jurisdiction."

The words "a final judgment or decree," in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and these orders to remand were not final judgments or decrees whatever the ground upon which the Circuit Court proceeded. *Graves* v. *Corbin*, 132 U. S. 571, 591.

Appeals dismissed for want of jurisdiction.

ORMSBY *v.* WEBB.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 179. Argued January 9, 10, 1890.— Decided March 3, 1890.

An order in the Supreme Court of the District of Columbia, at special term, admitting a writing to probate and record as the will of a deceased person, in conformity with the findings of the jury empanelled, in the same court, to try the issue of will or no will, is one involving the merits of the proceeding, and may be reviewed by the same court in general term, and such review will bring before the general term all the questions arising upon bills of exceptions taken at the trial before the jury: and if the value of the matter in dispute be sufficient, this court has jurisdiction to reëxamine a final order of the Supreme Court of the District of Columbia affirming the order of the Probate Court, and to pass upon the questions of law raised by such bills of exceptions.

Van Ness v. *Van Ness*, 6 How. 62; and *Brown* v. *Wiley*, 4 Wall. 165, distinguished.

In the trial before a jury of an issue made up in a Probate Court as to the incompetency of a deceased person, from unsoundness of mind or undue influence, to make a will, declarations made by the deceased to a witness that he received the bulk of his estate by breaking the will of his grandfather, who was also the ancestor of the caveators, and that his estate consisted in a great degree of that property and its accumulations; and also declarations of one of the legatees, made about, or after the date of the execution of the alleged will, that she had knowledge at that time of the execution of the will and of its provisions, should be excluded from the jury.

On the trial of that issue it was proper for the jury to consider whether the undue influence alleged to have been exercised by a particular legatee in

respect to other matters extended to or controlled the execution of the will, and give it such weight as they might deem proper.

An instruction to the jury, at such trial, that if they should believe the evidence of a witness named, they must find for the will, while apparently objectionable, as giving undue prominence to the testimony of that witness, was held, in view of the scope of her evidence, not to have been erroneous.

THE case is stated in the opinion.

Mr. John J. Johnson and *Mr. William G. Johnson*, (with whom was *Mr. William Stone Abert* on the brief,) for plaintiffs in error.

Mr. Enoch Totten, (with whom was *Mr. William B. Webb* on the brief,) for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This writ of error brings up for review a judgment of the Supreme Court of the District of Columbia, in general term, which affirmed a final order of the same court, in special term, admitting to probate and record a certain writing as the last will and testament of Levin M. Powell, who died in the city of Washington on the 15th day of January, 1885. That instrument provided for the disposition of property of the value of more than one hundred thousand dollars.

At October term, 1886, of this court a motion was made that the writ of error be dismissed for want of jurisdiction, "because the judgment of the Supreme Court of the District of Columbia to which said writ of error was directed is not a final judgment;" and, in the alternative, that the judgment be affirmed because the writ of error was sued out merely for delay. That motion was overruled. *Ormsby* v. *Webb*, 122 U. S. 630. At the present term a second motion to dismiss was made; this time, upon the ground that the case is one of equity jurisdiction, and could be brought here only by appeal.

The history of this litigation, as disclosed by the record, is as follows:

Sarah C. Colmesnil, one of the heirs at law of the deceased,

presented to the Supreme Court of the District of Columbia, holding a special term for probate business, a petition alleging that the above writing — previously presented to that court for probate by the persons named therein as executors — was not the last will and testament of Levin M. Powell; that by reason of his physical and mental condition he was incompetent to make a will; and that if his name was placed to that writing, it was not done by his will, but by the procurement, undue influence and fraud of Harriet C. Stewart, one of the persons named therein as a legatee.

It was thereupon ordered that the following issues be transmitted to be tried in the circuit court before a jury:

"First. Whether the said paper-writing purporting to be the last will and testament of the said Levin M. Powell, bearing date on the 27th of October, 1884, was executed and attested in due form of law.

"Second. Whether the contents of said paper-writing were read to or by the said Levin M. Powell at or before the alleged execution thereof by him.

"Third. Whether the said Levin M. Powell at the time of the alleged signing of said paper-writing was of sound and disposing mind and capable of executing a valid deed or contract.

"Fourth. Whether the said writing was executed by the said Levin M. Powell under the influence of suggestions, importunities and undue persuasion of the said Harriet C. Stewart, or any other person or persons, when his mind, from its disordered, diseased and enfeebled state, was unable to resist the same.

"Fifth. Whether the execution of said paper-writing was procured by fraud, misrepresentation or undue influence or persuasion of the said Harriet C. Stewart, or any other person or persons acting of their own volition or under the direction of the said Stewart."

Subsequently, in the Supreme Court of the District, holding a circuit court, an order was made that upon the trial of the above issues before a jury, Mrs. Colmesnil and others who had filed caveats, should be plaintiffs, and Charles D. Drake and William B. Webb, as the proponents of the last will and testa-

ment of the deceased, and who were named as his executors, should be defendants.

The verdict of the jury consisted of answers to the above questions. The first, second and third were answered in the affirmative; the fourth and fifth, in the negative. A motion for a new trial having been overruled, the caveators prosecuted an appeal to the general term, which affirmed the action of the special term.

At a subsequent date the caveators filed in the Supreme Court of the District, holding a special term for what is called Orphans' Court business, the record of the trial of the issues submitted to the jury, and moved that the verdict be set aside upon the ground that the court trying those issues erred in rejecting competent testimony, in its instructions to the jury, in refusing to instruct the jury as requested by the caveators, and in rulings during the trial to which they took exceptions. This motion was overruled, and an order was made admitting the writing in question to probate and record as the will of Levin M. Powell, and directing letters testamentary to issue to the persons named therein as executors. From this last order an appeal was taken to the general term, which affirmed the order of the special term overruling the motion to set aside the verdict of the jury, as well as the order admitting the above writing to probate as the last will of the deceased.

The question raised by the first motion to dismiss for want of jurisdiction in this court, having been reargued, will be again examined in connection with the motion to dismiss upon the ground that the case, in any event, is one of equity cognizance to be brought here only by appeal. We do this because no opinion was delivered when this motion was overruled at a former term.

The defendants in error contend, in effect, that this court is without jurisdiction to review an order of the Supreme Court of the District, by virtue of which a writing is finally admitted to probate as the last will and testament of the person signing it, whatever may be the value of the matter in dispute. This, it is argued, results from the statutes regulating

the jurisdiction of the courts of the District, and the decisions of this court declaring their scope and effect.

The act of February 27, 1801, concerning the District of Columbia, 2 Stat. 103, created the Circuit Court of the District, with all the powers in such court and the judges thereof that were vested by law in the Circuit Courts and judges of the Circuit Courts of the United States, and with jurisdiction of all crimes and offences committed in the District, and of all cases in law and equity between parties, both or either of which shall be residents thereof. The eighth section of the act provided that "any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be reëxamined and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the Circuit Court of the United States." The same act created an Orphans' Court in each of the counties of Washington and Alexandria, that should have the powers and perform the duties prescribed in reference to such courts in Maryland, appeals therefrom to be to the Circuit Court of the District, which should therein have all the powers of the chancellor of that State. § 12.

Among the statutes of Maryland then in force was the act of 1798, which authorized the Orphans' Court, whenever required by either party to a contest therein, to direct a plenary proceeding by bill or petition, to which there should be an answer on oath or affirmation, and which made it the duty of the court, when either party required it, to direct an issue or issues to be made up and sent to the court of law most convenient for trying the same. The act provided that such courts of law "shall have power to direct the jury, and grant a new trial, as if the issue or issues were in a suit therein instituted, and a certificate from such court, or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the Orphans' Court to establish or

destroy the claim or any part thereof;" also, that "the Orphans' Court shall give judgment or decree upon the bill and answer, or upon bill, answer, deposition or finding of the jury." 2 Kilty's Laws Md. c. 101, sub c. 8, § 20; Dennis' Probate Laws D. C. 67.

By the act of March 3, 1863, 12 Stat. 762, c. 91, the Circuit, District and Criminal Courts of the District were abolished, and the Supreme Court of the District was established with general jurisdiction in law and equity, and with the powers and jurisdiction then possessed and exercised by the Circuit Court. That act provided that one of the justices might hold a District Court of the United States for the District of Columbia in the same manner and with the same powers and jurisdiction possessed and exercised by other District Courts of the United States, and a Criminal Court with the same powers as were exercised by the Criminal Court of the District; that special terms of such Supreme Court should be held by one of the justices, at such time as the court in general term should direct, and by which non-enumerated motions in suits and proceedings at law and in equity, and suits in equity, not triable by jury, should be heard and determined, such justice, however, having the power to order any such motion or suit to be heard, in the first instance, at the general term; and that "any party aggrieved by any order, judgment, or decree, made or pronounced at any such special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of said Supreme Court, and upon such appeal the general term shall review such order, judgment or decree and affirm, reverse, or modify the same, as shall be just." § 5. It also provided that "all issues of fact triable by a jury or by the court shall be tried before a single justice; when the trial is by a jury, at a Circuit Court; and when the trial is without a jury, at a Circuit Court or special term." § 7.

The eighth and ninth sections of that act are as follows:

"SEC. 8. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice, and afterwards settled in such

manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages: *Provided*, That such motion be made at the same term or circuit at which the trial was had. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"SEC. 9. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

The next act of Congress having any bearing upon the question before us is that of June 21, 1870, which provides that the several general and special terms authorized by the act of March 3, 1863, "which have been or may be held, shall be, and are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings, and acts of said general terms, special terms, circuit courts, district courts, and criminal courts, heretofore or hereafter rendered, made, or had, shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of said Supreme Court: *Provided*, That nothing herein contained shall affect the right of appeal as provided by law." The same act abolished the Orphans' Court and invested the justice holding the special term of the Supreme Court for that purpose with the powers and jurisdiction then held and exercised by the former court, subject, however, to the provisions of the fifth section of the act of March 3, 1863, giving an appeal to the general term from any order involving the merits. 16 Stat. 159, 160.

The provisions of the acts of 1863 and 1870, so far as they regulate the jurisdiction and practice in the courts of this

District, are embodied in chapter 23 of the Revised Statutes of the District, without any material change.

When the Revised Statutes of 1874 were enacted, the jurisdiction of this court as to judgments or decrees of the Supreme Court of the District was thus defined: "The final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of one thousand dollars, may be reëxamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a Circuit Court." Rev. Stat. § 705. But by an act approved February 25, 1879, 20 Stat. 320, c. 99, such power of review was extended to cases where the matter in dispute exceeded the value of $2500, exclusive of costs; and by an act passed March 3, 1885, the amount was increased to $5000, with the reservation of the right of appeal or writ of error, without regard to the sum or value in dispute, in cases involving the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States. 23 Stat. 443, c. 355.

It is contended, on behalf of the appellees, that although this court has jurisdiction to reëxamine and reverse or affirm the final judgment or decree of the Supreme Court of the District of Columbia, in any case where the value of the matter in dispute, exclusive of costs, exceeds $5000, it has not jurisdiction to reëxamine the final judgment of that court, in general term, affirming an order of the same court, in special term, admitting a will to probate and record, although such final judgment and order, unless reversed, may affect the ownership or disposition of property of a greater value than that amount. And this view, it is argued, is sustained by the decisions in *Van Ness* v. *Van Ness*, 6 How. 62, 67, and *Brown* v. *Wiley*, 4 Wall. 165. We are of opinion that this point was neither involved nor decided in those cases.

Before examining those cases our attention will be first given to that of *Carter's Heirs* v. *Cutting*, 8 Cranch, 251. That was

an appeal, under the act of 1801, from a judgment of the Circuit Court of this District, affirming a judgment of the Orphans' Court of Alexandria County (which court had the same jurisdiction, and was created by the same act, as the Orphans' Court of Washington County), dismissing a petition filed for the revocation and repeal of the probate of a will. Two objections to the appeal were urged in this court: 1, That by the act of 1801 the Circuit Court had only the power of the chancellor of Maryland, and that by the laws of Maryland the decree of the chancellor was final; 2, That the decree of dismissal was not a final judgment, order or decree of the Circuit Court wherein the matter in dispute, exclusive of costs, exceeded $100. Mr. Justice Story, speaking for the court, said as to the first objection: "We are of opinion that the conclusiveness of its sentence forms no part of the essence of the powers of the court. Its powers to act are as ample, independent of their final quality, as with it. Besides, the act of February 27, 1801, § 8, has expressly allowed an appeal from '*all* final judgments, orders and decrees of the Circuit Courts,' where the matter in dispute exceeds the limited value, and there is nothing in the context to narrow the ordinary import of the language. We cannot admit that construction to be a sound one, which seeks by remote inferences to withdraw a case from the general provisions of a statute, which is clearly within its words and perfectly consistent with its intent. The case of *Young* v. *Bank of Alexandria*, 4 Cranch, 384, is, in our judgment, decisive against this objection." In reference to the second objection, it was said: "It is conceded by both parties that the estate devised to the respondent, Sally C. Cutting, is worth several thousand dollars. If, then, the probate of the will had any legal operation and was not merely void, the controversy as to the validity of that probate was a matter in dispute equal to the value of the estate devised away from the heirs." The decree of the Circuit Court in that case, dismissing the petition, was reversed, and the cause remanded to that court with directions to proceed to a hearing upon the merits. The Circuit Court was thus required to determine, upon its merits, the validity of the probate of a will.

The case of *Van Ness* v. *Van Ness* also arose under the act of 1801. It involved the question whether a particular person was the widow of an intestate, and upon that question depended the right of that person to have letters of administration granted to her. This issue, having been raised in the Orphans' Court, by petition, was, pursuant to the Maryland statute of 1798, sent to the Circuit Court, as originally established, for trial by jury. Under the instructions of that court a verdict was returned against the petitioner; and by its order the finding of the jury was certified, under seal, to the Orphans' Court, where the petition was dismissed. From that order a writ of error was brought, raising the question whether this court could take cognizance of the case, and inquire whether the Circuit Court erred in its instruction to the jury. Chief Justice Taney, speaking for the court, said (p. 67): "It is true the Orphans' Court has no power to grant a new trial, and is bound to consider the fact to be as found by the jury; and consequently the judgment of that court must be against the plaintiff. But the matter in contest in the Orphans' Court is the right to the letters of administration. And it is the province of that court to apply the law upon that subject to the fact, as established by the verdict of the jury, and to make their decree accordingly; refusing to revoke the letters granted to the defendant, and dismissing the petition of the plaintiff. The suit between the parties must remain still pending until that decree is pronounced. The certificate from the Circuit Court is nothing more than evidence of the finding of the jury upon the trial of the issue. It merely certifies a fact, that is to say, that the jury had so found. And the order of the Circuit Court, directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment, order or decree, in the legal sense of these terms as used in the act of Congress. Certainly it is not a final judgment or order. For it does not put an end to the suit in the Orphans' Court, as that court alone can dismiss the petition of the plaintiff which is there pending; and no other court has the power to pass a judgment upon it. A verdict in any court of common law, if not set aside, is in all cases conclusive as to

the fact found by the jury, and the judgment of the court must follow it; as the Orphans' Court must follow the verdict in this case. Yet a writ of error will not lie upon the verdict."

The case of *Brown* v. *Wiley* is to the same effect. That case arose upon a petition filed in the Orphans' Court before the act of 1863 was passed, raising the question whether the petitioner was a child of the intestate, and as such entitled to a certain fund in the hands of an administratrix. After that act was in force the issues were submitted to a jury empanelled in the Supreme Court of the District, at special term, and was determined in favor of the petitioner. A motion for a new trial, on exceptions duly taken, was heard at general term and overruled. The cause was then remanded with direction to proceed according to law. Thereupon an order was made that the finding of the jury be certified by the clerk to the Orphans' Court, which was still in existence. From that order a writ of error was brought, and this court, holding that it was not a final order, dismissed the writ. That this was the utmost extent of the decision is manifest from the following extracts from the opinion delivered by Chief Justice Chase, p. 70:

"The case, in almost every particular, is identical with that of *Van Ness* v. *Van Ness*. In that case, as in this, an issue of fact was sent out of the Orphans' Court to the Circuit Court to be tried by a jury; was tried and found in the negative. Exceptions were taken to the rulings upon the trial, and an order was made certifying the finding to the Orphans' Court. The proceeding was brought into this court by writ of error, which was dismissed for want of jurisdiction. . . . The order certifying the finding to the Orphans' Court, in the case of Van Ness, was identical in effect with the two orders overruling the motion for new trial, and certifying the finding in the case before us. In each case the exceptions taken at the trial before the jury were overruled, and nothing was left for action in the court before which the issues were tried; but the case went to the Orphans' Court for final judgment. In that case it was held that the order was not one which could,

under the act, be reëxamined on writ of error, and we see no reason for a different ruling in this."

Neither of the above cases involved the precise question now under examination. The decision in *Carter's Heirs* v. *Cutting* was, that the final order of the Orphans' Court, dismissing a petition which sought the revocation of the probate of a will, could be reviewed upon its merits in the Circuit Court, and that the final order of the latter court could be reëxamined in this court. The decision in both *Van Ness* v. *Van Ness* and *Brown* v. *Wiley* was, that an order by the Circuit Court in the first case, and by the Supreme Court of the District in the other case, which directed the finding of the jury to be certified, simply directed a fact to be certified, and, therefore, was not a final judgment, reviewable by this court. In none of the above cases did the question arise, whether a final order — made after the trial before the jury of the issue of will or no will — admitting to probate a paper presented as the last will of the decedent, was reviewable upon its merits; by the Circuit Court while the act of 1801 was in force, or by the Supreme Court of the District after the passage of the act of 1863. Nor did either of those cases involve any question as to the jurisdiction of this court to reëxamine a final judgment affirming an order of probate. The latter question is now, for the first time, presented for determination.

That an order in the Supreme Court of the District, at special term, admitting a will to probate and record is a final judgment, cannot, it seems to us, be disputed. It was so declared in *Van Ness* v. *Van Ness* and *Brown* v. *Wiley*. A will, admitted to probate and record by a court of competent jurisdiction, is a muniment of title for all receiving property under it; and, until the order so admitting it to probate is, by some appropriate proceeding, set aside or reversed, stands in the way of those who may have resisted the probate. In every sense, it is a final adjudication. And that an order of probate made in the Supreme Court of the District, special term, is reviewable by the general term is made clear by the provision that a party aggrieved by any order, judgment, or

decree in a special term, involving the merits of the action or proceeding, may appeal to the general term, which "shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just." Rev. Stat. D. C. § 772; 12 Stat. 763, c. 91, § 5. Clearly an order of probate, based upon a finding by the jury upon issues as to the competency of the testator to make a will, is one involving the merits. If so, how is it possible, in view of the express words of the statute, to question the jurisdiction of the general term to review such final order of probate?

In respect to the authority of this court to reëxamine the final judgments and decrees of the Supreme Court of this District, the words of the statute are quite as clear as those defining the jurisdiction of the general term to review the orders and judgments of the special term. It embraces the final judgment or decree of that court "in any case" involving a specified amount. It is true that this reëxamination must be upon writ of error or appeal "in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a Circuit Court." But this language does not determine the nature of the "case" in the Supreme Court of the District, the final judgment in which is subject to reëxamination by this court. It only indicates the mode in which a case may be brought here for review. So that the only question is whether issues framed by the Supreme Court of the District, and which involve an inquiry as to whether the decedent was or was not incompetent, from unsoundness of mind or because of undue influence exerted upon him, to make a will — issues to which there are adversary parties — constitutes a "case," within the meaning of the act of Congress defining the jurisdiction of this court over the final judgments and decrees of the court below. If it does not, then it would follow that a proceeding in the Supreme Court of the District to revoke the probate of a will is a "case," the final judgment in which, as held in *Carter's Heirs* v. *Cutting*, may be reëxamined by this court, when the value of the matter in dispute is sufficient, while a proceeding in the same court involv-

ing the validity, as a last will and testament, of an instrument offered for probate, and, therefore, its admission to probate, is not a "case," the final judgment in which can be here reviewed. We cannot assent to this view. The latter proceeding is as much a "case" as the former. One involves the validity of the probate of a will, the other the validity as a will of a paper offered for probate. Upon the determination of each depend rights of property, and in each are adversary parties. There can be no reason why Congress should extend the jurisdiction of this court to proceedings involving the validity of the probate of wills, and not to proceedings involving the validity of an instrument offered for probate as a will. That the issues in the former may be heard and determined, in the first instance, without a jury, and upon evidence before a court, while the issues in the latter may, and if the parties require, must, be tried, in the first instance, by a jury, with the right in the parties to have bills of exceptions showing the rulings of the court, cannot affect the nature of the "case."

There are other decisions that throw some light upon the inquiry as to the jurisdiction of this court to reëxamine the final judgments or decrees of the highest court of this District. In the case of *Custiss* v. *Georgetown and Alexandria Turnpike Company*, 6 Cranch, 233, one of the questions was as to the jurisdiction of this court to review the final order of the Circuit Court for the District of Columbia quashing an inquisition taken by the marshal condemning land for a turnpike road. Its jurisdiction was maintained. By the words of the act constituting the Circuit Court of the District, this court was given jurisdiction to reëxamine "any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value," etc. These words, Chief Justice Marshall said, were "more ample than those employed in the judicial act." It will be found upon comparing the statute defining the jurisdiction of this court over the judgments and decrees of the Supreme Court of this District, with the statute of 1801 creating the Circuit Court of the District, that the words of the former are as broad and ample as the words of the latter. The jurisdiction

of this court extends to "the final judgment or decree of the Supreme Court of the District of Columbia, in any case," etc., while the words in the act of 1801 were "any final judgment, order or decree in said Circuit Court, wherein the matter in dispute," etc. In *Railroad Co.* v. *Church*, 19 Wall. 62, the jurisdiction of this court, to reëxamine the final order of the Supreme Court of this District confirming an inquisition of damages returned therein, and which was instituted before the marshal and a jury of the district, was sustained. The court said that its power to review the judgments and final orders of the Supreme Court of the District was as ample as its power over the final judgments, orders and decrees of the Circuit Court which it superseded. These two adjudications illustrate, to some extent, the nature of the cases from the courts of this District which may be reëxamined here, and show that the question now before us is to be determined by the acts of Congress defining the relations between this court and the highest court of this District, and not by reference to the statutes of Maryland, or to the statutes defining our jurisdiction to review the judgments of the Circuit Courts of the United States, held in the several States. And we may repeat here what Chief Justice Marshall said in *Young* v. *Bank of Alexandria*, 4 Cranch, 384, in which the main question was as to the power of this court to review the judgments of the Circuit Court of this District in a certain class of cases: "The words of the act of Congress being as explicit as language can furnish, must comprehend every case not completely excepted from them."

Whatever difficulties may have arisen, in cases like this, while there existed in this District a separate, distinct tribunal, having original cognizance of the probate of wills and the administration of the estates of deceased persons, cannot arise under existing legislation, which brings all such business within the cognizance of the Supreme Court of the District, and makes all orders, whether in its special or general term, the orders of that court. As was said in *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, 571, 573, the act of 1863 was the introduction into this District of a new organization of its

judicial system, under which all the courts previously existing here as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new Supreme Court of the District of Columbia. For this reason, it was said that the new statutory provisions should be construed in the sense of the New York system, from which they were imported, rather than in the light of the jurisprudence of Maryland previously prevailing in this District. Referring to the clause in the Constitution declaring that no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law, the court, speaking by Mr. Justice Matthews, said: "But that rule is not applicable as between the special and general terms of the Supreme Court of the District of Columbia as now organized. The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The Supreme Court sitting at special term, and the Supreme Court sitting in the general term, though the judges may differ, is the same tribunal."

We are of opinion that an appeal to the general term from the final order of probate made in the special term, which is not based upon a judicial determination of facts, but merely upon the finding of a jury, of necessity, brings into review before the general term all the questions of law that are properly presented by the bill of exceptions taken at the trial. We say, of necessity, because: 1. The statute requires the Supreme Court of the District, at general term, to review, upon appeal, any order, judgment or decree of the special term, involving the merits of the action or proceeding. 2. The judgment of the special term admitting a will to probate and record, pursuant to the verdict of the jury upon issues relating to the competency of the deceased to make a will, clearly involves the merits of the controversy, because it establishes the validity as a will of the writing offered for probate. 3. The right of appeal to the general term from such a judgment of the special term would be of no value whatever, in most cases, unless the former could, upon such appeal, deter-

mine the questions of law properly presented in the bill of exceptions taken at the trial before the jury. It could not have been intended that an appeal to the general term from the order of probate should only involve an inquiry as to whether that order was in conformity with the verdict of the jury.

So an appeal to this court from the final judgment of the Supreme Court of the District, affirming the order of probate, of necessity, brings here for reëxamination all the questions properly arising upon those bills of exceptions. The presentation of the instrument in question for probate as the last will of the deceased, the division of the adversary parties into plaintiffs and defendants, the framing of the issues to be tried by the jury, the trial before the jury, the allowance of bills of exception, the motion for a new trial and the overruling of that motion, the admission of the will to probate, and the affirmance of the order of probate, all occurred, not, as under the old system, in different courts but in the same court — the Supreme Court of the District of Columbia. If this proceeding, in which there are adversary parties, and the issues in which involve rights of property exceeding in value the jurisdictional amount, be, within the meaning of the statute, as we hold it is, "a case" which has been finally determined by the Supreme Court of the District, our authority to determine the questions of law, properly raised, and which in the court below, in any of its divisions, controlled the right to have the will probated, cannot be affected by the circumstance that the original order of probate simply followed the finding of the jury, and was made by the court below, held by a single justice, not by the court in general term.

Nor is the question before us affected by the consideration that an order of the general term, merely affirming an order of the special term which overruled a motion for a new trial, where the finding of the jury is favorable to the caveatees, is not itself a final judgment. Such an order is, in legal effect, a direction that a judgment of probate be entered by the same court which denied the new trial. It is only when that judgment is entered in special term, and is followed by judg-

ment of affirmance in general term, to review which a writ of error is sued out, that the jurisdiction of this court attaches. And in exercising that jurisdiction, this court will not, as it was asked to do in *Van Ness* v. *Van Ness*, and in *Brown* v. *Wiley*, review simply the order directing the finding of the jury to be certified; but it will inquire whether the facts embraced in that finding were ascertained in conformity with law. If that inquiry is not to be fruitless we must regard the court, in which the facts have been found and certified, as a unit for the purposes of the writ of error. And when that court makes an order, in general term, which, under the statute, may be reëxamined here, the appeal therefrom brings up for review the questions upon which the final judgment really depends, namely, those presented by the bills of exception taken at the trial of the issues submitted to the jury. It would be strange, indeed, if our reëxamination of the final judgment of the Supreme Court of the District could not reach the errors of law which it may have committed in the conduct of that trial, and upon which that judgment is based.

For the reasons which have been stated we are of opinion that the motion to dismiss the writ of error for the want of jurisdiction in this court to review the judgment in question was properly overruled at a former term.

And we are of opinion that the last motion to dismiss, which proceeds upon the ground that this case is one of equitable cognizance to be reviewed here, if at all, only upon appeal, must also be overruled. It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this District for the probate of a

will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of Congress defining the cases in the Supreme Court of this District, the final judgments in which may be reëxamined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity. The last motion to dismiss must, consequently, be denied.

We come now to consider the merits of the case as disclosed by the bills of exceptions taken by the caveators at the trial. The principal questions before the jury related to the alleged undue influence exerted upon the testator in the execution of the will, and to his capacity to make a disposition of his property according to a fixed purpose. Upon these points the instructions given, at the instance of the caveators, were certainly as full as they could have desired.

The first exception taken by them relates to the exclusion of evidence tending to prove that the decedent said to the witness that he received the bulk of his estate by breaking the will of his grandfather, who was also the ancestor of the caveators, and that his estate consisted in a great degree of that property with its accumulations. Argument is not needed to show that the manner in which the decedent acquired his estate was wholly immaterial upon the issue as to whether the paper in question was or not valid as his last will and testament.

The second and third exceptions refer to the exclusion of testimony tending to show, by the declarations of Mrs. Stewart, one of the principal legatees, made about or after the date of the execution of the will, that she had knowledge at that time of the execution of the will and of its provisions. The exclusion of this evidence was right. The proper foundation being laid, the declarations of Mrs. Stewart could have been proved for the purpose of impeaching or discrediting her testimony as a witness for the caveatees. But such declarations, not under oath, whenever made, were not competent for any

other purpose upon the trial of the issue as to competency to make a will. She was not the only legatee who was interested in the issues to be tried.

The fourth exception is based upon the refusal of the court to give this instruction: "In order to establish undue influence it is not necessary to prove the influence to have been exercised at the time of the execution of the will or with reference to that act; but if the jury believe from the evidence that the undue influence existed prior to and near the time of the execution of the will, they may infer that the will was executed under the continuance of such influence." It was not error to the prejudice of the caveators to refuse this instruction, for the reason, if there was no other, that the court had already, at their instance, fully instructed the jury upon the subject of undue influence. Upon the motion of the caveators the jury were instructed that if the alleged will or any part of it was obtained by undue influence they should find it in their verdict that it was so obtained; that it was not necessary, in order to prove that he was unduly influenced in the execution of the will, that the mind of the deceased be shown to be so weak as to render him incapable of attending to ordinary business; that it was material to inquire not only whether the will expressed his intention at the time of its execution but how that intention was produced; that influence obtained by flattery, importunity, threats, superiority of will, mind or character, or by what art soever that human thought, ingenuity, or cunning might employ, which would give dominion over the will of the deceased to such an extent as to destroy free agency or constrain him against his will to do what he was unable to refuse, was such influence as the law condemned as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection, or obtained at one time or another; and that if they believed, from all the facts and circumstances in evidence, that the alleged will was the result of an unsound mind or of the undue influence or importunities of the person or persons surrounding the alleged testator at the time of the execution thereof, or both, they should so say in their verdict.

Under these instructions the jury were at liberty to determine from all the evidence — that bearing directly on the execution of the will as well as that showing that the testator was, in respect to his affairs, generally under the control of others — whether in the execution of the will he was a free agent. This view disposes of the sixth exception, relating to the refusal of the court to instruct the jury that evidence that the legatee, Harriet C. Stewart, improperly influenced the testator as to other important matters and things than the execution of this will was proper to be considered as tending to show that she could and did improperly influence him to make the bequests in her favor or to exclude others of his next of kin and heirs at law from a participation in his estate. The evidence upon this subject was before the jury, and under the instructions given in determining the question whether the undue influence exercised by Mrs. Stewart in respect to other matters extended to or controlled the execution of the will, they could give it such weight as they deemed proper.

The instruction set out in the fifth exception was so manifestly wrong that it is unnecessary to give it special consideration.

The instructions contained in the seventh and eighth exceptions were properly refused upon the ground that the jury had already been instructed that it was both their right and duty to consider all the proof before them, and make such answer to the questions as the whole evidence justified.

The only remaining assignment of error to be noticed is that referring to the following instruction given by the court: "If the jury shall believe the evidence of Mrs. Harriet C. Stewart upon the subject of undue influence, given by her in this case, then the verdict must be in favor of the defendants and in support of the will." It is clear from the record that if Mrs. Stewart did not exercise undue influence over the testator there was no ground to suppose that any one else did, or to doubt the validity of the paper in question as a last will and testament. Her evidence covered the whole case so completely that, if the jury believed what she said, they were bound to sustain that paper as a valid will. With her evidence, taking

it to be true, the caveators had no ground upon which to contest the probate of the will. While this instruction is apparently liable to the objection that it gave undue prominence to the testimony of a single witness, we are not satisfied, looking at all the evidence, that the court erred in saying to the jury that if Mrs. Stewart told the truth, the case was for the propounders of the will.

Upon the whole case we do not perceive any ground upon which to disturb the finding of the jury.

The judgment of the Supreme Court of the District, in general term, which affirmed the judgment in special term, admitting the paper in question to probate and record as the last will and testament of Levin M. Powell, must be affirmed, and it is so ordered.

Mr. Justice Gray, not having heard the whole argument, took no part in the decision.

CHENEY *v.* LIBBY.

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

No. 724. Submitted December 4, 1889. — Decided March 3, 1890.

Time may be made of the essence of a contract, relating to the purchase of realty, by the express stipulations of the parties; or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser; and unless its provisions contravene public policy, the court should give effect to them according to the real intention of the parties.

But even when time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which the court has to decree specific performance may be controlled by the conduct of the party who refuses to perform the contract because of the failure of the other party to strictly comply with its conditions.

Opinion of the Court.

When a contract for the purchase of land provides that it shall be forfeited if the vendee fails to pay any instalment of the purchase price at the time limited, the failure of the latter to make a tender of payment, in lawful money, of a particular instalment on the very day it falls due, will not deprive him of the right to have specific performance, if such failure was superinduced by the conduct of the vendor, and if the vendee, without unreasonable delay, tenders payment, in lawful money, after the time so limited.

A provision in the contract forbidding its modification or change except by entry thereon in writing signed by both parties, coupled with a provision that no court should relieve the purchaser from a failure to comply strictly and literally with its conditions, has no application when the apparent cause of the failure to perform such conditions was the conduct of the vendor.

If the vendor notifies the purchaser that he regards the contract as forfeited, and that he will not receive any money from him, the latter is not required, as a condition of his right to specific performance, to make tender of the purchase price. It is sufficient if he offer in his bill to bring the money into court.

A note for the purchase price of land is made payable at a particular time and at a particular bank. The payor is ready at such time and place to pay, and offers to pay, but the bank has not received the note for collection; *Held*,

(1) The bank is not authorized to receive the money for the payee by reason simply of the fact that the note is payable there;

(2) The tender of payment is not payment;

(3) A decree of specific performance should not become operative until the money is brought into court;

(4) The payee is not entitled to interest unless it appears that the payor, after the tender, realized interest upon the money.

In equity. The case is stated in the opinion.

Mr. Adams A. Goodrich for appellant.

Mr. Samuel P. Davidson for appellee.

Mr. Justice Harlan delivered the opinion of the court.

This is a suit to compel the specific performance by the appellant, Cheney, of a written agreement entered into May 28, 1880, between him and the appellee, Libby, whereby the former demised and let to the latter the possession and use of, and contracted, bargained and agreed to sell to him, two sections of unimproved land in Gage County, Nebraska. The

defendant claimed that the contract was forfeited, long before this suit was brought, by Libby's failure to comply with its stipulations. Upon that ground, he resists the granting of the relief asked. The Circuit Court adjudged that the plaintiff was entitled to a decree.

The question to be determined is, whether there was any such default upon the part of the plaintiff, Libby, as deprived him of the right to specific performance.

The sum agreed upon for the possession, use, occupancy and control of the land was $1361.60 yearly, represented in Libby's notes, and in the taxes, assessed and to be assessed against the land. The price for the land was $8960, of which $1600 was paid at the date of the contract. The balance was to be paid, "without notice or demand therefor," in annual instalments at the times specified in promissory notes, of even date with the contract, which were executed by Libby to Cheney, at Tecumseh, Nebraska. The notes were made payable to the order of Cheney, at the office of Russell & Holmes, private bankers in that city. Eight of the notes represented the balance of the principal debt — each one being for $920 — and were payable respectively in three, four, five, six, seven, eight, nine and ten years after date. The remaining ten notes represented the annual interest.

Libby agreed to meet the notes as they respectively matured, pay the taxes on the land for 1880 and subsequent years, and, during that year, (the weather permitting,) break two hundred acres, and build on the land a frame barn of sixteen feet by twenty, and a frame dwelling-house of a story and a half. Cheney undertook to pay the taxes of 1879 and previous years, and bound himself to convey the land, in fee simple, with the ordinary covenants of warranty, (reserving the right of way that might be demanded for public use for railways and common roads,) upon the payment by Libby of the several sums of money aforesaid at the times limited, and the strict performance of all and singular the conditions of the contract.

It was further stipulated between the parties: That "time and punctuality are material and essential ingredients in this contract;"

That if Libby failed to perform and complete all and each of the payments, agreements and stipulations in the agreement mentioned, "strictly and literally," the contract should become void, in which event all the interests created by the contract in favor of Libby, or derived from him, should immediately cease and determine, and revert to and revest in Cheney, without any declaration of forfeiture, or reëntry, and without any right in Libby of reclamation or compensation for moneys paid or services performed;

That in case the contract was forfeited, Cheney could take immediate possession of the land with all the crops, improvements, fixtures, privileges and appurtenances thereon or appertaining thereto, Libby to remain bound for all taxes then assessed against the premises, and all instalments of principal or interest then due on the contract to be regarded as rent;

That whenever one-half of the purchase price was paid, with all accrued interest and taxes, Cheney should execute a deed, as provided for in the contract, and take notes and a mortgage for the remaining payments to run the unexpired time; and,

That when Libby's right to purchase the land terminated by reason of non-performance of his covenants, or his failure to make the payments, or any of them, at the time specified, he should be deemed to have only the rights of a tenant, and to hold the land under the contract as a lease, subject to the statute regulating the relation of landlord and tenant; with the right in Cheney to enforce the provisions of the contract, and recover possession of the land, with all the fixtures, privileges, crops and appurtenances thereon as if the same was held by forcible detainer.

The agreement also contained these stringent provisions: That no court should relieve Libby from a failure to comply strictly and literally with the contract; that no modification or change of the contract could be made except by entry thereon in writing signed by both parties; and that no oversight or omission to take notice of any default by Libby should be deemed a waiver by Cheney of the right to do so at any time.

Libby went into possession under the contract. He and

those in possession under him had, prior to the commencement of this suit on the 26th of February, 1887, broken up and cultivated most of the land, and made improvements thereon of a permanent and substantial character. Nearly all of these improvements were made prior to the first of January, 1885. He met all the obligations imposed upon him with respect to the breaking up of the land and its improvement by the erection thereon of buildings. His evidence, which is uncontradicted, was: "We have broken up and cultivated about 1200 acres; built five houses and stable and outbuildings to each house; made wells to each house; erected two wind-mills; fenced one whole section with wire and posts and fenced half of other section with hedge; we have set out some fruit trees and shrubbery, all to the value of about ten thousand dollars; all was done under and in pursuance of this contract."

He, also, met promptly all the notes given for principal and interest maturing prior to 1885. The total amount paid by him prior to that date, including $1600 paid at the execution of the contract, was in excess of $5000.

But the defendant insists that there was such default upon the part of the plaintiff with respect to the notes maturing May 28, 1885, as worked a forfeiture of the contract, and, consequently, that specific performance cannot be decreed. The precise grounds upon which this contention rests, as well as those upon which the plaintiff relies in support of his claim for relief, cannot be clearly understood without a careful scrutiny of all that passed between the parties in reference to the lands in question.

The plaintiff resided in Iowa, while the defendant resided at Jerseyville, Illinois. The notes given by the former were upon blanks furnished by the latter's agent, who caused them to be made payable in Tecumseh, Nebraska, at the private bank of Russell & Holmes, through whom the defendant had, for many years prior to 1880, made collections, and with whom he had kept an account. The first payment under the contract was made in bank drafts delivered to the defendant's agent in Tecumseh. All the other notes falling due in 1880 to 1884, inclusive, except the interest note maturing in 1882,

were paid by bank drafts sent to Russell & Holmes, who placed the proceeds to the credit of Cheney in their bank. The checks of the latter upon that bank, on account of those deposits, were always paid in current funds. The draft to pay the interest note for 1882 was also sent to Russell & Holmes, but as Cheney had not transmitted that note to them, the draft was forwarded to him. He received it and sent the note to Libby. In no single instance prior to 1885 did he make objection to the particular mode in which Libby provided for the payment of his notes, or intimate his purpose to demand coin or legal-tender notes in payment. In every instance, except as to the interest note for 1882, the notes were paid at the banking house of Russell & Holmes, and by drafts sent to and used by them for that purpose.

But it is quite apparent from the evidence that Cheney, in 1885, indulged the hope that he could bring about a forfeiture of the contract for non-compliance upon the part of Libby with its provisions, and that he would, in that or some other way, get the land back. It is proper to advert to the circumstances justifying that conclusion.

On the 4th of March, 1885, — all previous instalments having been punctually met — Libby offered, in writing, to pay *all* the principal notes mentioned in the contract, as well as the interest note due May 28, 1885, if a deed was made to him. To this offer Cheney replied, under date of March 19, 1885: "Your letter of the 4th has just reached me. I have no papers with me and cannot attend to the matter as you request. I expect to go to New Orleans to the Exposition and to be at home in time to see to it properly. If I am behind time no harm will come to you." Libby wrote again, under date of May 20, 1885, renewing the offer contained in his letter of March 4. Under date of May 23, 1885, — only five days before the notes for 1885 matured, — Cheney replied: "Yours of 20th is received. I think it probable that I can do as you suggest, but I will be in Beatrice [the county seat of Gage County, where the lands are] between the 1st and 10th of June on other business, and will then make inquiries and see if I can lend the money to good hands, and will then let you know more certainly."

On the 26th of May, 1885, Libby sent to Russell & Holmes a draft upon the First National Bank of Omaha, Nebraska, made by one Stuart, a private banker doing business at Madison, in the same State, for $1251.20, which was the amount of Libby's two notes for principal and interest that matured May 28, 1885. It was sent in payment of those notes, and was received for that purpose by Russell & Holmes. They accepted it for the amount of money named in it, and were, therefore, ready to take up Libby's two notes when presented for payment at their office.

On the 28th of May, 1885, A. W. Cross, of the First National Bank of Jerseyville, Illinois, — where Cheney resided, — appeared at the banking-house of Russell & Holmes, and made a deposit of $5000, all in current funds, and a good portion of it *in bills of his own bank.* While there he inquired of Russell & Holmes (without disclosing the reason for his inquiry) whether they kept a "legal-tender revenue [reserve], as national banks were required to do." He was told that they did not, but that a supply of legal-tender was on hand. About two o'clock of the 1st of June — which, as May 31 fell on Sunday, was the last day of grace for Libby's two notes due in 1885, Neb. Stat. c. 41, § 8 — one of Cheney's attorneys went into the bank of Russell & Holmes, and asked if he could be given $5000 in legal-tender notes in exchange for other currency. His request was complied with. At a later hour of the same day Cheney appeared in the bank, without having responded to Libby's offer, twice made, to pay all the notes for the principal debt, and the interest note maturing in 1885. He came there with checks, drawn by Cross, to be cashed, and asked as *an accommodation* to him that they be paid in legal-tender notes. He was promptly accommodated to the extent of $2500. But when he asked for $2500 more in legal-tender notes, Holmes suspected there was a scheme to exhaust his bank of legal-tender notes, and refused to comply with this request. After Russell & Holmes had thus, by way of accommodation, paid to Cheney and his attorney seven thousand five hundred dollars in legal-tender notes — but not until the hour for closing the bank, on that

day, against the public had passed — Libby's two notes were presented by Cheney, and payment thereof demanded in coin or legal-tender notes. The bank offered to pay in current funds, as they had previously done in respect to Libby's notes, but Cheney declined to take in payment anything except coin or legal-tender notes. The notes were then placed by him in the hands of a notary, who was conveniently present, and the latter presented them for payment, announcing that he would not receive anything except United States notes or legal-tender funds. Payment in such funds was refused by the bank and the usual protest was made. The notary and Cheney then left the room, the latter saying, before leaving, that "he would call in the morning." But he did not call the next or upon any subsequent day.

Within fifteen or twenty minutes after Cheney and his notary left the bank, Holmes, of the firm of Russell & Holmes, went to the office of the notary to find Cheney and pay the notes in the funds demanded. But Cheney was not there, and the notes were in his hands. Inquiry was made at the principal hotel and at other places, but he could not be found. Holmes was informed that he had left town.

Libby having been notified of the protest of the notes, notwithstanding he had, in due time, sent a bank draft to Russell & Holmes to be used in paying them, directed Stuart, the banker at Madison, Nebraska, to go immediately to Tecumseh. The latter arrived there on the 9th of June, and, having learned what passed between Cheney and Russell & Holmes, determined to pay off the notes in such funds as Cheney demanded. He informed the notary, who had protested the notes for non-payment, that he was then ready, in behalf of Libby, to pay them in gold. The latter did not have the notes, did not know where Cheney had gone, and said that the latter "did not want the money, but that he wanted the land back."

Stuart having knowledge of Cheney's letter, in which he notified Libby of his purpose to visit Beatrice between the 1st and 10th of June, went to that place in search of Cheney, but could not find him.

Libby wrote to Cheney, under date of June 12, 1885, informing him that gold was deposited at Russell & Holmes' office to pay the two notes due May 28, 1885. This letter was received by Cheney in due course of mail. On the 20th of June, 1885, the latter enclosed to Libby twelve unpaid notes, (including the two due May 28, 1885,) saying that the contract of May 28, 1880, was "terminated and ended by your failure to pay the two notes due May 28, 1885, and otherwise to comply with the contract, which is now null and void." How Libby had "otherwise" failed to meet his obligations under the contract does not appear. Under date of June 23, 1885, Russell & Holmes advised Cheney by letter of the fact that they were authorized by Libby to pay, and they were ready to pay, the notes due May 28, including protest fees, in legal-tender notes or coin. Libby, under date of June 25, 1885, replied to Cheney's letter, saying: "I refuse to accept said notes, excepting the two which were paid, and have this day sent them to your bankers, Messrs. Russell & Holmes, of Tecumseh, Neb., for your use and benefit and subject to your order. I shall make payments as fast as they become due, and shall require you to execute a conveyance of the land in accordance with the terms of the contract. It will be useless for you to send me any of these notes, except you send them for payment." Under date of June 29, 1885, Russell & Holmes advised Cheney that they had received from Libby his notes, amounting to $6679.20, subject to his, Cheney's, order. The latter wrote, July 9, 1885, in reply to Libby's letter of June 25th, that he did not recognize the notes placed with Russell & Holmes as being subject to his order.

On the 20th of August, 1885, Libby, by his attorney, made a tender to Russell & Holmes of $120 in gold coin as a balance of one-half of the purchase money, and offered to surrender the contract and execute a mortgage and notes for the balance of the purchase money, as stipulated in the contract, and demanded a deed; of all which Cheney was notified. The latter replied, under date of August 22, 1885, that he would not receive any money from Libby, and refused to make a deed.

It further appears that the plaintiff punctually paid into the bank of Russell & Holmes the amounts of the notes due in 1886 and 1887. The funds remained in that bank and are now there, subject to Cheney's order, on presenting the notes. Of these payments he was promptly informed.

Shortly before the commencement of this suit Libby again offered to Cheney to pay in cash all the unpaid portion of the principal debt named in the contract, and all interest due at that date. He also renewed his offer to execute a mortgage on the land to secure all unpaid instalments not due, and demanded a deed. But those offers being declined, the present suit was brought.

The peculiar wording of the written contract renders it somewhat doubtful whether there was a sale of the lands to the appellee to be made complete by a conveyance of the legal title or defeated altogether, according to his performance or failure to perform the conditions upon which he was to receive a deed; or whether he was simply given possession, paying a fixed amount annually, for use and occupancy, with the privilege of purchasing and with the right to demand a conveyance in fee simple, upon the performance of those conditions. Taking the whole contract together, we incline to adopt the former as the true interpretation. Such was the view taken by the Supreme Court of Nebraska of a similar contract as to land between Cheney and one Robinson. *Robinson* v. *Cheney*, 17 Nebraska, 673, 679. But it is not necessary to express any decided opinion upon this question; for, in any view, it is clear from the contract, not only that appellant could retain the legal title until the appellee's obligations under it had all been performed, but that he could resume possession immediately upon the failure of the appellee to meet, punctually, any of the conditions to be performed by him. Time may be made of the essence of the contract "by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser." *Taylor* v. *Longworth*, 14 Pet. 172, 174; *Secombe* v. *Steele*, 20 How. 94, 104; *Holgate* v. *Eaton*, 116 U. S. 33, 40; *Brown* v. *Guarantee Trust Co.*, 128 U. S. 403, 414. The par-

ties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that "time and punctuality are material and essential ingredients" in the contract; and that it must be "strictly and literally" executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and, therefore, a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. 1 Sugden on Vendors, 8th Amer. Ed. 410 [268]; *Barnard* v. *Lee*, 97 Mass. 92, 94; *Hipwell* v. *Knight*, 1 Younge & Coll. Exch. 401, 415. These observations are made because counsel for the appellant insists, with some confidence, that an affirmance of the decree below will necessarily be a departure from the general principles just stated.

But there are other principles, founded in justice, that must control the decision of the present case. Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited, will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, (*Hennessy* v. *Woolworth*, 128 U. S. 438, 442,) may, and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. *Seton* v. *Slade*, 7 Ves. 265, 279; *Levy* v. *Lindo*, 3 Merivale, 81, 84; *Hudson* v. *Bartram*, 3 Madd. 440, 447; *Lilley* v. *Fifty Associates*, 101 Mass. 432, 435; *Potter* v. *Tuttle*, 22 Connecticut, 512, 519. See, also, *Ahl* v. *Johnson*, 20 How. 511, 518.

To this class belongs, in our judgment, the case before us. Although the contract between Cheney and Libby called for

payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds, that is, such as are ordinarily received by men of business or by banks. And such funds were received in payment of all of Libby's notes falling due in 1880 to 1884, inclusive. While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal-tender paper in payment of notes subsequently falling due, such conduct, during a period of several years, was calculated to produce the impression upon Libby's mind that current or bankable funds would be received in payment of any of his notes. And, therefore, upon every principle of fair dealing Cheney was bound to give reasonable notice of his purpose, after 1884, to accept only such funds as, under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is, that Cheney designed to throw Libby off his guard, and render it impossible for the latter, or for the bankers to whom he sent drafts to be used in paying his notes, to supply the requisite amount of coin or legal-tender paper, on the very day the notes matured, and at the moment of their presentation for payment. The efforts of Russell & Holmes, within a few moments after Cheney left their bank on the 1st of June, to find him, and to pay off the notes in legal-tender paper, and the efforts of Libby, by his agent, as soon as he was informed of Cheney's demand for payment in coin or legal-tender paper, to reach him, and to pay off the notes maturing in 1885, in lawful money, and his repeated offers, subsequently, to pay them in such money, showed the utmost diligence, and sufficiently excuse his failure to pay in coin or legal-tender paper on the very day his notes matured. To permit Cheney, under the circumstances disclosed, to enforce a forfeiture of the contract, would enable him to take advantage of his own wrong, and to reap the fruits of a scheme formed for the very purpose of bringing about the non-performance of the contract.

But it is contended that the provision in the contract forbidding its modification or change, "except by entry thereon

in writing signed by both parties," coupled with the provision that no court should relieve Libby from a failure to comply strictly and literally with the contract, stands in the way of a decree for specific performance. It is sufficient, upon this point, to say, that such provisions — if they could in any case fetter the power of the court to do justice according to the settled principles of law — cannot be applied where the efficient cause of the failure of the party seeking specific performance to comply strictly and literally with the contract was the conduct of the other party. If the defendant had agreed, in writing, signed by himself alone, to accept current funds and not to demand coin or legal-tender notes, and, notwithstanding such agreement, he had demanded coin or legal-tender notes, under circumstances rendering it impossible for the plaintiff to meet the demand on the day limited by the contract, would he be permitted to say that the contract was forfeited for the failure to make payment according to its provisions? We suppose not, although, according to his argument, such an agreement not having been signed by both parties and endorsed on the contract, would not estop him from insisting upon a strict and literal compliance with its terms.

It results from what has been said that the failure of the plaintiff, Libby, in person or by agent, to pay the notes maturing in 1885, in coin or legal-tender paper, at the time they were presented by Cheney for payment at the banking-house of Russell & Holmes, did not work a forfeiture of the contract, and does not stand in the way of a decree for specific performance.

In respect to the notes falling due in 1886 and 1887, the evidence satisfactorily shows that the plaintiff, at the times and place appointed for their payment, offered, and was then and there ready, to pay them in lawful money, but the notes not being on either occasion in the hands of Russell & Holmes for collection, he could not make actual payment, but left the money at their bank to be paid over to Cheney whenever the notes were presented at that place. The notes due in those years were, it is true, in the manual possession of Russell & Holmes, but they were not in their custody by direction of

Cheney for collection or for any other purpose. Libby did all that he could do with respect to the notes falling due in those years in order to comply "strictly and literally" with the contract. Indeed, after the surrender by Cheney in 1885, of the notes due in that and subsequent years, and his formal notification to Libby that he regarded the contract as forfeited, and would not receive any money from him, Libby was not bound, as a condition of his right to claim specific performance, to go through the useless ceremony of tendering payment at the banking-house of Russell & Holmes of the notes maturing in 1886 and 1887. *Brock* v. *Hidy*, 13 Ohio St. 306; *Deichmann* v. *Deichmann*, 49 Missouri, 107, 109; *Crary* v. *Smith*, 2 Comstock (2 N. Y.) 60. In *Hunter* v. *Daniel*, 4 Hare, 420, 433, it was said: "The only remaining point insisted upon was that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or, in fact, to call for the benefit of it; and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The general rule in equity certainly is not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money." Whether that be a sound view or not, with reference to the particular contract here in question, Libby did, in fact, make a proper tender of payment as to these notes. Before the bringing of this suit he had paid, and offered to pay, more than one-half of the price for the land and all accrued interest and taxes, and, therefore, was entitled by the terms of the contract to a deed, he executing notes and a mortgage for the remaining payments to run the unexpired time, as stipulated in the agreement.

The court below found that the notes falling due in 1885, 1886 and 1887 were paid; that the plaintiff had deposited

with the clerk for the defendant a mortgage on the land to secure the payments due, eight, nine and ten years after the date of the contract; and that he had fully done and performed every obligation imposed upon him to entitle him to a deed. It was adjudged that the defendant, within forty days from the decree, execute, acknowledge and deliver to the plaintiff a good and sufficient deed, with the usual covenants of warranty, (excepting the right of way that may be demanded for public use for railways or common roads,) conveying to him the land in question, and in default of which it was adjudged that the decree itself should operate, and have the same force and effect, as a deed of the above description.

We are not able to concur in the finding that the notes falling due in 1885, 1886 and 1887 had been *paid* when this decree was passed. If those notes had been placed by Cheney with Russell & Holmes for collection, and the latter had collected the amounts due on them, then they would have been paid; for in such case, that firm would have been the agent of the payee to collect the notes, and the money received by them would have belonged to him.

In *Ward* v. *Smith*, 7 Wall. 447, 450, the question arose as to whether a bank at which certain bonds were made payable was the agent of the holder to receive payment. The court said: "It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The

agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds." See, also, *Adams* v. *Hackensack Improvement Com.*, 44 N. J. Law (15 Vroom), 638, where this question is elaborately examined; *Hills* v. *Place*, 48 N. Y. 520; *Williamsport Gas Co.* v. *Pinkerton*, 95 Penn. St. 62, 64; *Wood* v. *Merchants' Saving, Loan & Trust Co.*, 41 Illinois, 267.

Russell & Holmes, then, did not become the agent of Cheney to receive the amount of the notes by reason simply of the fact that the notes were made payable at their bank. The funds left by Libby with them to be applied in payment of the notes of 1885, 1886 and 1887 are, therefore, his property, not the property of Cheney. The utmost effect of Libby's offer, within a reasonable time after June 1, 1885, to pay the note of that year in lawful money, and of his offers, at the appointed times and place, to pay the notes of 1886 and 1887, was to prevent the forfeiture of the contract, and to save his right to have it specifically performed, so far as that right depended upon his paying those notes. But they must be actually paid by him before he is entitled to a deed, or to a decree that will have the force and effect of a conveyance. Under the circumstances it was not absolutely necessary that he should have brought the money into court for the defendant at the time he filed his bill. His offer in the bill to perform all the conditions and stipulations of the contract was sufficient to give him a standing in court. *Irvin* v. *Gregory*, 13 Gray, 215, 218; *Hunter* v. *Bales*, 24 Indiana, 299, 303; *Fall*

v. *Hazelrigg*, 45 Indiana, 576, 579. But the decree of specific performance ought not to become operative until he brings into court for the defendant the full amount necessary to pay off the notes for principal and interest falling due in 1885, 1886 and 1887. *Caldwell* v. *Cassidy*, 8 Cowen, 271; *Haxtun* v. *Bishop*, 3 Wend. 15, 21; *Hills* v. *Place*, *supra*; *Wood* v. *Merchants' Saving Co.*, *supra*; *Webster* v. *French*, 11 Illinois, 254, 278; *Carley* v. *Vance*, 17 Mass. 389, 391; *Doyle* v. *Teas*, 4 Scammon, 202, 261, 267; *McDaneld* v. *Kimbrell*, 3 Greene (Iowa), 335. The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the moneys left by him for Cheney at the bank of Russell & Holmes. *Davis* v. *Parker*, 14 Allen, 94, 104; *January* v. *Martin*, 1 Bibb, 586, 590; *Hart* v. *Brand*, 1 A. K. Marsh. 159, 161; 2 Sugden on Vendors, 8th Amer. Ed. 314–15 [627–8].

The decree below is affirmed. But it is adjudged and ordered that the said decree be and is hereby suspended, and shall not become operative until the plaintiff brings into the court below for the defendant the full amount of the notes for principal and interest executed by him to the defendant and made payable on the 28th days of May, 1885, 1886 and 1887, without interest upon any note after its maturity.

McKEY *v.* HYDE PARK VILLAGE.

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

No. 1421. Submitted January 7, 1890. — Decided March 3, 1890.

The only contention between the parties in this action of ejectment was, whether the centre of a street in the village of Hyde Park was the southern boundary line of the plaintiff's land, or whether that line ran twenty-three feet further south. The court in its charge to the jury said: "In 1873 the village of Hyde Park laid out and opened 41st Street sixty-six

Citations for Plaintiff in Error.

feet wide from Grand Boulevard to Vincennes Avenue, the centre of which was a line equidistant from the north and south lines of the quarter section, on the theory that this line was the true east and west boundary between the four quarters of the quarter section and the true southern boundary of the McKey tract;" and then directed the jury thus: "If you believe from the evidence that the centre of the street is the centre east and west line of the quarter section, then you are also instructed that it was and still is the true boundary line, and that the plaintiff is not entitled to the land described in the declaration on the theory that the Greeley survey was correct;" *Held*, that this was erroneous as it in effect directed the jury to find that the plaintiff was not entitled to recover; and, as the evidence was conflicting, that was a question to be determined by the jury.

A rule in force for the subdivision of public lands for disposal under the public land law does not necessarily apply to the subdivision of private lands by their owners after they have been granted by the government without having first made official subdivisions.

In Illinois the inference that an owner of land has dedicated it to the public for use as a street can only be drawn from acts which show an actual intention to so dedicate it, or from acts which equitably estop the owner from denying such intention.

EJECTMENT. Verdict for the defendant, and judgment on the verdict, to review which this writ of error was sued out. The case is stated in the opinion.

Mr. J. R. Doolittle, for plaintiff in error, cited *Irwin* v. *Dixon*, 9 How. 10, 30; *Cincinnati* v. *White*, 6 Pet. 431; *Kelly* v. *Chicago*, 48 Illinois, 388; *Bauer* v. *Gottmanhausen*, 65 Illinois, 499; *Lull* v. *Chicago*, 68 Illinois, 518; *Kyle* v. *Town of Logan*, 87 Illinois, 64, 67; *Hyde Park* v. *Dunham*, 85 Illinois, 569, 577; *Chicago* v. *Johnson*, 98 Illinois, 618; *Herhold* v. *Chicago*, 108 Illinois, 467; *Peyton* v. *Shaw*, 15 Bradwell, Ill. App. 192, 196; *Robertson* v. *Wellsville*, 1 Bond, 81; *Lownsdale* v. *Portland*, Deady, 39; *Lansdown* v. *Elderton*, 14 Ves. 512; *Gray* v. *Gray*, 1 Beavan, 199; *Harding* v. *Harding*, 4 Myl. & Cr. 514; *Requea* v. *Rea*, 2 Paige, 339, 341; *Miller* v. *Collyer*, 36 Barb. 250; *Cazet* v. *Hubbell*, 36 N. Y. 677, 680; *Bloomington* v. *Bloomington Cemetery Assn.*, 126 Illinois, 221; *Chicago* v. *Stinson*, 124 Illinois, 510; *Gates* v. *Salmon*, 35 California, 576; *S. C.* 95 Am. Dec. 139; *Sutter* v. *San Francisco*, 36 California, 112.

Mr. James H. Roberts, for defendant in error, cited: *Cincinnati* v. *White's Lessee*, 6 Pet. 453, and cases cited; *Macon* v. *Franklin*, 12 Georgia, 239; *Case* v. *Favier*, 12 Minnesota, 89; *Cady* v. *Conger*, 19 N. Y. 256; *Barclay* v. *Howell's Lessee*, 6 Pet. 496, 513; *Wilder* v. *St. Paul*, 12 Minnesota, 192; *Forney* v. *Calhoun County*, 84 Alabama, 215; *Adams* v. *Saratoga Railroad*, 11 Barb. 414; *Chicago* v. *Wright*, 69 Illinois, 318.

Mr. Justice Lamar delivered the opinion of the court.

This is an action of ejectment brought in the Circuit Court of the United States for the Northern District of Illinois by William D. McKey against the village of Hyde Park, to recover possession of a strip of land 23 feet wide and 150 long, used and occupied by the village as a part of a street known as Forty-first Street. The ground of McKey's complaint is, that the village, in locating and opening that street, entered upon, and unlawfully took possession of his land to the extent of the above mentioned strip, ejected him therefrom, and withholds from him the possession thereof. The defendant filed a plea of not guilty, and at the trial contended that the street, including that strip, was properly located and was rightfully used as a public highway by virtue of a common law dedication, and also under a deed from plaintiff's co-tenant, with the acquiescence of plaintiff through a long period of years.

The controversy in the case is as to the location of a boundary line, there being, according to the bill of exceptions, no contention as to the title of the premises in dispute. The land in dispute is in the south ten acres of the N.W. $\frac{1}{4}$ of the N.E. $\frac{1}{4}$ of section 3, township 38 N., R. 14 E. of the third principal meridian in Cook County, Illinois. Upon the trial it was shown that the trustees of the Illinois and Michigan Canal had owned the N.E. $\frac{1}{4}$ of section 3, deriving their title by grant from the State of Illinois; and that they conveyed the northwest quarter of this N.E. $\frac{1}{4}$ to P. F. W. Peck, describing it in the deed as the northwest quarter of the N.E. $\frac{1}{4}$ of the section, containing forty acres, more or less. By mesne convey-

ances the title to the south ten acres of this N.W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3, in June, 1886, became vested in two brothers, Edward and Michael McKey, living in Wisconsin, as tenants in common, and was held by them until the death of Michael McKey, intestate, September 29, 1868, upon whose death his interest therein descended to his four minor children, one of whom, William D. McKey, the plaintiff, became of age on September 18, 1874. Edward McKey died intestate August 14, 1875.

In order to show his title to the premises in dispute the plaintiff put in evidence the proceedings of the Circuit Court of Cook County in chancery in a suit for the partition of the McKey tract among the heirs and owners thereof. As shown by this evidence that court in that case appointed commissioners to partition the land, and authorized them to subdivide it into blocks, lots, streets and alleys, which they did, and attached to the record a plat entitled "McKey's Addition to Hyde Park."

The plaintiff also put in evidence the final decree in that cause entered October 6, 1882, the said plat being a part of it. The decree reads as follows:

"It appearing to the court that the plat in said report attached, marked 'E', which said commissioners have entitled 'McKey's Addition to Hyde Park,' being a subdivision made by Circuit Court commissioners in partition of that part of the south ten acres of the northwest quarter, etc., represents their subdivision of the land above described under description No. 5, and was by them duly submitted to the president and board of trustees of said village of Hyde Park, and was approved by them on the eighth of September, A.D. 1882, as appears by the certificate of the clerk of said village thereon, the pieces or parcels of land designated on this plat 'E' as streets and alleys being laid out for public streets and alleys as on said plat 'E' shown. It is further ordered, adjudged and decreed that the several maps or plats by said commissioners prepared and the subdivision by them made and shown thereon, and the respective titles given thereto, be, and the same are hereby in all respects approved, ratified, and confirmed,

and it is ordered that the originals now here in court be recorded in the recorder's office of said Cook County, as required by law. And it is further ordered that the clerk of this court certify, under his hand and [the] seal of this court, on each of said original maps or plats a minute of the order of this court approving the same, in words and figures as follows, to wit:

"State of Illinois, }
"*County of Cook*, } *ss*:

"This plat approved in all particulars by the court; and it is ordered that the same be recorded in the recorder's office of the County of Cook aforesaid. This certificate is made in pursuance of a decree of the Circuit Court of Cook County, in the State of Illinois, entered on the 6th day of October, 1882, in case number 39,801, in which William D. McKey and others are complainants and Richard M. McKey and others are defendants."

The plat shows that the lots embraced 23 feet of the street, and that the stakes of the lots were set 23 feet south of the north line of the street, leaving a strip 23 feet wide south of the lots to be thereby dedicated for use as a public street. The plaintiff for the purpose of showing that the line thus indicated by the plat as the southern boundary of the McKey tract was intended by the canal trustees to be the southern line of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 3, offered in evidence, in addition to their conveyance to Peck, the purchaser from them of that tract, all the other conveyances made by them of the said northeast quarter of said section 3, as follows: (1) A deed to Robert S. Wilson, dated April 1, 1857, for the north half of the southwest quarter of that quarter section which was stated in the deed to contain $19\frac{31}{100}$ acres, more or less, in consideration of $965; (2) a deed to John C. Dodge, dated October 6, 1855, for the south half of the southwest quarter of that quarter section, stated in the deed to contain 20 acres, at the rate of $50 per acre, amounting to the sum of $1000; (3) a deed to Isaac Cook, dated August 16, 1852, conveying the northeast quarter of that

quarter section, containing 40 acres, more or less, at the rate of $15 per acre, amounting to the sum of $600; (4) a deed to William B. Egan, dated January 28, 1856, conveying the north half of the southeast quarter of that quarter section, containing $19\frac{31}{100}$ acres; and, (5) a deed to Margaret Johnson, dated July 1, 1859, conveying the south half of the southeast quarter of that quarter section, containing $19\frac{31}{100}$ acres.

It was admitted, as stated above, that the canal trustees had held title to the whole of the said northeast quarter, and that the above deeds placed all the titles to said quarter section in the grantees aforesaid.

The plaintiff then introduced one Henry J. Goodrich, who testified "to his signature upon the plat, and that he was one of the commissioners appointed by the court to make the partition, and was at the same time president of the board of trustees of the village of Hyde Park; that he knew where the stakes were driven by the surveyors who made the plat, and he knew that the land as staked took 23 feet off the street; that at the time the board approved the plat they knew it was taking more land than what 'was intended to be given;' that they wanted to change the street; they wanted to leave that question in court and approve of the plat as it then stood; that the board was then in favor of changing the location of that street. The witness further testified that he had known that land ever since 1865 or 1866, and that it was then enclosed with a fence; that the fence was an old fence; that the fence was south of the centre line of the street as opened by the authorities of Hyde Park; and that he remembered the circumstance of a street being run through there. . . . It was admitted by stipulation of counsel that 41st Street was opened through the property in question in 1873."

Alexander Taylor, a witness for the plaintiff, testified that he resided very near this property for eighteen years, and had known it ever since 1869; and at one time lived on part of it. That "it was always fenced in until the time it was opened as a street, in 1873. There was a fence on the south line of it in 1869, which was quite an old fence then and which the gardener made into a reed fence to give shelter to his

garden from the north winds, and on the south side of it was the Bowen lot, cultivated as a vegetable garden; on the north side it was also enclosed. There was no fence on the north side of the ten-acre lot deeded to the McKeys, but the whole piece up to the railroad, including Mr. Hill's and Mrs. Smith's land, was all fenced in together. One-half of it belonged to the McKey estate and one-half belonged to Mrs. Smith and Mr. Hill, but it was enclosed on all sides and was used for a pasture by the witness. The fence on the south line between the McKey land and the Bowen land was an old fence which used to blow down; the pressure of the wind would break it down, and he had to patch it up. It was an old fence in 1869, made on cedar posts, a straight fence running through from Vincennes Avenue to Grand Boulevard. The wind would blow it down sometimes three or four lengths at a time. When the street was put through and the fence was moved south they turned the tops of the fence into the ground; they were so rotten they could not use them again. When the street was put through, the fence was moved south into Mr. De Lat's garden."

Frank McLeane testified to the same effect as to the existence of the old fence which ran straight through from Vincennes Avenue to Grand Boulevard, immediately south of which was Bowen's land, used as a garden.

The plaintiff then called S. S. Greeley, who testified that he was the surveyor who made the plat pursuant to the order of the court; that he staked the south line of the lots and the north line of the street; and that the stakes were all driven in the grade of the street. He stated that when he made the survey of McKey's addition he was informed of how the canal trustees had conveyed the whole of the quarter section by the certificates and conveyances above mentioned; that the United States plat of section 3 showed that the N. E. $\frac{1}{4}$ was a fractional quarter section — not full 160 acres, but $157\frac{23}{100}$ acres; and that, before making the survey, it was necessary to know how the canal trustees had conveyed the land.

He further stated: "I found then there were six con-

veyances by the canal trustees to six different parties in the northwest quarter of section 3; two of the pieces were conveyed as the northwest quarter of the northeast quarter and the northeast quarter of the northeast quarter, each being 40 acres, more or less; then there were four conveyances — one conveying the north half of the southwest quarter of the northeast quarter of section 3, containing $19\frac{31}{100}$ acres, more or less; one the south half of the southwest quarter of the northeast quarter, containing $19\frac{31}{100}$ acres, and one the north half of the southeast quarter of the northeast quarter, containing $19\frac{31}{100}$ acres, and one the south half of the southeast quarter of the northeast quarter, containing $19\frac{31}{100}$ acres. The south half of the southwest quarter of the northeast quarter was marked in two ways; it was marked $19\frac{31}{100}$ acres with a pencil mark through it. . . . I then found that the line between what is technically called the north half and the south half of the northwest quarter was not really the middle line of the quarter section, but was a line far enough south of that to give the proportion of 80 acres in the north half and $77\frac{23}{100}$ acres in the south half. I then divided it upon that basis, giving the north half $\frac{80}{157}$ of the width north and south, and giving the south half 77 and a fractional $\frac{1}{157}$ of the width north and south; that made the north part of the quarter section 1334 feet long on the west line, and the south part $1288\frac{2}{10}$ feet, and the true dividing line between the northwest quarter and the southwest quarter of the quarter section, which is properly the south line of the McKey property."

In reply to a question by the judge, he stated that he put the dividing line "just where the canal trustees seem to have done in their deeds." Witness further testified "that he had made surveys in the northwest quarter of this quarter section, and that he had surveyed the property immediately south of the McKey ten acres, which is in dispute, and that he had located the fence along the north line of said property and the south line of 41st Street as laid out by the village; that he had located this fence running east and west an equal distance between the north and south boundary lines of the quarter section, but that he had done this simply by retrac-

ing the subdivision which had been made before, and that he made the north line of the southwest quarter of the quarter section at the midway point, because he discovered that it was the way it had been made before."

The defendant to maintain the issues on its part introduced Henry McKey, son of Edward McKey, to show that the village of Hyde Park in 1873 opened 41st Street through the land in question, in pursuance of a deed from his father who was the original owner of an undivided half of the McKey tract; that the plaintiff, though a minor at the time, became of age in the year 1874, and did not commence this suit until 1887; that in the meantime the village of Hyde Park proceeded to open and improve the street, to lay sidewalks and to put in sewers without objection or interruption from the plaintiff; that witness was the only agent the McKeys had in the management of their property, and was present at the time the street was laid out; that he saw that the fence had been moved; that more of the street had been taken from the McKey tract than from the land adjoining it on the south; that he thought the location of the fence might have been wrong, and therefore made no objection; and that the location was not questioned until Mr. Greeley informed him of the alleged error of said location, and that the southern line of the lots extended 56 feet below the north line of the street. He also testified that in selling lots in their addition the McKeys followed the description in the plat thereof, but inserted in the deed a condition that they did not warrant the title to any portion of the lots claimed by the village as a part of the street.

In support of its contention that the 23-feet strip involved in this suit was rightfully included within the limits of the street, and that the same is located where it ought to be, the defendant introduced as witnesses McLennan, Rossiter, Lee and Foster, all surveyors of experience. Each of those witnesses testified that the centre line of 41st Street, as laid out by the village of Hyde Park, is the true southern boundary of the McKey tract.

Jacob T. Foster, county surveyor, said: "If he were called

upon to survey the northwest quarter of the northeast quarter, containing forty acres, more or less, he would ascertain the southern line of the quarter by measuring the west line of the quarter section and dividing it in the middle, then measuring the east line of the quarter section and dividing it in the middle, and run a line through from one point to the other, so that if the west line of the quarter section was 2622½ feet long he would make the west line of the quarter quarter one-half of that, and make the south line of the quarter quarter that many feet south of the north line. That is the correct principle in surveying."

The witness McLennan, a surveyor of thirty years, testified that "if this northeast quarter of section 3 be subdivided into four quarters by dividing the quarter section by equally distant lines, such a survey would locate 41st Street in exactly the position where it is now occupied by the village, and in that case the true line between the northwest quarter and the southwest quarter of this northeast quarter of the quarter section would be in the centre of 41st Street as now laid out and occupied."

Defendant's other witnesses testified to the same effect.

Several exceptions were taken to rulings of the court below during the progress of the trial, and also to the general charge to the jury. The jury returned a verdict in favor of the defendant upon which judgment was rendered. The plaintiff then sued out this writ of error.

The first assignment of error, which we think necessary to consider, relates to the following charge of the court:

"If you believe from the evidence that the centre of the street is the centre east and west line of the quarter section, then you are also instructed that it was and still is the true boundary line, and that the plaintiff is not entitled to the land described in the declaration on the theory that the Greeley survey was correct."

He preceded this charge by the following statement:

"In 1873 the village of Hyde Park laid out and opened 41st Street sixty-six feet wide from Grand Boulevard to Vincennes Avenue, the centre of which was a line equidistant from the north and south lines of the quarter section, on the theory that

this line was the true east and west boundary between the four quarters of the quarter section and the true southern boundary of the McKey tract."

In our opinion that instruction was erroneous. It in effect directed the jury to find that the centre of the street, which is a line equidistant from the north and south lines of the quarter section, is the true southern boundary of the McKey tract, and that the plaintiff was not entitled to recover the premises described in the declaration. The question in this branch of the case is, whether, as is contended by the plaintiff, the line designated in the plat of partition, adopted by the decree of the Chancery Court of Cook County, and approved by the president and board of trustees of the village of Hyde Park, is the true southern boundary of the McKey tract, or whether, as insisted by the defendant, the centre line of 41st Street is that boundary.

The facts adduced by the plaintiff in support of his contention are, that the whole of the northeast quarter of section 3 was owned by the canal commissioners; that it contained, as shown by the plat of the governmental survey, $157\frac{3}{100}$ acres; that there was never any official subdivisional survey of that quarter; that the canal commissioners, by six different deeds, conveyed to different parties and in different quantities the whole quarter section, 80 acres in the north part of the quarter and four times $19\frac{31}{100}$ or $77\frac{23}{100}$ acres in the south part; that S. S. Greeley, a surveyor of forty years' experience, employed by the court commissioners in the partition suit, with those deeds before him, proceeded to survey the property into subdivisions, and, as he testified, by tracing the lines of the various subdivisions just as the canal commissioners seemed to have placed them by their deeds, and, locating it "exactly as it was originally subdivided," he fixed the boundary line twenty-three feet south of that indicated by the centre of the street; and that the line thus certified to by him, adopted by the court, and approved by the president and board of trustees of the village of Hyde Park, coincided exactly with an ancient dividing fence between the McKey tract north and the Bowen tract south, running across the western half of the quarter section,

which, by its rotted condition, furnished a strong presumption that it had been built there by the original purchasers in accordance with a survey made upon the same principle as the one on which the partition plat was prepared.

The evidence as to the true southern boundary is at least conflicting; and its weight and value was a question to be determined by the jury.

Assuming that the rule laid down by the court is the usual one prescribed by the government for the direction of surveying officers in subdividing sections of the public lands for disposal under the public land law, it does not necessarily relate to the subdivision of private lands by the owners after they have been granted by the government without official subdivisions having been made. If the northeast quarter of section 3 had been subdivided by the surveying officers of the United States and recorded on the plat prior to the grant to the State, such general description as that contained in the deed from the canal company to Peck might properly be presumed to convey only an official quarter of the quarter section. But in the absence of such official subdivisional survey the intention of the parties, as to the amount of land conveyed, must, when ascertainable, be recognized and carried out. We think, therefore, the court erred when in its charge it withdrew from the consideration of the jury the evidence which had been submitted, very properly, we think, tending to prove, both by the location of the old fence, and by the deeds of adjoining lands executed by the canal commissioners, the southern boundary line of the premises in dispute.

Another assignment of error urged by counsel for plaintiff is, that the court erred, in giving the following charge to the jury: "If you believe from the evidence that in 1874, when the plaintiff attained his majority, he knew of the action of the village of Hyde Park in laying out, opening and improving the street, and that thereafter and until the partition suit was commenced, in 1881 or later, the street was maintained and used with his knowledge and without objection by him, you are authorized to infer that he consented to a dedication to that use of so much of the McKey tract as is embraced within the present limits of the street."

This instruction was repeated in the following more unqualified language: "The plaintiff became of age in 1874, and if the village of Hyde Park took possession of this strip of land in 1873, and he knew of that possession and the continued use and improvement of the street and made no objection; if with full knowledge of everything that was done from 1874, when he was of age, until Mr. Greeley informed him for the first time that he was the owner or part owner of the 23 feet, then he cannot recover as against the village of Hyde Park."

However correct technically, as an abstract proposition, the first part of this charge may be, we do not think the last paragraph of it, above quoted, states the law of Illinois as to what constitutes a dedication of real property in that State, as interpreted by her Supreme Court. In *City of Bloomington* v. *Cemetery Association*, 126 Illinois, 221, 227, 228, the court laid down the principle that mere "non-action will not raise an implication of an intention to dedicate private property to public use, nor will it estop the owner to deny such intention." After repeating the doctrine in the language of preceding cases, the court proceeded thus: "But it is said that he, and his grantee, the plaintiff, should be estopped to deny a dedication because of the public user of the land in question as a part of the street without objection on their part. Had the plaintiff, or its grantor, by any equivocal overt acts or declarations, given evidence of an intention to have the land in question included in the street, and thereby induced the public to use and the city to improve it as a part of the street, possibly the doctrine of estoppel might have been invoked. No such acts or declarations however are shown. All that is proved is mere non-action on their part, or, in other words, a mere omission to assert their title as against the public. Mere non-action will not raise an implication of an intention to dedicate private property to public use, nor will it estop the owner to deny such intention." See, also, *Herhold* v. *City of Chicago*, 108 Illinois, 467; *Peyton* v. *Shaw*, 15 Bradwell (Ill. App.) 192.

In *Kyle* v. *Town of Logan*, 87 Illinois, 64, 66, 67, the court states the same doctrine as follows: "In order to justify a claim that title to a tract of land has been divested by dedi-

cation, the proof should be very satisfactory, either of an actual intention to dedicate or of such acts and declarations as should equitably estop the owner from denying such intention. . . . The owner of the land must do some act, or suffer some act to be done, from which it can be fairly inferred he intended a dedication to the public. Acquiescence, with knowledge of the use by the public, without objection, is not, as held by the Circuit Court, conclusive evidence of a dedication, for it may be rebutted. The second instruction for appellees, announcing this principle, was erroneous. A dedication, from an user of twenty years, and for a shorter time, may be presumed, but it is not conclusive. The owner might show any fact which would overcome the presumption."

In *City of Chicago* v. *Johnson*, 98 Illinois, 618, 624, 625, the court laid down the doctrine on this subject as follows: "A dedication of private property to public uses will not be held to be established, except upon satisfactory proof, either of an actual dedication, or of such acts or declarations as should equitably estop the owner from denying such intention. This proposition is so clearly the law, it needs the citation of no authorities in its support."

In the still earlier case of *McIntyre* v. *Storey*, 80 Illinois, 127, 130, the court said: "A dedication of the right of way for a highway may be variously proven. It may be established by grant or written instrument, or by the acts and declarations of the owner of the premises. It may be inferred from long and uninterrupted user by the public, with the knowledge and consent of the owner; but this court has had frequent occasion to say, there must be a clear intent shown to make the dedication. The evidence offered for that purpose should be clear, either of an actual intent so to do, or of such acts or declarations as will equitably estop the owner from denying such intent;" citing *Marcy* v. *Taylor*, 19 Illinois, 634; *Kelly* v. *City of Chicago*, 48 Illinois, 388; *Godfrey* v. *City of Alton*, 12 Illinois, 29.

In *City of Chicago* v. *Stinson*, 124 Illinois, 510, 513, 514, the court said: "Before title can be divested by dedication, the proof must be very satisfactory either of an actual

intention to dedicate, or of such acts or declarations as should equitably estop the owner from denying such intention;" citing *Kelly* v. *City of Chicago*, 48 Illinois, 388. "Long use and long acquiescence in such use by the owner of land are sometimes regarded as, in and of themselves, evidence of a dedication. In cases, however, of implied or presumed acquiescence or consent on the part of the owner, very much depends upon the location of the road or street, the amount of travel, the nature of the use of the public, the rights asserted by the public, *the knowledge of the owner*, and like circumstances;" citing *Onstott* v. *Murray*, 22 Iowa, 457. "We have said: 'Acquiescence, with knowledge of the use by the public, without objection, is not . . . conclusive evidence of a dedication, for it may be rebutted;' citing *Kyle* v. *Town of Logan*, 87 Illinois, 64. The two prominent elements to be considered, in determining whether there has been a common law dedication or not, are the intention of the owner to dedicate, and the acceptance by the public of the intended dedication. 'The owner of the land must do some act, or suffer some act to be done, from which it can be fairly inferred he intended a dedication to the public;'" citing *Kyle* v. *Town of Logan*, *supra*.

Under these authorities we think the court below committed error in that part of the charge to which we have just referred. The principle established by them is, that a dedication of a street or highway may be inferred from a long and uninterrupted user by the public with the knowledge and consent of the owner; but that mere knowledge and non-action or failure to assert one's rights are not conclusive evidence of such dedication, for they may be rebutted; and the party is always allowed to show facts and circumstances to overcome such presumption.

In the case at bar the facts were shown that at the time the village opened the street through the property of the plaintiff he was a minor and a non-resident; that though he became of age the year after, he was then, and up to a short time before this suit was brought, a non-resident, living at Janesville, Wisconsin; and there was no evidence to show that he

had ever until then seen the premises or been in Chicago. There was evidence also to show that during a great part of that period he was a co-tenant with other minors who resided out of the State of Illinois. Whether these facts were sufficient to explain the non-action of the plaintiff, and to negative the presumption of a dedication or not, was a question for the jury, which the court, by its charge, in effect withdrew from their consideration.

We do not deem it necessary to refer to any of the other assignments of error, as those we have discussed are sufficient to dispose of the case.

It results from what we have said that the judgment of the court below should be, and it hereby is,

Reversed, with a direction to order a new trial, and to take such further proceedings as shall not be inconsistent with this opinion.

CRENSHAW *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1081. Argued January 6, 1890. — Decided March 3, 1890.

The provision in the naval appropriation act of August 5, 1882, c. 391, § 1, which directs, in certain cases, the honorable discharge of naval cadets from the navy, with one year's sea pay, is not in conflict with the contract clause of the Constitution of the United States.

An officer in the army or navy of the United States does not hold his office by contract, but at the will of the sovereign power.

It is not within the power of a legislature to deprive its successor of the power of repealing an act creating a public office.

This was an action, brought by the appellant, James D. Crenshaw, in the Court of Claims, for the purpose of recovering an alleged balance of $3763.66 due him on account of salary as a midshipman in the United States navy. The Court of Claims dismissed the appellant's petition, 24 C. Cl. 57; and an appeal from that judgment brought the case here.

Statement of the Case.

The material facts in the case were as follows: In September, 1877, the appellant was appointed a cadet midshipman at the Naval Academy. At that time the provisions of the Revised Statutes in force and pertinent to this inquiry were as follows:

"SEC. 1520. The academic course of cadet midshipmen shall be six years.

"SEC. 1521. When cadet midshipmen shall have passed successfully the graduating examination at the academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at date of graduation."

"SEC. 1556. The commissioned officers and warrant officers on the active list of the navy of the United States, and the petty officers, seamen," etc., "shall be entitled to receive annual pay at the rates herein stated after their respective designations: . . . Midshipmen, after graduation, when at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave or waiting orders, six hundred dollars. Cadet midshipmen, five hundred dollars."

"SEC. 1229. The President is authorized to drop from the rolls of the army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

The appellant accepted the appointment and entered on his studies at the academy. He completed the course of four years, and after passing a successful examination received a certificate from the academic board in the following words, to wit:

"This certifies that Cadet Midshipman James D. Crenshaw has completed the prescribed course of study at the United States Naval Academy, and has successfully passed the required examination before the academic board preparatory to the two years' course afloat.

"June 10, 1881."

Statement of the Case.

On the 25th of August following, appellant was ordered to sea by the Navy Department, and directed to report for duty on board the steamer Pensacola. This he did. While he was serving on that steamer, under the aforesaid order, Congress passed an act, approved August 5, 1882, being the naval appropriation act, in which occurs this proviso:

"That hereafter there shall be no appointments of cadet midshipmen or cadet engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called 'naval cadets;' and from those who successfully complete the six years' course, appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and engineer corps of the navy and of the marine corps: *And provided further*, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea pay, as now provided by law for cadet midshipmen, etc., etc." 22 Stat. 284, 285, c. 391.

As stated above, this statute was passed while appellant was engaged in his service on the Pensacola. He continued on that vessel until the 14th of March, 1883, when he was ordered to report to the superintendent of the Naval Academy

for examination. He proceeded to the academy, passed his final examination successfully, and, on the 15th of June, 1883, received from the academic board his certificate of graduation, reciting that, "We, the academic board of the United States Naval Academy, having thoroughly examined Naval Cadet James D. Crenshaw on all subjects, theoretical and practical, taught at this institution, and having found him proficient in each, do hereby, in conformity with the law, grant to him this certificate of graduation. June 15, 1883."

On the 23d of June following he received this order:

"Navy Department, Bureau of Navigation and Office of Detail.

"Washington, June 23, 1883.

"Sir: You are hereby detached from the Naval Academy; proceed home and regard yourself waiting orders.

"By direction of the Secretary of the Navy.

"Respectfully, J. E. WALKER, *Chief of Bureau.*"

On the 26th of the same month an order, as follows, was issued:

"Sir: Having successfully completed your six years' course at the United States Naval Academy, and having been given a certificate of graduation by the academic board, but not being required to fill any vacancy in the service happening during the year preceding your graduation, you are hereby discharged from the 30th of June, 1883, with one year's sea pay, as prescribed by law for cadet midshipmen, in accordance with the provisions of the act approved August 5, 1882.

"Respectfully, W. E. CHANDLER, *Secretary of the Navy.*"

"Naval Cadet James D. Crenshaw, U. S. Navy."

Since the date of that order appellant has not been called on to do duty, and has not received any pay except that credited on his claim. In this state of the case he claimed that he was still a midshipman in the naval service, and, as such, entitled to pay. This claim was based upon the following propositions:

(1) That when he accepted the appointment of cadet midshipman he became an officer of the navy, and, as such, entitled to the benefits of section 1229, and Art. 36 of section 1624, (which is to the same effect,) of the Revised Statutes; that such acceptance constituted a statutory contract with the United States based on a valuable consideration, under which he was entitled to hold the office for life, unless removed by sentence of a court-martial, or in commutation thereof;

(2) That he was not, therefore, discharged by competent authority — because, first, since the reënactment by Congress in 1874 of section 1229 and Art. 36 of section 1624 of the Revised Statutes, neither Congress, the Secretary of the Navy, nor any department of the government was competent in time of peace to discharge an officer from the naval service;

(3) That, independently of the act of July 13, 1866, 14 Stat. 92, c. 176, § 5, (section 1229 and Art. 36 of section 1624 aforesaid,) the act of 1882 is unconstitutional, as applied to him, for the reason that he held an office by contract with the United States, and was entitled on graduation to be a midshipman to serve for life or during good behavior;

(4) That not only was the act of August 5, 1882, inoperative, as to him, for the reason stated, but also for the further reason that to apply it to his class would be to make Congress appoint to the office of naval cadet all such students as were in his situation; but that while Congress had the power, under the Constitution, to create the office, it did not have the power to designate the officers, that being the constitutional duty of the executive; and

(5) That the case of appellant did not fall within the terms of the act of 1882; that he was not at the date of its passage an undergraduate of the academy, but had graduated; and that, therefore, his discharge was not authorized by that act.

Mr. H. O. Claughton (with whom was *Mr. Rodolphe Claughton*, on the brief) for appellant.

Mr. Assistant Attorney General Maury for appellees.

Mr. Justice Lamar, having made the foregoing statement, delivered the opinion of the court.

The primary question in this case, one which underlies the first, second and third of appellant's propositions stated above, is, whether an officer appointed for a definite time or during good behavior had any vested interest or contract right in his office of which Congress could not deprive him? The question is not novel. There seems to be but little difficulty in deciding that there was no such interest or right. The question was before this court in *Butler* v. *Pennsylvania*, 10 How. 402, 416. In that case Butler and others, by virtue of a statute of the State of Pennsylvania, had been appointed canal commissioners for a term of one year, with compensation at four dollars per diem; but during their incumbency another statute was passed, whereby the compensation was reduced to three dollars; and it was claimed their contract rights were thereby infringed. The court drew a distinction between such a situation and that of a contract, by which "perfect rights, certain definite, fixed private rights of property, are vested." It said: "These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such

a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. . . . It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the State, as is the case in some instances in the state constitutions, and as is exemplified in the provision of the federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. . . . We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them."

The case of *Newton* v. *Commissioners*, 100 U. S. 548, 559, is in point. That was a controversy over the projected removal of a county seat; and the statute relied on by the objectors provided that before the seat of justice should be considered as permanently established at the town of Canfield, the citizens thereof should do certain things, all of which were admitted to have been duly done. The objectors, therefore, claimed a contract right that the county seat should remain

at Canfield. This court said: "The legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character;" citing Cooley Const. Lim. pp. 232, 342; *The Regents* v. *Williams*, 4 G. & J. 321 [*Que.* 9 G. & J. 365]. "In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. They involve *public interests*, and legislative acts concerning them are necessarily *public laws*. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

In *Stone* v. *Mississippi*, 101 U. S. 814, 820, considering the power of a legislature to grant an irrepealable charter, for a consideration, to a lottery company, the court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must

'vary with varying circumstances.'" See, also, *Hall* v. *Wisconsin*, 103 U. S. 5; *United States* v. *Fisher*, 109 U. S. 143. Nor is the holding of this court singular. Numerous decisions to the same effect are to be found in the state courts. *The People* v. *Morris*, 13 Wend. 325; *Commonwealth* v. *Bacon*, 6 S. & R. 322; *Commonwealth* v. *Mann*, 5 W. & S. 403, 418; *A. J. Hyde* v. *The State*, 52 Mississippi, 665; *The State of Mississippi* v. *Smedes and Marshall*, 26 Mississippi, 47; *Turpen* v. *Board of Commissioners of Tipton Co.*, 7 Indiana, 172; *Haynes* v. *The State*, 3 Humphrey, 480; *Benford* v. *Gibson*, 15 Alabama, 521.

In *Blake* v. *United States*, 103 U. S. 227, the fact is adverted to and the opinion of the Attorney General in Lansing's case, 6 Opinions Attys. Gen. 4, quoted approvingly to the effect that in this respect of official tenure there is no difference in law between officers in the army and other officers of the government.

Applying the above principles, it remains to say that we know of no instance in which their assertion is more imperatively demanded by the public welfare than in this case, and such others as this. If the position taken by the appellant is correct, then a logical and unavoidable result is, that our country, if ever we are so unfortunate as to be again involved in war, will be compelled, after the treaty of peace, to maintain the entire official force of the army and navy, and a host of sinecurists in full pay so long as they shall live; either that or to disband the army and navy before the peace shall be made, even this wholly inadmissible alternative being legally possible from one of appellant's positions. It is impossible to believe that such a condition of affairs was ever contemplated by the framers of our organic or statute law.

The effect of the authorities cited above, is in no respect modified by section 1229 or by Art. 36 of section 1624 of the Revised Statutes. In the first place, if it were granted that those sections mean what appellant claims for them — if they mean beyond question that one appointed as a cadet shall never be dismissed by authority of either the executive or the legislature, or by both in conjunction — yet that fact would

make no difference. The great question of protection to contract rights and vested interests, which forms such an interesting and important feature of our constitutional law, is not dominated by the turn of a phrase. Our courts, both state and national, look on these questions through the form to the substance of things; and, in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation. *Butler* v. *Pennsylvania*, *supra*; *Stone* v. *Mississippi*, *supra*; Cooley's Const. Lim. 283; *United States* v. *McDonald*, 128 U. S. 471, 473.

In the second place, section 1229 and Art. 36 of section 1624 of the Revised Statutes are a reproduction in the revision of the act of July 13, 1866, section 5, *supra*; and in *Blake* v. *United States*, *supra*, the court decided that that act only operated to withdraw from the President the power previously existing in him of removing officers at will, and without the concurrence of the Senate; and that there was no intention to withdraw from him the power to remove with the advice and concurrence of the Senate. If that construction of the statute be correct (and we see no cause for altering our view) it necessarily follows that it was not intended to place an officer where he never before had been — beyond the power of Congress to make any provision for his removal even by the Executive who appointed him.

It is claimed, however, that the construction so given to the act of 1866 was induced by the consideration of certain other statutes *in pari materia*, and that the reintroduction of it in the revision, unaccompanied by those other statutes, would render that construction inapplicable now. We do not think so. We have already considered the act of 1866 in its historical relations, and from the circumstances of its enactment deduced its meaning. When it was reënacted with all other

statutes of general interest, the political exigency which furnished the primary motive for its reënactment had drifted away with the lapse of time; but we do not think it can avail to give to a statute which, after all, is but a reënactment in the exact language of the original act, a meaning almost directly the reverse of that given to the original act. To give such effect to the action of Congress in codifying the statutes would go far to subvert all decisions and introduce chaos into our jurisprudence.

Thus far we have preferred to decide the case upon the broad grounds above stated, and, therefore, considered it as if the term of office enjoyed by the appellant was what he claims it to have been — a term for life. In fact, however, even if that were true as to other officers, it was not true as to him. The statute applicable to his case is section 1520 of the Revised Statutes, which fixes the academic course at six years; and when he entered the service under the regulations in such cases provided he executed a bond to serve for eight years, unless discharged by competent authority, thus recognizing his liability to be discharged.

As to the fourth proposition of appellant, that in enacting the statute of 1882 Congress assumed the power of appointment which belongs to the Executive, we do not so regard the act. Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties. This we think it had the power to do.

We think, too, that the appellant came within the terms of the act of 1882. There is a very plain distinction between this case and that of a cadet engineer, fully explained in *United States* v. *Redgrave*, 116 U. S. 474. The statute in express terms provides that "the academic course of cadet midshipmen shall be six years." If the Navy Department had assumed to make any regulations by which the final graduation should take place in less time, such regulations would have been void. But it did not so assume. It arranged for a two years' course afloat as a part of the academic course, and exacted a preliminary examination to test the cadet's qualifications therefor. But the cadet afloat was a member of the

Statement of the Case.

academy. He still was subject to a final examination at that institution, and without such examination successfully sustained never became a graduate. He was not so denominated until then, either in the Naval Register or elsewhere; and it was not until that final test had been sustained that, either by the practice of the academy, or by the provision of the statute he did or could receive his certificate of graduation.

The judgment of the Court of Claims is

Affirmed.

GUNTHER *v.* LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

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

No. 1367. Argued January 16, 1890. — Decided March 3, 1890.

A policy of insurance on a building and its contents against fire, containing a printed condition by which "kerosene or carbon oils of any description are not to be stored, used, kept or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void;" is avoided if kerosene or other carbon oil is drawn upon the premises near a lighted lamp by any person acting by direction or under authority of the assured's lessee; although there was attached to the policy at the time of its issue a printed slip, signed by the insurer, "privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only;" and although the insurer has since written in the margin of the policy, "privileged to keep not exceeding five barrels of oil on said premises."

Liverpool and London Insurance Co. v. *Gunther*, 116 U. S. 113, affirmed.

When there is no evidence to warrant a verdict for the plaintiff, so that if such a verdict were returned it would be the duty of the court to set it aside, a verdict may be directed for the defendant.

In contract; on a policy of insurance. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion.

Opinion of the Court.

Mr. C. Bainbridge Smith for plaintiffs in error.

Mr. William Allen Butler for defendant in error.

Mr. Justice Gray delivered the opinion of the court.

This was an action brought by a citizen of New York against a British corporation on two policies of fire insurance, dated November 16, 1877, and extended to July 15, 1880, the one on buildings, and the other on fixtures, furniture and other personal property in and about the same.

Each policy described the principal building as follows: "The two-story frame hotel building, with one-story frame kitchen and two-story frame pavilion adjoining and communicating, situated on Gravesend, Bay of Bath, Kings County, Long Island; (it is understood that the above property is to be occupied by a family when not in use as a hotel;) privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process."

Among the printed conditions of each policy were the following:

"If the assured shall keep gunpowder, fire-works, nitroglycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy shall be void."

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

Attached to and pasted on the face of each policy at the

time of its issue was a printed slip, signed by the defendant's agents, and in these words: "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only." And on the margin of the first policy were written and signed by the defendant's agents these words: "September 17, 1878, Privileged to keep not exceeding five barrels of oil on said premises."

At the first trial, a verdict was returned for the plaintiff, which was set aside and a new trial ordered by this court. 116 U. S. 113.

Afterwards the plaintiff died, and the action was revived in the name of his executors; and the answer was amended by leave of court, so as to set up, among other defences, as a breach of the second condition above quoted, "that kerosene, carbon oil or other inflammable liquid, so stored, used, kept or allowed on said premises as aforesaid, was drawn, not by daylight, but at or after dusk or dark and with a lighted lamp or lantern near, in violation of the express terms of the said condition, and that the fire which destroyed said premises was caused by such proximity of said lighted lamp; and the defendant further avers that it is advised and believes that the said policies thereby became and were null and void."

A second verdict for the plaintiffs was set aside by the Circuit Court, for the reasons stated in its opinion reported in 34 Fed. Rep. 501.

At the third trial, the plaintiffs introduced in evidence the policies, and renewal receipts continuing them in force until July 15, 1880, and proved the assured's ownership of the property insured; and the parties agreed that it was destroyed by fire on August 15, 1879, and that the amount of the loss, with interest, was $41,116.64.

The defendant proved by uncontradicted evidence that a barrel of about fifty gallons of kerosene was bought by Walker, the lessee of the premises, on August 13, 1879, and on the next day put by him in the oil room under the pavilion, which was a low room about twelve feet square, with doors opening into other rooms only. There was conflicting evidence upon the question whether any gasoline, naphtha or benzine was kept in

the oil room at the time of the fire. It was admitted that in 1878 the pavilion had been lighted by gasoline generated in a gasometer under the privilege in the first clause of the policy, but that its use was discontinued in the fall of 1878, and it was not used in 1879.

The only testimony introduced as to the cause of the fire was in substance as follows:

The defendant proved that the assured testified at the first trial, that on August 15, 1879, about dusk, he was seated on the piazza of the hotel, in sight of the pavilion, and saw some men with pails and a light; that his attention was attracted by shouts of children playing about in front, and he immediately looked back again and saw the men come out "as though they were on fire," and it did not occur to him that there was a fire in the oil room, although he saw it: that he called to the men to roll in the high grass, and one of them did so, and another ran into the water, and in another instant he saw the oil room burning, and the building immediately caught fire and in an hour or less was level with the ground.

The defendant called as witnesses the two men last mentioned, who testified that they had been sent from another hotel a mile off with two ordinary wooden pails to get five gallons of gasoline: that Walker directed one Schuchardt, a man in his employ, to let them have the oil; that Schuchardt, carrying a lighted glass stable lantern with small holes around the top, took them into the oil room, and drew the oil from a barrel, through a piece of pipe used as a faucet, into the pails, one of which leaked, and much oil was spilled upon the floor; that the lantern was very near the barrel, and presently there was a blue flame across the floor, and the whole room was in a blaze of fire; that Schuchardt got out first, and died of his burns; that one of the witnesses rolled in the grass and was little injured, and the other, who ran into the water, was so severely burned as to be obliged to keep his bed for three months.

The defendant moved the court to direct a verdict for the defendant, "on the ground that, as the established cause of the fire was the drawing in the oil room of the insured prem-

ises about dusk, in the vicinity of a lighted lamp, of a fluid product of petroleum under the circumstances shown by the evidence, not for filling lamps on the insured premises, but for another and different purpose, this of itself, and irrespective of other questions in the case, constitutes a violation of the several contracts of insurance in force at the time of the fire, as contained in the policies respectively, thereby rendering the said policies and each of them void, and defeating the right of the plaintiffs to recover in this action."

The plaintiffs requested the court to submit to the jury the questions "whether there was any naphtha, gasoline or benzine on the insured premises at the time of the fire," and "whether the fluid which was drawn from a barrel in the oil room at the time of the fire was so drawn in the presence of a lighted lamp."

The court denied the plaintiffs' requests and directed a verdict for the defendant. The plaintiffs excepted to these rulings, and sued out this writ of error.

Each of the policies in suit contains two conditions concerning the keeping or use, without written permission in or upon the policy, of naphtha, gasoline, benzine, or any burning fluid or chemical oil, upon the premises. By the general terms of the first of these conditions, the policy is avoided if the assured shall "keep or use" any of these articles. By the more specific provisions of the other condition, the prohibited articles "or any other inflammable liquid are not to be stored, used, kept or allowed" on the premises, "temporarily or permanently, for sale or otherwise," except certain articles named, and for the purpose and with the precautions therein specified, namely, "excepting the use of refined coal, kerosene or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise the policy shall be null and void."

The printed slip, bearing the words "Privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," was attached to each policy and delivered with it, and must therefore be construed in connection with and as part of it, and not as superseding any consistent clause in the

body of the policy. It is suggested that there is an inconsistency between the slip and the exception above referred to. But the two, upon being compared with one another, disclose no such inconsistency; and differ only in that the exception regulates the drawing of the oil, which the slip does not, while the slip regulates the trimming of the lamps, which the exception does not. Taking the exception and the slip together, the effect is the same as if they had been incorporated into a single sentence, so as to permit the use of kerosene or like oil "for lights, if the same is drawn and the lamps are filled and trimmed by daylight only."

In the exception, as well as in the slip, the words "for lights" are clearly restricted in meaning to lighten the insured premises only, and the words "by daylight" are intended, not to denote day-time as opposed to night-time, but to prevent the use of any artificial light from which the oil might catch fire.

The clause written in the margin of one policy, granting a privilege "to keep not exceeding five barrels of oil on said premises," cannot reasonably be construed as intending to dispense with any of the carefully prepared printed regulations concerning the precautions to be taken in handling and using it.

The clause following the description of the principal buildings in each policy, "privilege to use gasoline gas, gasometer, blower and generator being under ground about sixty feet from main building in vault, no heat employed in process," does not affect the case; for the use of the gas apparatus had been discontinued some time before the fire; and, as has been already decided, when this case was before us at a former term, that clause did not sanction the keeping or use of gasoline or other burning fluid except for actual use in that apparatus. 116 U. S. 130.

It has also been decided, that a breach of the conditions by any person permitted by the assured to occupy the premises was equivalent to a breach by the assured himself; and that the assured was chargeable with any acts of his lessee in keeping upon the premises any of the prohibited articles, although

they were not intended to be used there, but for lighting other places. 116 U. S. 128, 129.

There can be no doubt, therefore, that both policies were avoided if kerosene, gasoline or any other carbon oil was drawn upon the premises near a lighted lamp by any person acting by the direction or under the authority of the lessee; and what the particular kind of carbon oil so drawn was, is quite immaterial.

The testimony of the assured himself, that just before the fire he saw some men with pails and a light near the pavilion under which the oil room was, and presently afterwards saw two of the men come out "as though they were on fire," and in another instant saw the oil room burning, and the building immediately caught fire and within an hour was level with the ground, of itself strongly tended to the conclusion that the fire was caused by such a breach of the conditions of the policy.

But this conclusion was established beyond all reasonable doubt by the testimony of the two men whom he saw come out, the substance of which has been already stated, and the accuracy and credibility of which is not impaired in any essential point by the thorough cross-examination to which they were subjected at the trial, or by a careful comparison with their testimony given before a coroner's jury ten days after the fire, and introduced in connection with their cross-examination.

If the case had been submitted to the jury upon the testimony introduced, and a verdict had been returned for the plaintiff, it would have been the duty of the court to set it aside for want of any evidence to warrant it. Under such circumstances, it is well settled that the court was not bound to go through the idle form of submitting the case to the jury, but rightly directed a verdict for the defendant. *Schofield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615, 619, and cases there cited; *Robertson* v. *Edelhoff*, 132 U. S. 614, 626.

Judgment affirmed.

KENADAY *v.* EDWARDS.

GREEN *v.* EDWARDS.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 1236, 1237. Submitted January 9, 1890. — Decided March 3, 1890.

The value of the property in litigation determines the jurisdiction of this court.

In an appeal from a decree removing a trustee of real estate and denying him commissions, the jurisdiction of this court is to be determined, not by the amount of the commissions only, but by the value of the real estate as well.

The Supreme Court of the District of Columbia at special term confirmed a sale of real estate by a trustee without notice having been given to interested parties. Those parties subsequently appeared, and on their motion, after notice and hearing, the sale was vacated and the trustee at whose request it was made was removed; *Held*, that an appeal lay from that decree to the general term of the court.

A trustee of real estate, after a court of equity, on his own motion, has discharged him and relieved him of his trust and appointed another trustee in his place, has no remaining interest in the property which he can convey by deed.

A trustee of real estate, appointed by the court, subject to its control and order, cannot give good title to the trust estate by a deed made without the consent of the court.

Mary E. Macpherson, by clause 6 of her last will and testament, gave, devised and bequeathed to her nephews, Chapman Maupin and Robert W. Maupin, of Virginia, in fee simple, lot five hundred and eleven, with the improvements thereon, on F Street, between Fifth and Sixth Streets, in the city of Washington, to be held (using the words of the will) "by them and the survivor of them, and by such person or persons as may be appointed to execute the trusts declared by this my will, by the last will and testament of such survivor, or by other instrument or writing executed for that purpose by such survivor; but in trust, nevertheless, to manage and control the same and to take the rents, profits and income thence arising and to pay the one-half of the net amount received from such

rents, profits and income monthly, quarterly, half-yearly, or yearly, according to the discretion of my said trustees, to my daughter, Susan W. Edwards, wife of John S. Edwards, for and during her natural life, to her own sole and separate use, free from the control of her present or any future husband and from responsibility for his debts or engagements; it being my design that the income thus provided for my said daughter shall not be assigned, disposed of, or pledged in advance or by way of anticipation, but shall be employed to supply her current wants."

Upon the death of said Susan W. Edwards, the above moiety of net income, profits and rents was, by clause 7, to be invested by the trustees and held by them in trust for the sole and separate use of the testator's granddaughter, Susan W. Edwards, during her life, and upon her death that moiety, with its accumulations, was to be distributed by the trustees among the children and the surviving descendants of the children of the granddaughter *per stirpes*. If the granddaughter died without children or descendants living at her death, this moiety and its accumulations were to belong to the testator's great-granddaughter, Alice Tyler, subject to certain conditions, which need not be here stated.

The remaining moiety of the net income, rents and profits of the property was, by clause 8, devised to the same trustees in trust for the sole and separate use of the testator's great-granddaughter, Alice Tyler, with power to invest such income, rents and profits as in their best judgment was proper, and with authority to her, by last will, to appoint the said moiety and its accumulations to and among her children and their descendants surviving her, in such proportions as she might think fit. If she died, without making a will, then the property was to be distributed among her children and their surviving descendants in fee simple and *per stirpes*. In case she died without children or surviving descendants of such children, then the net income, rents and profits of the estate were to go to her mother, Mary M. Tyler, a granddaughter of the testator, during her life, and upon the death of the latter the next of kin of Alice Tyler were to take the estate and its accumulations.

Statement of the Case.

The will further provided: "I give, devise and bequeath all my other property whereof I may die seized, possessed or entitled, of whatsoever kind, real, personal or mixed, . . . unto the said Chapman Maupin and Robert W. Maupin and the survivor of them, and such person or persons as may be appointed to execute the trusts of this my will, by the last will and testament of such survivor, or by other instrument of writing executed for that purpose by such survivor, in trust, to hold the same for the purposes and upon the trusts hereinbefore declared in the sixth, seventh and eighth clauses of this my will in respect to the real estate and the accumulations therein named; and I do hereby confer upon my said trustees full power and authority, at his or their discretion, from time to time to sell by public or private sale and to convey to the purchaser or purchasers all or any part of the trust property in this will devised and bequeathed to my said trustees, and to receive, grant acquittance for, and reinvest the proceeds of such sales, and I do expressly relieve purchasers of such property from the obligation to see to the application of the purchase-money."

Robert W. Maupin died in 1876, leaving Chapman Maupin the sole surviving trustee.

Chapman Maupin having expressed a desire to surrender his trust, the present suit was brought in the court below by Susan W. Edwards, widow, and by Alice Tyler, by her next friend, for an accounting in respect to the rents and profits of the trust estate, and for the appointment by the court of a new trustee. After answer by the surviving trustee, the cause was referred to an auditor for the statement of the accounts. The report of the auditor, showing the amounts in the hands of the trustee to be accounted for, was approved. And it was adjudged by the court, March 29, 1882, that the fee-simple estate in the lands devised by the will of Mary E. Macpherson to Chapman Maupin and Robert Maupin, upon certain trusts therein declared, "be, and the same is hereby, taken out of the said Chapman Maupin, the survivor of the said co-trustees, and vested in James B. Green, of the city of Baltimore, together with all the rights, powers, duties and obligations incident

thereto under the said last will and testament; and it is further adjudged, ordered and decreed that all the trusts vested by the said will in the said co-trustees and surviving to the said Chapman Maupin be, and they are hereby, abrogated and repealed as to him and conferred upon the said James B. Green, subject to the terms of the said last will and testament, and that the retiring trustee pay over and deliver to his successor hereby appointed all money, books, papers and other property belonging or relating to the said trust estate.

"And it is further adjudged, ordered and decreed that the said James B. Green, trustee, as herein provided, shall file with this court, before any sale of the said real estate under the powers contained in the said will, a bond in the sum of eight thousand dollars, with a surety or sureties, to be approved by this court, for the faithful performance of his duty in connection with the said sale, and that he shall at all times be subject to the control and order of this court in matters touching the trust, and that the costs of these proceedings are payable out of the principal of the trust estate."

It having been suggested to Chapman Maupin — presumably by Green — that the decree in this cause could not be fully carried into effect without a conveyance by him of the trust property, with all the powers of the surviving trustee, to his successor, he executed, March 3, 1888, to Green a deed, granting and assigning to him and to his successors all the grantor's right, title and estate in and to the property devised to the grantor by the will of Mary E. Macpherson, "in trust for the uses and purposes set out in said will, and coupled with all the powers thereby conferred on the trustees therein named."

On the 7th of March, 1888, Green, as trustee, reported, in this cause, a sale he had made, through agents, on the 31st of January, 1888, to A. M. Kenaday, of the lot and improvements on F Street for $11,000 in cash to be paid on the ratification of the sale. While he expressed a belief that his powers under the will were sufficient to enable him to execute a valid deed to the purchaser, he was unwilling to do so without the approval of the court. The sale was thereupon, on the day this report was made, ratified and confirmed by

the court, but, so far as the record shows, without notice of the sale or of the above application to the court being given to either of the present plaintiffs or to any one representing them.

Green and Kenaday, upon the petition of the plaintiffs, were required, March 17, 1888, to show cause, within a time named, why the order ratifying and confirming the sale to Kenaday should not be set aside as having been improvidently made, the sale itself vacated, and Green removed from the office of trustee. This order was served upon Green, March 19, 1888, and Kenaday filed an affidavit, alleging that he purchased in good faith, and insisting upon his right to hold the property. His affidavit shows that the sale was consummated on the 7th of March, 1888, the day on which it was approved by the court.

By an order made March 23, 1888, Green was directed to pay into the registry of the court, on or before March 28, 1888, all the funds of every kind and description in his hands as trustee in this cause, and to make answer within one week. He filed an answer on the 29th of March, 1888, in which he denied that the order confirming the sale was improvidently made, or that the price paid for the property was inadequate. He rested his authority to make the sale upon the decree appointing him trustee, and upon the deed made to him by Chapman Maupin.

All the prayers of the petition of the plaintiffs, filed March 17, 1888, were, upon final hearing, denied. From that order the plaintiffs prosecuted an appeal to the general term.

In pursuance of an order of court, Green deposited in its registry one bond of the city of Richmond, Virginia, numbered 67, and standing in his name as trustee, and also $4921.22 in cash. The last-named sum was, by an order passed May 23, 1888, directed to be invested in notes, secured upon real estate, and, until the court otherwise directed, the interest accruing upon the above bond was directed to be paid to the plaintiffs or to their authorized attorney, and not to Green.

Notwithstanding these orders, Green collected the interest upon the bond of the city of Richmond, and paid it to brokers

in discharge of his personal indebtedness to them. He was, therefore, ordered, July 5, 1888, forthwith to pay into the registry of the court the whole of the interest upon that bond accrued and payable on the 2d of July, 1888. He subsequently moved to rescind that order. And Kenaday filed his petition, in general term, praying that the appeal from the decree in special term be dismissed for want of jurisdiction.

Upon final hearing in the general term it was adjudged that the order of March 7, 1888, confirming the sale by Green be set aside; that the sale itself be vacated; that Green be removed from his office and denied commissions as trustee; that he be required to pay into the registry of court the full sum received by him as the price of the property referred to in his report, and all other money, stock, certificates of deposit, and evidences of indebtedness received or held by him as trustee under his appointment in this cause; and that the cause be remanded to the court in special term to ascertain the amount to be paid by him, and to appoint a trustee in his place.

From that decree separate appeals have been prosecuted by Kenaday and Green.

Mr. George F. Appleby and *Mr. Calderon Carlisle* for Kenaday, appellant.

Mr. H. O. Claughton and *Mr. Cazenove G. Lee* for Green, appellant.

Mr. Leigh Robinson and *Mr. Henry Wise Garnett* for appellees.

Mr. Justice Harlan, after stating the above facts, delivered the opinion of the court.

The appellees have moved to dismiss each of these appeals upon the ground that the value of the matter in dispute is not sufficient to give this court jurisdiction; and with the motions to dismiss was joined a motion to affirm the decree as to each appellant. Both motions to dismiss are overruled. As to Kenaday, the decree denies his right to property of which he

claims to be the owner, and which is of the value of eleven thousand dollars. He paid that sum for it in cash to Green as trustee. It is true that there are funds in the registry of the court below, which, in the event of the affirmance of the decree, can be paid over to him, and he be thus far reimbursed for what he paid to Green on the purchase of the property. But we think that the value of the specific property which is in litigation must determine the jurisdiction of this court. And the same principle must control the right of Green to appeal. It cannot be said that his right to commissions as trustee constitutes the whole matter in dispute between him and the appellees. He claims, as trustee, the right to hold and control the proceeds of the sale made to Kenaday. The order removing him as trustee involves his ownership and control of the trust estate for the objects expressed in the will, and, therefore, the value of that estate is the value of the matter in dispute for the purposes of an appeal by him.

We pass to the consideration of the case upon its merits.

It is contended by the appellants that the general term cannot exercise any jurisdiction in equity unless, (1) a suit or proceeding or motion be ordered by the court holding the special term, to be heard by the general term in the first instance; or (2) a motion be filed in a suit that by the rules of the general term is designated as an enumerated motion; or (3) an appeal by a party aggrieved be taken from an order, judgment or decree of the special term which involves the merits of the action or proceeding. The argument is: As the application to set aside the order confirming the sale to Kenaday was heard and determined in special term; as such application could not be regarded as an enumerated motion; as an application to reopen the decree of confirmation was addressed to the discretion of the court, and was not appealable, and, for that reason, did not involve the merits of the proceeding; and as there was no appeal from the order confirming the sale, the general term was without jurisdiction to review the order of the special term refusing to set aside the previous order confirming the sale.

This argument is based upon a misconception of the object

and scope of the proceeding instituted by appellees on the 17th of March, 1888. By their petition filed on that day they assailed, as fraudulent, the sale made by Green to Kenaday, and asked that the order confirming it be set aside, and Green removed from the trusteeship. Upon that petition Green and Kenaday were ruled to show cause why the order of March 7, 1888, ratifying and confirming the sale, should not be set aside, the sale itself vacated, and the trustee removed. They both appeared to that petition; Kenaday by affidavit, insisting upon his right to hold the property, and Green by formal answer. The case was heard in special term upon this petition, and it was ordered that all of its prayers be denied. From that order the petitioners appealed to the general term. It was clearly an order involving the merits of the proceeding; because, unless reversed or modified, it sustained the sale to Kenaday, confirmed his right to hold the property as against the appellees, and held Green in the position of trustee. It was not an appeal simply from an order refusing to set aside the decree of confirmation, but one that involved the integrity of the order confirming the sale, and, therefore, the merits of the whole case made by the petition. As said by Mr. Justice Merrick, in the opinion delivered by him when the court below overruled a petition for rehearing: "It is apparent that in this case the most substantial rights of the parties were involved. Here is an application at the same term at which an order is passed ratifying a sale, which being passed and not appealed from or corrected in any other mode, would definitively settle the rights of the parties and deprive the petitioners absolutely and forever of a title to real estate, by the conversion of the realty into a sum of money, whether the full or an inadequate price for the value of the land need not be considered."

The next contention of the appellant Kenaday is that he is a *bona fide* purchaser for value of this property from a trustee who had full power, under the will creating him trustee, in connection with the deed to him from Chapman Maupin, the surviving trustee, to sell and convey; and that his right to hold the property cannot be affected unless there was such inadequacy of price as indicated collusion between him and

the trustee. It may be that the surviving trustee, under the broad powers of sale given by the will, could in his discretion have sold this property if he had not surrendered his position as trustee, and if the title had not, by the decree of the court, been taken out of him. And it may be that it was competent for him, while holding the trusteeship, to transfer to some one else, by a written instrument, the powers the will gave him. But he had not exercised any such powers prior to the decree of March 29, 1882, divesting him of title, and substituting Green in his place as trustee. After that date he had no connection with the trust estate, and his powers as trustee ceased. That he had the right to surrender his trust, and that it was competent for a court of equity to appoint another person to take the title to the trust property, cannot, in our opinion, be successfully questioned. But the order appointing a new trustee expressly declared that he should at all times be subject to the control and order of the court touching the trust. His subsequent sale, therefore, of the property was subject to confirmation or rejection by the court. He could not pass the title without its consent. The deed from Chapman Maupin, after he had ceased to be trustee, did not add to Green's powers, or place him or the trust estate beyond the control of the court which appointed him.

It results, from what has been said, that the rights acquired by Kenaday, under his purchase from Green, were subject to the power of the court to ratify or disapprove the sale. The order approving the sale was improvidently passed, because made without notice to the beneficial owners of the property, who were entitled to its income, and who were before the court for the protection of their rights. The confirmation was obtained by the trustee with knowledge that the appellees, if notified of the application to the court, would oppose its ratification.

Under all the circumstances disclosed by the record — and which it will serve no useful purpose to state in detail — we are of opinion that the court below did not err in setting aside the confirmation of the sale, vacating the sale itself, and removing the trustee without allowing him any commissions.

The decree below is in all particulars *Affirmed.*

BRYAN *v.* KALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 1287. Submitted January 7, 1890. — Decided March 3, 1890.

The defence of laches on the part of a plaintiff seeking relief in equity may be set up under a general demurrer.

The granting or refusing relief in equity on the ground of laches in applying for it must depend upon the special circumstances of each case.

A bill in equity alleged that on the 24th September, 1883, letters of administration upon the estate of a deceased person were granted to one of his creditors whose several debts were secured by mortgages upon the estate of which he died seized; that on the 28th day of the same month, the administrator, though having in his possession money sufficient to discharge those claims, proceeded to foreclose the mortgages, and did on the 16th of the next October take judgment in his individual name against himself as administrator for the amount of the claims and for attorney's fees, and in the following December caused the various parcels to be sold; that the property brought much less than its real value, or than it would have brought at an open sale; that one of the tracts was bought by the administrator and assigned by him to the judge by whom the decree was rendered; that the wife of the deceased survived him; that all the property was acquired during marriage and was common property of the husband and wife, and, at the decease of the husband, descended to the wife; and that on the 20th of June, 1887, she conveyed her rights to the plaintiff. The bill which was filed July 18, 1887, made the several purchasers, the administrator, and the judge who rendered the decree, defendants, and asked to have the decree of sale and the sales thereunder set aside, and for further relief. To this complaint the defendants demurred, and the demurrer was sustained. *Held*, that the circumstances set forth in the complaint were of so peculiar a character, that a court of equity should be slow in denying relief upon the mere ground of laches in bringing the suit.

THE court stated the case as follows:

This suit was brought by the appellant on the 18th of July, 1887, in the District Court of the Second Judicial District of Arizona, and was there heard upon demurrer to the complaint. The demurrer was sustained, and the plaintiff refusing to amend, the suit was dismissed. That judgment having been affirmed by the Supreme Court of the Territory, the only question is whether the facts alleged in the complaint —

assuming, as we must, that they are true — set forth a cause of action entitling the plaintiff to relief.

The case made by the complaint is as follows: Jonathan M. Bryan was the owner at the time of his death on the 29th of August, 1883, (1) of the southeast quarter section number thirty-three, in township two north, of range three east, of the district of lands subject to sale at the land office of the United States at Tucson, Arizona, and of the Gila and Salt River Meridian; (2) the northeast quarter of section five, in township one north, of range three east, of the same district and meridian, and lying one-half mile north of the city of Phœnix, in Maricopa County, Arizona, such piece of land being once called the "Shortle ranch," but now commonly known as "Central Place;" (3) the southeast quarter of section nine, in township one north, of range three east, of the same meridian and district; and (4) all of block ninety-eight in the city of Phœnix, according to a map or plat of that city, made by William A. Hancock, surveyor of the town site of such city, and on file in the office of the county recorder of Maricopa County.

On or about the 24th of September, 1883, letters of administration upon his estate were issued by the probate court of Maricopa County to M. W. Kales, who immediately qualified and entered upon his duties as administrator, continuing to be and to act as such until December 6, 1884, when he was discharged. Since that date there has been no administrator of the decedent's estate.

While Bryan was the owner and in possession of the above-described real estate, he executed to Kales, four promissory notes for the amounts, respectively, of $1200, $2500, $1500 and $500, dated December 11, 1882, February 23, 1883, February 26, 1883, and March 14, 1883, and payable, respectively, December 11, 1883, February 23, 1884, October 26, 1883, and September 14, 1883, — each note calling for interest payable every three months, at the rate of one and a half per cent per month, and, if not so paid, the note to become due and payable. At the date of each note he executed, acknowledged and delivered to Kales a mortgage upon real estate to

secure its payment; upon the first of the above-described pieces of real estate, to secure the note for $1200; upon the second, to secure the note for $2500; upon the third, to secure the note for $1500; and upon the fourth, to secure the note for $500. These mortgages were all duly recorded.

Before the notes fell due, and before they were presented for allowance against the estate of Bryan, in the probate court having jurisdiction thereof, and without application to any court for an order to pay the notes or any of them, or to sell any property of the estate to pay them, and "while holding in his hands as administrator sufficient money to pay all the principal and interest which might become due on said notes or any of them," Kales on the 28th of September, 1883, instituted, in the District Court of the Second Judicial District of Arizona, in and for Maricopa County, in his individual name, an action against himself as administrator. He declared, in that action, upon the notes and mortgages, and prayed judgment against himself as administrator for the sum of fifty-seven hundred dollars, with interest on twelve hundred dollars of [that] sum from the 11th day of June, 1883, on twenty-five hundred dollars from the 23d day of May, 1883, on fifteen hundred dollars from the 26th day of May, 1883, and on five hundred dollars from June 14, 1883, the interest on each sum to be at the rate of one and a half per cent per month; with a like rate of interest upon the principal sum named in any judgment or decree that may be obtained from the date thereof until the same shall be fully paid and satisfied; and for ten per cent for attorneys' fees upon forty-two hundred dollars of the principal sum, and five per cent for attorneys' fees upon twenty-five hundred dollars of the principal sum, and for costs of suit.

He also prayed that the usual decree be made for the sale of the premises by the sheriff according to law and the practice of the court; that the proceeds of sale be applied in payment of the amount due the plaintiff; that the defendant and all persons claiming under him or his decedent subsequent to the execution of the mortgages upon the premises, either as purchasers, incumbrancers, or otherwise, be barred and

foreclosed of all right, claim, or equity of redemption in the premises and every part thereof, and that the plaintiff have judgment against the defendant, as administrator of the estate of J. M. Bryan, deceased, for any deficiency remaining after applying the proceeds of the sale of the premises properly applicable to the satisfaction of the judgment, and that such deficiency be made a claim against the estate of the said J. M. Bryan, deceased, to be paid as other claims against said estate.

He further prayed that the plaintiff or any other party to the suit might become a purchaser at the sale; that the sheriff execute a deed to the purchaser; that the latter be let into the possession of the premises on production of the sheriff's deed therefor; and that the plaintiff have such other or further relief in the premises as to the court seemed meet and equitable.

A summons was sued out by M. W. Kales as an individual against himself as administrator, requiring the latter to appear and answer the complaint. It was personally served on the day it was issued, and, on the succeeding day, October 6, 1883, in his capacity as administrator, he made the following answer to the complaint filed by himself in his individual capacity:

"The defendant, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, answering the complaint on file in this action, admits each and every material allegation in the said complaint, and consents that judgment and decree be entered in accordance with the prayer thereof."

In other words, M. W. Kales consented that he might as an individual take judgment against himself as administrator.

On the 16th of October, 1883, the court, D. H. Pinney being the judge thereof, rendered a decree of foreclosure and sale, finding, upon the complaint, answer and proofs heard, that there was due to the plaintiff, M. W. Kales, from the defendant, M. W. Kales, administrator, the sums, with interest, specified in the several mortgages, with the attorney's fee provided for in the mortgages and claimed in the complaint, and directing the proceeds of the sale of each parcel to be applied to the debt secured by the mortgage on that parcel.

Statement of the Case.

The decree further provided:

"That the defendant, M. W. Kales, as administrator as aforesaid, and all persons claiming or to claim from or under him or from or under the said J. M. Bryan, deceased, and all persons having liens subsequent to said mortgages by judgment, decree, or otherwise upon the lands described in said mortgages or either of them, and they or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises and every part and parcel thereof from and after the delivery of said sheriff's deed.

* * * * *

"And it is further adjudged and decreed that if the moneys arising from said sale of any of the separate parcels of said lands described in either of the respective mortgages shall be insufficient to pay the amount so found due to the plaintiff, as above stated, upon each of the respective mortgages, with interests and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff upon each of the respective mortgages separately in his return of sale, and that on the coming in and filing of said returns of deficiency the same shall become a claim against the estate of J. M. Bryan deceased, to be paid as other claims are paid."

The remainder of the decree contains a description of the property or parcels of land covered by the respective mortgages.

On the 8th of November, 1883, the District Court made an order commanding the sheriff to sell upon notice all the property described in the mortgages, and make return thereof. Pursuant to that order, the sheriff, L. H. Orme, advertised, and on the 15th of December, 1883, sold, the property in parcels, as follows: The first parcel to Robert Garside for $1500; the second to M. W. Kales for $2975; the third to William Gilson for $1850; and the fourth to M. W. Kales for

$600. The amount bid for each parcel was much less than such parcel was worth in open market, or than it would have brought at the usual sheriff's sale. The sheriff delivered to each purchaser a certificate of sale. He made his return of sales on the 26th of December, 1883, but the sales have never been confirmed by the District Court.

After the sales and before the making of any deeds, Kales assigned to J. T. Simms the certificate of sale for the second parcel, and to D. H. Pinney the certificate of sale for the fourth parcel. On the 16th of June, 1884, the sheriff executed a deed for the first parcel to Garside, who, by deed of May 20, 1887, sold and conveyed to J. DeBarth Shorb. Simms, having received from the sheriff, June 10, 1884, a deed for the second parcel, sold and conveyed, by deed of February 28, 1887, to George T. Brasius, who subdivided it into blocks and lots as "Central Place;" and, subsequently, May 3, 1887, sold and conveyed one lot to John W. Jeffries, and, May 5, 1887, another lot to Henry W. Ryder. Gilson received a sheriff's deed for the third parcel, June 19, 1884, and, April 6, 1886, sold and conveyed to Cordelia L. Beckett, wife of C. G. Beckett. The fourth parcel was conveyed by the sheriff, June 16, 1884, to D. H. Pinney, who, September 10, 1886, sold and conveyed a portion thereof to the Bank of Napa, a corporation existing under the laws of California. Another portion of the fourth parcel was conveyed by Pinney, November 18, 1886, to F. Q. Story, who sold and conveyed to M. H. Sherman.

Bryan left no descendants. His wife, Vina Bryan, survived him. All the property in question was acquired by him during marriage, and, at the time of his death, — the complaint alleges, — was the common property of himself and wife, and, upon his death, she became and was his sole heir, and to her all of the common property descended, and in her remained until June 29, 1887, when, by deeds of conveyance, she granted, released and conveyed to the present plaintiff all of these lands, together with all her estate, right, interest and claim in the same and every part thereof.

The complaint makes all of the persons hereinbefore named

as having purchased at sheriff's sale or received conveyances for these parcels of land defendants to this suit. It alleges that of "all the facts herein alleged, the defendants and each of them, at all the times herein mentioned, had full notice; that the defendant, D. H. Pinney, was the judge of the said District Court, and acted as such in all the proceedings had in the said action, wherein said defendant, M. W. Kales, was plaintiff, and said M. W. Kales, as administrator of the estate of J. M. Bryan, deceased, was defendant; and said defendant, D. H. Pinney, rendered and made the said decree of foreclosure and order of sale therein and was so the judge of said District Court at the time of the assignment to him by said defendant, M. W. Kales, of the sheriff's certificate of sale of said block number 98, in said city of Phœnix, and also at the time of the execution and delivery to him by the said sheriff of the said sheriff's deed thereof."

The plaintiff, after alleging that the premises described in the complaint are of the value of $125,000, prayed:

That the proceedings, judgment, decree and order of sale had, made, rendered or entered in the action brought by Kales be annulled, set aside, and declared void;

That the sale of the property, and the certificate of sale and deeds made to Kales, Garside, Gilson, Pinney and Simms be set aside and declared void, and the parts and portions of the property conveyed to the several defendants be decreed to have been received by them and each of them with notice and in trust for Vina Bryan and her grantee, the plaintiff herein;

That the defendants and each of them, now pretending to claim or own the above property or any part thereof, be decreed to hold the same and each part claimed by them in trust for the plaintiff, and required to convey to him upon his doing whatever the court adjudged should be equitably done by him;

That the defendants and each of them be enjoined from selling, conveying, mortgaging or in any way interfering with the premises; and

That the plaintiff have such other and further relief as may be just and equitable.

Opinion of the Court.

Mr. William A. McKenney, for appellant, on the question of laches, cited: *Moss* v. *Berry*, 53 Texas, 632; *Railroad Co.* v. *Dubois*, 12 Wall. 47; *Lux* v. *Haggin*, 69 California, 255; *Stockman* v. *Riverside Land &c. Co.*, 64 California, 57; *Kelly* v. *Hurt*, 61 Missouri, 463; *Fielding & Gwynn* v. *DuBose*, 63 Texas, 631; *Hill* v. *Epley*, 31 Penn. St. 331; *Knouff* v. *Thompson*, 16 Penn. St. 357; *Bales* v. *Perry*, 51 Missouri, 449; *Strong* v. *Ellsworth*, 26 Vermont, 366; *Sulphine* v. *Dunbar*, 55 Mississippi, 255; *Rice* v. *Dewey*, 54 Barb. 455; *Mayo* v. *Cartwright*, 30 Arkansas, 407; *Neal* v. *Gregory*, 19 Florida, 356; *Bramble* v. *Kingsbury*, 39 Arkansas, 131; *Terre Haute &c. Railroad* v. *Rodel*, 89 Indiana, 128; *Viele* v. *Judson*, 82 N. Y. 32; *Diffenback* v. *Vogeler*, 61 Maryland, 370; *Meley* v. *Collins*, 41 California, 663.

Mr. William Pinckney Whyte and *Mr. Clark Churchill*, for appellees, cited to the same point: *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Diefendorf* v. *House*, 9 How. Pr. 243; *The Key City*, 14 Wall. 653; *Badger* v. *Badger*, 2 Wall. 87; *Speidel* v. *Henrici*, 120 U. S. 377; *Richards* v. *Mackall*, 124 U. S. 189; *Smith* v. *Clay*, 3 Bro. Ch. 639 n.; *Piatt* v. *Vattier*, 9 Pet. 405; *McKnight* v. *Taylor*, 1 How. 161; *Wagner* v. *Baird*, 7 How. 234; *Hume* v. *Beale*, 17 Wall. 336; *Marsh* v. *Whitmore*, 21 Wall. 178; *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806; *Godden* v. *Kimmel*, 99 U. S. 201.

Mr. Justice Harlan, having stated the facts as above reported, delivered the opinion of the court.

The grounds upon which the District Court sustained the demurrer to the complaint are not shown by the record otherwise than from the statement in the opinion of the Supreme Court of the Territory that it was because of laches in bringing suit. The latter court said: "It appears that the grantor of the plaintiff stood by and saw all this property sold, and had a right to redeem the same in six months after the sale; that her residence was Maricopa County at the death of her

husband, and its continuance will be presumed to be there, the contrary not having been alleged; that there was no action brought to set aside the judgment; that from the 8th day of November, 1883, till the [2] 9th day of June, 1887 — nearly four years — she saw the property greatly enhancing in value, saw it sold time and again, then sells it to the plaintiff, who now comes into a court of equity and asks a cancellation of all those sales. If the bill had shown, and which plaintiff was allowed to show, that any disability existed on the part of any one having an interest in the property at the time of sale, we would grant the prayer of the bill. No such disability being shown, can we think of allowing the party who has so long slept upon her rights to divest the present owners of their valuable property?"

The difficulty with this view is that it has no foundation in the allegations of the complaint. From the mere fact that Mrs. Bryan's residence at the time of her husband's death was in Maricopa County, where the real estate in question is situated, the court below presumed not only that it continued there, but that she "stood by" for nearly four years, forbearing to exercise her right to redeem, and "saw the property enhancing in value — saw it sold time and again" — without asserting any interest in it. No such presumption was justified by the allegations of the complaint. The case made by those allegations is that of an administrator, who, having claims against the estate he represented, which were secured by mortgage upon real property of which his intestate died seized, and having in his hands money sufficient to discharge those claims, yet resorted to the expedient of taking judgment in his individual name against himself in his fiduciary capacity, for the amount of the claims and for attorneys' fees, and caused the property to be sold. And of all those facts — the demurrer admits — the defendants and each of them had full notice when they made their respective purchases. Referring to the allegation in the complaint, that the administrator, at the time he sued himself, had in his hands sufficient money to pay off his claims, the counsel for the defendants suggest that this might well be, if those moneys had been applied to the

debts in question without providing for the payment of other debts against the estate, the expenses of administration, or preferred claims; and that for aught appearing in the complaint, it may have been the duty of the administrator to apply the moneys in his hands to other debts and claims. A sufficient answer to this suggestion is, that the allegation in the complaint upon this point imports a failure of the administrator to use the moneys in his hands to discharge the debts held by him, when he could properly have so used them.

It is true, as contended, that where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief, the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself. *Lansdale* v. *Smith*, 106 U. S. 391, 393; *Speidel* v. *Henrici*, 120 U. S. 377, 387. But no such case is made by the bill. The limitation prescribed by the statutes of Arizona for the commencement of an action to recover real property, or the possession thereof, is five years. If this statute governs courts of equity as well as courts of law — and such is the plaintiff's contention — the present action is not barred by limitation. If, as contended by the defendants, a court of equity may deny relief because of laches in suing, although the plaintiff commenced his action within the period limited by the statute for actions at law, still the granting or refusing relief, upon that ground, must depend upon the special circumstances of each case. *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Brown* v. *County of Buena Vista*, 95 U. S. 157, 160; *Haywood* v. *National Bank*, 96 U. S. 611, 617. The case made by the complaint in this suit is one of fraud upon the part of the administrator, and in that fraud — if the allegations of the complaint are sustained by proof — the defendants and each of them must be held to have participated. The circumstances as detailed in the complaint are so peculiar in their character, that a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit.

Other questions arise upon the face of the complaint, namely, as to whether Mrs. Bryan had such interest in the property as made her a necessary party to the suit of foreclosure

instituted by Kales in his individual capacity, and as to how far the validity of the decree of foreclosure and sale was affected by the very unusual fact that the same person was both plaintiff and defendant in that suit. *Perkins* v. *Se Ipsam*, 11 R. I. 270; *McElhanon* v. *McElhanon*, 63 Illinois, 457; *Hoag* v. *Hoag*, 55 N. H. 172. But as these questions were not considered by the court below, and as their correct determination can be best made when all the facts are disclosed, we express at this time no opinion upon them, and place our decision upon the ground that the Supreme Court of the Territory erred in holding that the complaint failed to show that the plaintiff was entitled to relief from a court of equity. The defendants should be required to meet the case upon its merits.

The decree is reversed with directions that the demurrer to the complaint be overruled, and for further proceedings consistent with this opinion.

FIELD, J. — I concur in the judgment of this court for the reasons stated; but I wish to add that in my opinion the judgment recovered by Kales against himself as administrator is an absolute nullity.

In re WIGHT, Petitioner.[1]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 1521. Argued and submitted January 10, 1890. — Decided March 3, 1890.

When it is found by a Circuit Court of the United States that the clerk has failed to put in the record an order which was made at the next preceding term of the court, remanding a case to the District Court, the Circuit Court may direct such an order to be entered *nunc pro tunc*.

The writ of *habeas corpus* cannot be used as a writ of error to inquire into all the errors committed by the court below.

An indictment against a letter carrier of the United States Postal Service,

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[1] The docket title of this case is *Wight* v. *Nicholson, Superintendent of the Detroit House of Correction.*

charging that "he did wrongfully secrete and embezzle a letter which came into his possession in the regular course of his official duties, and which was intended to be carried by a letter carrier, which letter then and there contained five pecuniary obligations and securities of the government of the United States," is a sufficient charge that the letter embezzled was intended to be carried by a letter carrier of the United States.

In an indictment against a letter carrier for the embezzlement of a letter received by him in his official character to carry and deliver, it is not necessary to aver that "the letter has not been delivered" if an embezzlement of it is charged.

In a proceeding for a *habeas corpus* to release from confinement a letter carrier charged with embezzling letters delivered to him for carriage, this court will not inquire into the motives with which the letter was put into the mail, even though the object was to detect or entrap the party into criminal practices.

THIS was a petition for a writ of *habeas corpus*. The writ was refused in the court below, and the petitioner appealed. The case is stated in the opinion.

Mr. Henry M. Duffield for appellant.

Mr. Solicitor General, for appellees, submitted on his brief, which adopted verbatim the brief by *Mr. Charles T. Wilkins*, the attorney for the United States in the court below.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court for the Eastern District of Michigan discharging a writ of *habeas corpus* on a hearing before that court. By this writ the appellant here, Charles H. Wight, sought to be relieved from imprisonment in the Detroit House of Correction, under sentence of the District Court of the United States for the Eastern District of Michigan. The petitioner was indicted in that court upon the charge that on the 28th day of June, 1888, while he was employed in one of the departments of the postal service of the United States, to wit, as superintendent of letter carriers in the post-office at Detroit, he wrongfully and unlawfully secreted and embezzled certain letters which came into his possession in the regular course of his official duty, and

which were intended to be carried by a letter carrier, and which letters contained obligations and securities of the United States of pecuniary value, called treasury notes. There were six other counts for a similar offence.

Upon the trial in the District Court, the jury found a verdict of guilty, against petitioner. He thereupon made a motion in that court for a new trial, and likewise a motion in arrest of judgment. Pending the argument of these motions, the District Court made an order transferring the cause to the Circuit Court for said district, which order is in the following language:

"It is now by the court ordered that this case be certified and remitted to the next Circuit Court of the United States for this district."

These motions were heard in the Circuit Court on the 11th day of March, 1889, before Judges Howell E. Jackson, Circuit Judge, and Henry B. Brown, District Judge, and on the 12th day of March, 1889, the following order was entered of record:

"United States of America
v.
Charles Wight.

"In this cause the defendant's motion to set aside verdict and in arrest of judgment, after mature deliberation thereon, are by the court here now denied."

And on the same day, at the District Court room in the city of Detroit, that court made the following entry:

"The United States
v.
Charles Wight. } Convicted on indictment for embezzling letters, etc.

"The court now deliver judgment on the motions to set aside the verdict rendered by the jury herein and for a new trial, heretofore argued and submitted; and, thereupon, it is ordered that said motions be, and the same are hereby, denied, and that the order heretofore made herein certifying this cause to the Circuit Court of the United States for this district be,

and the same is hereby, vacated as having been improvidently made.

"And the said defendant being now placed at the bar of the court for sentence, thereupon the court do now sentence him, the said Charles Wight, to be imprisoned and kept at hard labor, at and in the Detroit House of Correction, in the city of Detroit, Wayne County, Michigan, for the term of two years from and including this day, and to stand committed until the terms of this sentence are complied with."

On the 25th of August, thereafter, an application was made to Mr. Justice Harlan of this court, who was the justice assigned at that time to the sixth circuit, for a writ of *habeas corpus*, to deliver the petitioner, Wight, from restraint in the Detroit House of Correction, by Joseph Nicholson, its superintendent. On this application Justice Harlan made an order that a rule issue from the Circuit Court against the marshal of the United States for the Eastern District of Michigan and the superintendent of the Detroit House of Correction, returnable before that court within three days after service of process, to show cause why the *habeas corpus* should not issue as prayed in the petition. To this rule Nicholson made a return, in which he said that he held the said Wight in restraint of his liberty as a prisoner in the Detroit House of Correction, by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan, rendered on the 12th day of March, 1889, a copy of which he set out. To this return, Wight, by his counsel, made exception by way of answer, in which he said that the District Court for the Eastern District of Michigan had not, at the time of the sentence referred to in said return, any jurisdiction over him, the said Wight, or any authority to pass sentence against him, because the said cause in which it pretended to pass sentence upon him on the 12th of March, 1889, had been duly certified and remitted from said District Court into the Circuit Court of the United States in said district, and the transcript thereof duly filed, and that up to the date of said alleged sentence, to wit, the 12th day of March, 1889, was and at the date hereof is still pending in the Circuit Court of

the United States, as more fully and at length alleged and shown by the certified copies of the proceedings in said cause, in the petition filed in this matter.

Petitioner Wight also averred that the District Court of the United States for the Eastern District of Michigan never had or obtained jurisdiction over him for the following reasons: That the indictment on which petitioner was arraigned and tried in said court did not charge the commission of any offence over which said court had jurisdiction, and because the evidence in the case did not establish any offence against the laws of the United States, of which said District Court had jurisdiction.

Upon examination of the record of the Circuit Court in the case at this stage of the proceeding on the writ of *habeas corpus*, it was ascertained that no order remanding the case from the Circuit Court to the District Court had been entered on the journals of the former court, the last order on the subject being the one which we have already recited, overruling the motion for a new trial and the motion in arrest of judgment. Thereupon the judges of the Circuit Court caused the following order to be made:

"United States of America
v.
Charles Wight.

"The defendant, being personally present in court, as well as by his counsel, Henry M. Duffield, Esq., and the court having its attention called to its records made and entered in the above-entitled cause on the 12th day of March, A.D. 1889, by the return of Joseph H. Nicholson, superintendent of the Detroit House of Correction, to the writ of *habeas corpus* heretofore allowed by this court on the petition of the above-named Charles Wight, and upon inspection of said records, so made and entered as aforesaid, it satisfactorily appears to the court that the same is not a full and correct record of the order which was in fact made by this court on the 12th day of March aforesaid, in this, that it fails to show the order of this court which was duly made on the said 12th day of

March, remitting said cause out of this court into the District Court of the United States for the Eastern District of Michigan; therefore, after hearing the said Charles Wight, by his counsel, in opposition thereto, this court, upon its own motion, based upon its recollection of the facts of the making of said order remitting said cause as aforesaid into said District Court, now orders and directs that the same be entered now as of the said twelfth day of March, one thousand eight hundred and eighty-nine, according to the facts thereof, which are as follows:

"At a session of the Circuit Court of the United States for the sixth circuit and eastern district of Michigan, continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on the twelfth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

"Present: The Hon. Howell E. Jackson, Circuit Judge; the Hon. Henry B. Brown, District Judge.

"United States of America
v.
Charles Wight.

"The defendant being personally present in court, as well as by his counsel, Henry M. Duffield, Esq., said United States being represented by C. P. Black, United States attorney, and Charles T. Wilkins, assistant United States attorney, and the said United States attorney objecting to the consideration of said cause on the part of this court for the reason that there was no authority in law for the District Court to remit said cause to this court after verdict had in said District Court; therefore the court, upon its own motion, hereby remits said cause back into the said District Court for the Eastern District of Michigan for such action as said District Court shall see fit to take."

Thereupon the Circuit Court on the 30th day of September, 1889, on the same day that it had ordered the *nunc pro tunc* entry of the order remanding the cause to the District Court, being of the opinion that this order cured the defect of the record, which showed the case to be still pending in the Circuit

Court and being further of opinion, as appears from their judgment in the matter, that the case had never been lawfully removed from the District into the Circuit Court, and that therefore said District Court had always retained jurisdiction of the case, made an order discharging the writ of *habeas corpus*.

It is mainly upon these orders about the several removals of the case from one court into the other that appellant relies to show that the District Court at the time of pronouncing its judgment of imprisonment against appellant had no jurisdiction of the case. But there is also a further point made, that the letters which the appellant embezzled were never put into the mail with intent that they should be carried, within the meaning of the statute.

Of course if the judge of the District Court is right in the opinion expressed by him in the orders which he made, that he had no power after the verdict in the District Court to transfer it to the Circuit Court, then the case had really never been withdrawn from the jurisdiction of the District Court, and the question arising upon the absence of any record in the Circuit Court of an order remanding it back to the District Court is of no consequence, because all that was done in the Circuit Court, in that view, was without jurisdiction, and the case never was lawfully in that court, and the District Court had the right to make the order, which it did make, setting aside its former order transferring the case to the Circuit Court. In this view of the subject, the case having always been really under the jurisdiction and control of the District Court, its judgment sentencing the prisoner on the verdict was within its power, and is not examinable on this writ of *habeas corpus*.

But we are not satisfied that this view of the powers of the two courts is a sound one. While we do not decide the question now, because it is not necessary, (as our judgment is the same in either event,) we shall, for the purposes of the present case, treat it as if the order transferring the case from the District Court into the Circuit Court was a valid order, so that it could only be remanded from the Circuit Court into the District Court by some order or action of the former.

No such order was found upon the records of the Circuit Court at the time sentence was imposed upon the prisoner in the District Court; if no such order had been made previous to that judgment, the case was still pending in the Circuit Court, and the District Court had no authority to pass the sentence it did upon the prisoner. This view of the subject calls upon us to inquire whether the *nunc pro tunc* order of September 30 was a valid order, and one within the power of the Circuit Court to make.

Our first impression was that whatever might be the powers of the courts in this regard over their records during the term in which the transactions are supposed to have occurred, the record of which, or failure to make any record of which, is the subject of amendment, yet when it was attempted to do this after an adjournment and at a subsequent term of the court, the powers of the court in making such changes in the records of the proceedings were limited to those in which there remained written memoranda of some kind in the case, and among the files of the court, by which the record could be amended, if erroneous, or the proper entry could be supplied, if one had been omitted. And especially that in criminal procedure this power to make such entries, at a subsequent term of the court, of what had transpired at a former term, as would establish the authority of the court to pass a sentence of fine or imprisonment, either did not exist at all, or, if it did, was limited to cases in which some written evidence of what was done remained in the papers connected with the case.

We are satisfied, however, upon an examination of the authorities, that this restriction upon the power of the court does not exist. Mr. Bishop, in his first volume on Criminal Proceedings, section 1160, states the doctrine in the following terms:

"When the term of the court has closed, it is too late to undo, at a subsequent term, what was done at the former term. A judgment of the court, for instance, cannot then be opened, and modified or set aside. Neither, it has been held, can the clerk, at a subsequent term, make an entry of what truly

transpired at the preceding term. But this refers to the power of the *clerk*, proceeding of his own motion. The *court* may order *nunc pro tunc* entries, as they are called, made to supply some omission in the entry of what was done at the preceding term; yet this is a power the extent of which is limited, and not easily defined. In general, mere clerical errors may be amended in this way. So of the mistake of the clerk in the name of the judge before whom the indictment was found."

The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of what was done at the time of the proceedings. An extensive list of authorities is cited in the foot-note of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk had made no entry, the following cases directly affirm that proposition: *Galloway, Administrator* v. *McKeithen*, 5 Iredell (Law), 12; *Hyde* v. *Curling*, 10 Missouri, 374; *State* v. *Clark*, 18 Missouri, 432; *Nelson* v. *Barker*, 3 McLean, 379; *Bilansky* v. *The State of Minnesota*, 3 Minnesota, 427.

The opinion of the court in this latter case contains a somewhat full reference to the history of this subject, as it is found in the reports of the English cases, and in Blackstone's Commentaries, vol. 3, p. 408, the result of which is to show that at an early day the English courts exercised this power so recklessly, when the pleadings were all *ore tenus*, and great liberality was necessarily allowed in amendments, that the abuse was corrected by the king, who made the declaration that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own records shall be a warranty for their own wrong, nor that they may rase their rolls, nor amend them, nor record them contrary to their original enrolment." This, Blackstone declares, meant only that the justices should not by their own private rasure change a record already made up, or alter the truth to any sinister purpose.

In the Minnesota case, the plaintiff in error had been con-

victed of the crime of murder, and after trial and verdict, and after the case had been carried to the Supreme Court of the State, the record of the proceedings on the trial was amended so as to show affirmatively that each juror was sworn as prescribed by law; that they were put in charge of the officer to keep them as prescribed by law; and that they were polled at the request of defendant on their coming in with their verdict; matters which, it seems, had been omitted in the record of the judgment. The Supreme Court in that case, as we think, stated with force and precision the true rule on this subject. They said: "While we should go as far as any court in reprobating a rule to place the proceedings of a court almost entirely at the mercy of the subordinate officials thereof, we should be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of the records. And while we admit the power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. . . . But when the facts stand undisputed, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. It is our opinion that this power, of necessity, exists in the District Court, and that its exercise must in a great measure be governed by the facts of each case."

The case in 5 Iredell, although a civil suit, established the doctrine that a court has a right to amend the records of any preceding term by inserting what had been omitted either by the act of the court or clerk, and that when so amended it stands as if it had never been defective, or as if the entries had been made at the proper time.

The case of *Hyde* v. *Curling*, 10 Missouri, 227, which was also a civil suit, and seems to have been very well considered, is thus stated in the syllabus of the report: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*, but where the court

has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*."

In the case in 18 Missouri, of *State* v. *Clark*, it appeared that the prisoner had been tried on an indictment which was not signed at the time of the trial by the foreman as a true bill and that the clerk had not marked the time of filing the same, on the indictment. It was held, on writ of error to the Supreme Court, that the court had a right, on motion at a subsequent term, to amend its record by a statement of these facts, not only by the endorsement upon the bill, but by a regular entry on the journal, that "the grand jury returned into court the following true bills of indictment," (naming the one under which the defendant was convicted). The court said that, if these acts had taken place, the failure of the clerk to make proper and formal entries on the records of the court might have been supplied or corrected by having such entries made *nunc pro tunc*.

In *Nelson* v. *Barker*, 3 McLean, 379, Mr. Justice McLean observed, in regard to an amendment of a declaration under a plea of misnomer, that it was objected to on the ground that there was nothing to amend by, to which he replied that at common law the court could only give leave to amend when there was something to amend by, and anciently amendments were required to be made at the term at which the error occurred, but now an amendment may be made at any time before judgment, and in some cases after judgment; and he refers to the 32d section of the Judiciary Act of 1789.

This, which has been commonly called the statute of jeofails and amendments of the United States, may be found in section 954, Revised Statutes, and is as liberal in the powers which it confers on the courts to make amendments as any of those enacted in more modern times. We are forced to the conclusion that the action of the Circuit Court in making the order for a *nunc pro tunc* record, which showed that the case had been remanded from that court to the District Court prior to the time when the sentence was passed upon the prisoner, was a legitimate exercise of power.

With regard to the proposition which denies that the indict-

ment in the District Court and the evidence by which it is sustained conferred jurisdiction on that court, we do not think it needs much comment. The grand jurors charged in the first count of this indictment that "the said Wight, who was then and there a person employed in one of the departments of the postal service of the United States, to wit, employed as an assistant to the superintendent of letter carriers in the post-office at Detroit aforesaid, unlawfully and wrongfully did secrete and embezzle a letter which came into his possession in the regular course of his official duties, and which was intended to be carried by a letter carrier, which letter then and there contained five pecuniary obligations and securities of the government of the United States," and were the property of one Angus M. Smith, and with the letter were then and there enclosed in an envelope addressed to "Oscar Singleton, Montevideo, Cook Co., Mich." A similar statement is in effect made in all the other counts.

The law under which the prisoner was indicted is section 5467 of the Revised Statutes of the United States, the language of which, applicable to the case, is as follows:

"Any person employed in any department of the postal service who shall secrete or embezzle or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage-stamp, stamped envelope, postal-card, money-order, certificate of stock, or other pecuniary obligation or security of the Government, . . . any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed,

shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

The argument of counsel assumes that in this proceeding, by writ of *habeas corpus*, we can inquire into and correct nearly all errors which may have been committed by the District Court in the control of the case originally. This has been so often denied by this court, and the proposition is so clear, that in a writ of *habeas corpus* nothing can be inquired into but the jurisdiction of the court, that it is unnecessary to pursue the entire line of argument of counsel for appellant. *Cuddy, Petitioner*, 131 U. S. 280. We are of opinion, notwithstanding the allegation of counsel that there was no jurisdiction because the indictment did not charge that the letter embezzled was intended to be carried by a letter carrier, that it so alleged in the exact terms of the statute just cited, and is therefore sufficient.

With regard to the proposition "that the failure to allege in some of these indictments that the letter had not been delivered to the party to whom it is directed renders the whole proceeding void," we think it is unsound. While the purpose for which this clause was inserted in the act is not very clear, it was probably intended to repel the idea that the stealing or embezzling of such a letter after it had been carried through the mail or delivered by the letter carrier to its owner and its purpose served, did not render the party guilty under this statute. At all events, the fact of its delivery being a matter of defence, when it was proved that the party in the course of his employment had embezzled the letter and stolen the money, it will be presumed that the defendant made the most he could of that defence on the trial. We are not of opinion that it is necessary for us to examine into the question raised on the evidence at the trial as to whether the securities were put into the letter and that into the mail, as a mere decoy or not. The question whether it was intended to be conveyed by the mail or by the letter carrier was a question of fact to be ascertained by the jury, and in a case like this, where the party has been convicted of embezzling a letter and valuable property in a letter passing through the regular course of the

mail and the hands of the letter carrier, where the indictment is a good one, and where the party has been found guilty and sentenced, we are not disposed to inquire into the motives for which the letter was put into the mails, even though the object was to detect or entrap the party in his criminal practices. For these reasons the judgment of the Circuit Court is *Affirmed.*

The Chief Justice (with whom concurred Mr. Justice Harlan) dissenting.

I am compelled to withhold my assent to the conclusion reached by the court in this case. In my judgment the District Court had power after the verdict to transfer the cause to the Circuit Court, and having done so, it required an order remitting the cause from the Circuit Court to the District Court, before the latter court could pronounce a lawful sentence. The petitioner was sentenced by the District Court, which, as the record then stood, had no jurisdiction, and was committed accordingly, and while undergoing imprisonment under that sentence sued out the writ of *habeas corpus.* The Circuit Court then entered an order *nunc pro tunc* as of the previous term, remitting the cause into the District Court, basing its action upon "its recollection of the facts of the making of said order." The record before us does not disclose the existence of any minutes of the clerk or notes of the judge that the entry of such an order had been directed, or of any other official evidence to that effect, and I do not understand it to be contended that there was any such. Granting that, as has been said, the judge during the term is a living record, and may alter and supply from memory any order, judgment or decree which has been pronounced, and this, because he is presumed to retain his own action in his recollection; yet after the term has elapsed, the exercise of such a power to the extent of supplying an order upon which jurisdiction depends, in the absence of any entry, minute or memorandum to proceed by, or of any statutory provision expressly allowing it, ought not to be conceded in criminal cases. The statute of amendments and jeofails has no application.

Statement of the Case.

Upon this ground, my brother HARLAN and myself are of opinion that the judgment should be reversed.

MR. JUSTICE GRAY was not present at the argument of this case and took no part in its decision.

McMURRAY *v.* MORAN.

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

No. 193. Argued January 30, 1890. — Decided March 3, 1890.

A railroad company made a mortgage to secure an issue of 3000 bonds of $1000 each. It contracted with a contractor for the construction of 31 miles of its road and as part consideration therefor agreed to give him 310 of these bonds. Before any further issues were made it agreed with a banking house in New York, as a part consideration for their acquiring these bonds, that it would only issue bonds to the extent of $10,000 a mile on its constructed road, and on the faith of this the New York house bought and paid for the bonds, and the 31 miles of road were constructed. Subsequently, and without constructing any additional miles, it issued 147 more bonds which were mostly used in the settlement of debts to parties who had notice of the agreement with the New York house. Default having been made in payment of interest a bill in equity was filed to foreclose the mortgage; *Held*,

(1) That as to all persons acquiring any part of the 147 bonds with notice of the agreement with the New York house, the 310 bonds held by the latter were entitled to priority;

(2) That holders who took them without notice of it, whether taking originally from the company, or by purchase from one who took with knowledge, were entitled to share with the New York house in the distribution.

THE "Nevada and Oregon Railroad Company," a corporation of the State of Nevada, by its mortgage or deed of trust, executed April 25, 1881, bargained, sold and conveyed to the Union Trust Company of New York all of the property, franchises and estate, real and personal, then existing and to be acquired, including its line of road constructed or to be con-

structed or completed, to secure the payment of three thousand bonds of one thousand dollars each, to be issued by the mortgagor, and made payable on the first day of June, 1930, at the city of New York, with interest, semi-annually, at the rate of eight per cent per annum. Each bond contained an agreement that if there was a continuous default for six months in the payment of interest, the principal and all arrearages of interest thereon should, at the option of the holder, become immediately due and payable.

Of the three thousand bonds authorized to be executed by the railroad company, only six hundred were issued and certified by the trustee. The appellees, Moran Brothers, became the holders for value of 310 of the bonds so certified, paying therefor $248,000. In respect to those bonds, there was such default in meeting the interest thereon that appellees became entitled to declare the principal due and payable. And having so declared, the Union Trust Company brought suit in the court below for the foreclosure of the mortgage or deed of trust, the sale of the mortgaged property, and the application of the proceeds of sale in payment of the bonds held by Moran Brothers, and of such other bonds as were entitled to share in the proceeds.

The present suit was brought by Moran Brothers against the appellants as the holders of 147 of the 600 bonds certified by the trustees. It proceeds upon the theory that as between the appellees holding the 310 bonds first issued, and the appellants holding the 147 subsequently issued, the former were entitled to priority in the distribution of the proceeds of the sale of the mortgaged property.

It appears from the evidence that "*The* Nevada and Oregon Railroad Company," a Nevada corporation, entered into a written contract, of date August 26, 1880, with one Thomas Moore, for the construction by him of certain divisions of its road, whose aggregate length was one hundred and eighty-five miles. A part of the consideration for Moore's undertaking this work was the representation of the company, embodied in the contract, that "fifty-year eight per cent first-mortgage bonds, to the extent only of ten thousand dollars per mile, and capital

stock to the extent only of twenty thousand dollars per mile for the first one hundred and eighty-five miles will be issued, making a total of eighteen hundred and fifty thousand dollars in first-mortgage bonds, and thirty-seven hundred thousand dollars, par value in stock, upon the entire one hundred and eighty-five miles." The contract further provided for the payment to Moore of $100,000 in lawful money, $310,000 in first-mortgage bonds, and $450,000 in the stock of the railroad company, at par, for the Reno division as far as Beckwith Pass. The contractor was to have all the first-mortgage bonds as the work of construction progressed.

This contract was supplemented by another one, executed December 4, 1880, whereby the time and order of performance as well as of payments were changed. It provided that the Reno division, from Reno to Beckwith Pass, should be first constructed; that "upon the shipment of 1000 tons of rails and splices the company should pay to the contractor $200,000 in cash, and upon arrival of same at Reno $150,000 in first-mortgage bonds and $300,000 in stock, and upon shipment of balance of rails for the present work $160,000 in first-mortgage bonds and $150,000 in stock;" that "the company shall deposit with the trustee in New York, on or before January 10, 1881, $10,000 in cash, and the $450,000 in stock, and, on or before January 25, 1881, the $310,000 in the first-mortgage bonds;" that this contract should not be "construed as abating or impairing any portion of the contract of August 26, 1880;" and that "the entire stock to be issued upon the line from Reno to the temporary terminus as herein stated [Beckwith Pass] shall be limited to $600,000, without reference to any excess in distance over thirty miles, and the first-mortgage bonds upon the same to $310,000."

A separate contract was made on the same day with reference to the construction of the road from Beckwith Pass to the Oregon line.

The company having failed to make payments to Moore, as it had agreed to do, on account of work done on the Reno division, another contract was made February 1, 1881, by which the company stipulated to deliver to the contractor the

$450,000 of stock and the $310,000 first-mortgage bonds as soon as the certificates and bonds could be engrossed and signed. It was provided that this contract should not impair the contracts previously made between the parties.

On the 25th of April, 1881, the "Nevada and Oregon Railroad Company," the company first above named, was organized. It was the successor, and acquired all the rights, franchises, and property of "*The* Nevada and Oregon Railroad Company" of 1880, and assumed to meet all the contract obligations, and to pay all the debts of the old company. The mortgage, heretofore referred to, of April 25, 1881, was executed by the new company.

By contract of date April 26, 1881, the new company adopted, confirmed, and renewed Moore's contract with the old company, and, subsequently, May 24, 1881, the contract for the construction of the road from Beckwith Pass to the Oregon line was extended one year.

Before the last two dates, namely, on March 23, 1881, the appellees, Moran Bros. and Moore, entered into a contract, by which the former agreed to pay the latter the sum of $248,000, in specified instalments, upon completion, within certain periods named, of five, ten, twenty-one, twenty-six and thirty-one miles of Reno division against the delivery of the first-mortgage eight per cent bonds of the "Nevada and Oregon Railroad Company." By that contract Moran Bros. became entitled to receive the bonds on instalments, as the above number of miles were constructed.

Subsequent transactions between the parties are so clearly and succinctly stated in the opinion delivered in this cause by Judge Sabin, 20 Fed. Rep. 80, that the following extract is made from it:

"Moore went on under these various contracts and graded 32 miles on the first section north from Reno and commenced grading on the 170 miles running north from Beckwith Pass. He also laid about 17 miles of track from Reno northerly, and provided certain rolling stock and other materials. Moore became embarrassed, and on about November 16, 1881, abandoned his contracts and left the State. From that time forward

the company assumed the management of the road and conducted its future operations as best it could. The company was in a very embarrassed condition. It was largely in debt and without money or resources of any kind to meet its liabilities. It had attempted to build and equip a railroad without first having provided any adequate means for so doing.

"On the twenty-fifth of March, 1882, Moore, as party of the first part, the railroad company, defendant, of the second part, D. W. Balch, H. J. McMurray, A. H. Manning, W. F. Berry and C. A. Bragg, of the third part, and Alvin Burt, as trustee, of the fourth part, entered into an agreement, the object of which was to adjust, as therein provided, the then unsettled business matters between Moore and the railroad company. This contract recognizes the fact that the railroad company had issued to Moore these 310 first-mortgage bonds; that he had negotiated them with Moran Bros., complainants in the second above-entitled suit; that he had been paid for 210 of said bonds by Moran Bros. and that they held the remaining of said bonds subject to contract with Moore, to be paid for as the road was completed. By this contract Moore surrendered his rights in these bonds for the benefit of the railroad company, which subsequently drew the money due upon them. Section 11 of this contract is as follows:

"'The parties of the second and third part hereby covenant and agree for themselves and the other stockholders, and for the creditors of the party of the first part as follows, viz.: . . . (*b*) That no second mortgage shall be made, issued, or recorded upon said railroad or any portion thereof.

"'That the issue of first-mortgage bonds thereon shall be limited to $10,000 per mile of completed road, or such an amount that the annual interest charge thereon shall not exceed $800 per mile of completed road, and also that the issue of capital stock of said company shall be limited to $20,000 per mile of said railroad.'

"Pursuant to this contract, on the twenty-sixth of April following, Moore and Moran Bros. join in a communication to Balch, as president of said railroad company, informing him of the terms upon which he can, as the road is completed, draw

upon complainants for $75,000, the balance due upon these 100 bonds. These funds were so drawn and with them the road was completed the 31 miles. It should be noted that this contract of March 25, 1882, was entered into by Balch as president of, and on behalf of, said railroad company, pursuant to a resolution of the board of directors of said company adopted January 13, 1882, prior to his departure from Reno to New York for the purpose of endeavoring to effect a settlement of the business of the company. And this contract, if not formally ratified by the directors of the company by resolution adopted to that effect, was actually ratified by the company by its acting upon it, carrying out to some extent, at least, its provisions, and accepting the benefits arising therefrom, and especially in drawing and using the balance due upon the 100 bonds paid by Moran Bros. after its execution. Now, all of these various contracts conclusively show this; that this railroad company, defendant, and its predecessor had repeatedly contracted with Moore and promised and held out to the public that upon no part of the line of its road should there be issued more than $10,000 in first-mortgage bonds for each mile of completed road. It was upon this condition and agreement that Moran Bros. purchased these bonds. Charles Moran, one of the complainants, testifies that the railroad company issued its circulars to that effect; that he saw them; that this limitation was the condition in the purchase of the bonds; that they would not have advanced $11,000 per mile upon the road. He is supported in this by the testimony of Moore, Fowler and Balch, and by every contract in evidence executed either by the railroad company, defendant, or by its predecessor, and subsequently ratified by the Nevada and Oregon Railroad Company; and this testimony is wholly uncontradicted."

The decree below was accompanied with a finding of facts. Among the facts so found were the following:

That before and at the time the 310 bonds were sold the railroad company, in consideration of their purchase, obligated itself in writing that it would not issue or sell any more than ten of said bonds, or $10,000 worth, for each mile of completed road, and no more than 310 for or upon the Reno division, the

defendants and each of them having notice of such agreement;

That while these agreements were in force, and after Moran Bros. had purchased and paid for the 310 bonds now held by them, the company, by and through its then officers and trustees, defendant Balch, trustee and president; King, trustee and secretary; Bragg, Manning and Berry, trustees; McMurray, stockholder; and Deal and Webster, attorneys, issued and advised, caused and procured to be issued, the bonds mentioned in the answer, 147 in number, the defendants and each of them well knowing at the time the terms and conditions of the contracts limiting the issue of bonds, and that complainants had purchased for value the 310 bonds mentioned in the bill of complaint;

That the 147 bonds, and each of them, were procured from the Union Trust Company of New York by defendant Balch, under and in pursuance of a resolution of the board of trustees of the railroad company, adopted by Balch, Bragg, Manning, Berry and King, acting as such board, and for the purpose expressed in the resolution, and represented to the Union Trust Company, of negotiating them for value, and after said bonds were so procured the board delivered them to the original holders thereof without payment therefor of any sum of money whatever;

That, except the 10 bonds issued to the defendants Webster and Deal, the remaining 137 of the 147 bonds were delivered for and in consideration of preëxisting debts, and principally for debts owing by Moore and not debts owing by the company, and in large part for claims that Balch, McMurray, Manning, Berry and Bragg had assumed and agreed to pay; the bonds issued to Webster and Deal having been delivered in consideration of professional legal services to be rendered by them as solicitors for the defendants, and not delivered until after this suit was commenced; and,

That the defendants, who in the answer are alleged to hold a portion of the 147 bonds, and each of them, received such bonds and hold the same as security for debts which existed at and before the time the bonds were acquired by them, and

none of such persons are *bona fide* purchasers of said bonds for value.

Upon this state of facts it was decreed that the complainants were entitled to have the amount of their bonds, principal and interest, paid out of the proceeds of the mortgaged premises, and that none of the defendants were entitled to participate in or share such proceeds until after the payment in full of the principal and interest of the 310 bonds, nor unless there should be a surplus remaining; and if there should be such surplus, then the defendants were entitled to participate in the distribution, each in proportion to the amount of the bonds held by him.

Mr. Horatio C. King for appellants. *Mr. W. E. F. Deal* was on their brief.

Mr. Wheeler H. Peckham for appellees.

Mr. Justice Harlan, after stating the above facts, delivered the opinion of the court.

It appears satisfactorily from the evidence that when appellees purchased the 310 bonds from Moore, the latter had contracts with the railroad company, by which it was restricted in issuing bonds to $10,000, par value, for each mile of completed road. It was that feature of the several contracts between the company and Moore that gave value, in the commercial world, to the bonds delivered to him. And the benefit of that restriction upon the issuing of bonds necessarily passed to those who purchased them from Moore. The issuing of bonds in excess of those delivered to Moore, and by him sold to Moran Bros., was in palpable violation of the company's agreement with him; for, as is conceded, the 310 bonds, held by appellees, represented, on the above basis, all of the completed road. No one receiving the bonds thus improperly issued, who had notice of the restriction which the company, by the contracts with Moore, imposed upon its authority, could be deemed a *bona fide* holder for value. The circum-

stances under which the 147 bonds were obtained by the railroad company from the trustee, the Union Trust Company, are stated with substantial accuracy, in the finding of facts made by the court below. Those who procured those bonds to be issued by the railroad company had knowledge of the want of authority in the company to put them on the market to the prejudice of the rights of the appellees as the holders of the 310 bonds. They were used in payment of the company's debts and obligations and in discharge of obligations assumed by some of its officers. The purpose for which they were issued and used, however meritorious in itself, as between the company and those who originally took them, cannot affect the rights of the appellees arising under the company's contracts with Moore, as the original owner of the 310 bonds.

We do not mean to say that the 147 bonds and each of them are absolutely void for every purpose and by whomsoever held. If the present holders paid value for them without actual notice of the restriction imposed by the company upon its authority to issue them, they would be deemed *bona fide* holders for value, unaffected by the agreements between Moore and the railroad company. And they would be deemed holders for value, even if they took the bonds in payment of, or as security for, the company's preëxisting debts. *Railroad Co.* v. *National Bank*, 102 U. S. 14.

The mortgage of 1881 does not contain any provision that gives priority to some of the holders of the bonds secured by it over other bonds of the same issue. If it did, all holders of the bonds so secured would be bound to take notice of such provisions, the mortgage having been duly recorded in Nevada. Nor is notice of the rights secured to Moore, as the holder of the 310 bonds, to be imputed to the defendants because the contracts between him and the company, or some of them, were put upon record. We do not understand that, by the law of Nevada, such instruments were required to be recorded, or that the record of them carries with it notice to all the world of their contents. Gen. Stat. Nev. 1883, c. 18, §§ 2571, 2593. The question, therefore, is one of actual notice

upon the part of the defendants when they took the bonds held by them respectively, of the limitation upon the company's authority to issue bonds in excess of the 310. We thus limit the inquiry as to notice, because it is clear that the defendants must have known when they took the bonds that the 310 had been previously issued, and that that amount more than represented completed road on the basis of $10,000 a mile.

Upon a close scrutiny of the evidence we are of opinion that the decree below is correct as to the 56 bonds held by McMurray, the 28 bonds held by the First National Bank of Reno or by Bender for Manning & Berry, and the fraction of a bond held by Bender for the last-named firm. They were received by McMurray and Manning & Berry, respectively, with actual notice, derived from their relations with the railroad company, of its agreement not to issue on the Reno division more than 310 bonds, or $10,000 of bonds for each mile of completed road, and with knowledge, when they took the bonds, that the number thus limited had been previously issued to the contractor Moore. In respect to the 13 bonds held by Wright, the like number held by Watkins, and the five bonds held by Schooling, the evidence shows that the present holders took them for value from the first holders, without notice as to the restriction which the company, by its agreements with Moore, had imposed upon its authority to issue bonds on the Reno division. They were entitled to share in the proceeds of the sale of the mortgaged property, in proportion to the amount of bonds held by them respectively, and upon terms of equality with Moran Bros.

As to the remaining bonds, the appeal must be dismissed, because the amount, at par value, held by each of the respective appellants owning them, is not sufficient to give this court jurisdiction to review the decree below, so far as it affects them. No one of those claims, principal and interest, exceeded at the time of the decree below, the sum of five thousand dollars. Each claim is distinct and separate from the claims of all other appellants; and the right of each claimant to be regarded as a *bona fide* holder for value depends upon the

special circumstances under which he took the bonds now held by him. *Gibson* v. *Shufeldt*, 122 U. S. 27; *Jewell* v. *Knight*, 123 U. S. 426, 432.

The decree below as to H. J. McMurray, A. H. Manning and W. F. Berry, partners as Manning & Berry; Charles T. Bender, trustee for Manning and Berry, and the First National Bank of Reno as trustee for Manning & Berry, must be affirmed; and reversed as to the appellants William Wright, A. A. Watkins and Jerry Schooling, and the cause, as to those parties, must be remanded for further proceedings consistent with this opinion. The appeal by all the other appellants must be dismissed. The appellants Wright, Watkins and Schooling will recover against the appellees their costs in this court. It is so ordered.

MEDLEY, Petitioner.

ORIGINAL.

No. 5, Original. Argued and submitted January 15, 1890. — Decided March 3, 1890.

A state statute, (enacted after the commission of a murder in the State,) which adds to the punishment of death, (that being the punishment when the murder was committed,) the further punishment of imprisonment by solitary confinement until the execution, is, when attempted to be enforced against the person convicted of that murder, an *ex post facto* law, and a sentence inflicting both punishments upon him is void; and the same is the case with a statute which confers upon the warden of the penitentiary the power to fix the day of execution, and compels him to withhold the knowledge of it from the offender, when neither of those provisions formed part of the law of the State when the offence was committed.

Any law passed after the commission of the offence for which a person accused of crime is being tried which inflicts a greater punishment on the crime than the law annexed to it at the time when it was committed, or which alters the situation of the accused to his disadvantage, is an *ex post facto* law within the meaning of that term as used in the Constitution of the United States.

No one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the

imputed offence was committed, or by some law passed afterwards by which the punishment is not increased.

There being no error in the proceedings of the court below on the trial and the verdict by which the party was convicted, and the error commencing only when the sentence or judgment of the court on the verdict is entered, the court, after deliberation, determines that the Attorney General of the State shall be notified by the warden of the penitentiary, of the precise time when he will release the prisoner from his custody, at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner.

THE case is stated in the opinion.

Mr. Walter Van Rensselaer Berry and *Mr. Henry Wise Garnett* (with whom was *Mr. A. T. Britton* on the brief) for the petitioner.

Mr. Henry M. Teller, and *Mr. Aaron W. Jones*, attorney general of the State of Colorado, submitted on their brief.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an application to this court by James J. Medley for a writ of *habeas corpus*, the object of which is to relieve him from the imprisonment in which he is held by J. A. Lamping, warden of the state penitentiary of the State of Colorado.

The petitioner is held a prisoner under sentence of death pronounced by the District Court of the Second District of the State of Colorado for the county of Arapahoe. The petition of the prisoner sets forth that an indictment for the murder of Ellen Medley was found against him by the grand jury of Arapahoe County on the 5th day of June, 1889; that the indictment charges petitioner with this murder, which took place on the 13th day of May of that year; that he was tried in said District Court on the 24th day of September thereafter and found guilty by the jury of murder in the first degree; that on the 29th day of November he was sentenced to be remanded to the custody of the sheriff of Arapahoe County, and within twenty-four hours to be taken by said sheriff and delivered to the warden of the state penitentiary,

to be kept in solitary confinement until the fourth week of the month of December thereafter, and that then, upon a day and hour to be designated by the warden, he should be taken from said place of confinement to the place of execution, within the confines of the penitentiary, and there be hanged by the neck until he was dead.

Copies of the indictment, of the verdict of the jury and of the sentence of the court are annexed to the petition as exhibits.

The petitioner then sets forth that he was sentenced under the statute of Colorado, approved April 19th, 1889, and which went into effect July 19th, 1889, and repealed all acts and parts of former acts inconsistent therewith, without any saving clause, and that the crime on account of which the sentence was passed was charged to be and was actually committed on the 13th day of May of the same year.

The petitioner enumerates some twenty variances between the statute in force at the time the crime was committed and that under which he was sentenced to punishment in the present case, all of which are claimed to be changes to his prejudice and injury, and therefore *ex post facto* within the meaning of section 10, article 1 of the Constitution of the United States, which declares that no State shall pass any bill of attainder or *ex post facto* law.

The petitioner applies directly to this court for the writ of *habeas corpus* instead of to the Circuit Court of the United States, because, he alleges, that court has in a similar case, involving the same points, decided adversely to the petitioner.

Upon examining the petition and the accompanying exhibits an order was made that the writ should issue and be returnable forthwith. By an arrangement between the parties and the counsel, it was agreed that the prisoner need not in person be brought to Washington. The case was therefore heard on the documents and transcripts of record presented to the court, and the only question argued before us was whether the act of April 19, 1889, which by the Constitution of the State of Colorado became operative on the 19th day of July thereafter, and under which the sentence complained of was im-

posed by the District Court, is an *ex post facto* law, so as to be void under the provision of the Constitution of the United States on that subject, and if so, in what respect it is in violation of that constitutional provision.

This statute will be found in the Session Laws of the State of Colorado of 1889, page 118, and is as follows:

"An Act relative to the time, place and manner, of infliction of the death penalty, and to provide means for the infliction of such penalty; and making it a misdemeanor, punishable by fine or imprisonment, to disclose or publish proceedings in relation thereto.

"*Be it enacted by the General Assembly of the State of Colorado.*

"Section 1. The commissioners of the state penitentiary, at the expense of the State of Colorado, shall provide a suitable room or place enclosed from public view within the walls of the penitentiary, and therein erect and construct, and at all times have in preparation, all necessary scaffolding, drops, and appliances requisite for carrying into execution the death penalty; and the punishment of death must, in each and every case of death sentence pronounced in this State, be inflicted by the warden of the said state penitentiary in the room or place and with the appliances provided as aforesaid, by hanging such convict by the neck until he shall be dead.

"Sec. 2. Whenever a person convicted of a crime, the punishment whereof is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence. Said warrant shall be directed to the warden of the state penitentiary of this State, commanding said warden to do execution of the sentence imposed as aforesaid, upon some day within the week of time designated in said warrant, and shall be delivered to the sheriff of the county wherein such conviction is had, who shall within twenty-four hours there-

after proceed to the said penitentiary and deliver such convicted person, together with the warrant as aforesaid, to the said warden, who shall keep such convict in solitary confinement until infliction of the death penalty; and no person shall be allowed access to said convict, except his attendants, counsel, physician, a spiritual adviser of his own selection and members of his family, and then only in accordance with prison regulations.

"SEC. 3. The particular day and hour of the execution of said sentence, within the week specified in said warrant, shall be fixed by said warden; and he shall invite to be present thereat the sheriff of the county wherein the conviction was had, the chaplain and physician of the penitentiary, one practising surgeon resident in the State, the spiritual adviser of the convict, if any, and six reputable citizens of the State of full age. Said warden may also appoint three deputies or guards to assist him in executing said sentence, and said warden shall permit no person or persons to be present at such execution except those provided for in this section. The time fixed by said warden for said execution shall be by him kept secret and in no manner divulged, except privately to the persons by him invited to be present as aforesaid; and such persons so invited shall not divulge such invitation to any person or persons whomsoever nor in any manner disclose the time of such execution. All persons present at such execution shall keep whatever may transpire thereat secret and inviolate, save and except the facts certified to by them as hereinafter provided. No account of the details of any such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law at the state penitentiary, shall in any manner be published in this State.

"SEC. 4. Upon receiving notice from said warden of such execution, it shall be the duty of said sheriff to be present and witness such execution; and [he] shall receive and cause the certified transcript of record of said execution, hereinafter specified, to be filed within ten days after said execution, in the office of the clerk of the court in which said conviction was had;

and the said clerk shall record said transcript at length in the records of the said case. In case of the disability, from illness, or other sufficient cause, of said warden or said sheriff to be present at such execution, it shall be the duty of their respective deputies, acting in their place and stead, to execute said warrant, and to perform all other duties in connection therewith and by this act imposed upon their principals.

"SEC. 5. Said warden shall keep a book of record, to be known as record of executions, in which shall be entered at length the reports hereinafter specified. Immediately after said execution a *post mortem* examination of the body of the convict shall be made by the attending physician and surgeon, and they shall enter in said book of record the nature and extent of such examination, and sign and certify to the same. Said warden shall also immediately make and enter in said book a report setting forth the time of such execution, and that the convict (naming him) was then and there executed in conformity to the sentence specified in the warrant of the court (naming such court) to him directed, and in accordance with the provisions of this act, and shall insert in said report the names of all the persons who were present and witnessed said execution, and shall procure each and every of such persons to sign said report with their full name and place of residence before leaving the place of execution; and said warden shall thereupon attach his certificate to said report, certifying to the truth and correctness thereof, and shall immediately deliver a certified transcript of said record entry to said sheriff.

"SEC. 6. Any person who shall violate or omit to comply with section three of this act shall be guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than fifty dollars nor more than five hundred dollars or by imprisonment in the county jail for not less than thirty days nor more than six months.

"SEC. 7. The warden, or other person acting in his stead who performs the duties imposed upon him by this act, shall be paid for his services out of the moneys provided for the maintenance of said state penitentiary the sum of fifty (50)

dollars; and the said sheriff shall be paid for his services by the county where such conviction was had the sum of twenty-five dollars, together with his mileage fees as provided by law.

"SEC. 8. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

"Approved April 19, 1889."

Section 19 of Article V of the Constitution of the State of Colorado, as amended November 4, 1884, is as follows:

"No act of the general assembly shall take effect until ninety days after its passage, unless in case of emergency (which shall be expressed in the preamble or body of the act) the general assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. No bill except the general appropriation for the expenses of the government only, introduced in either house of the general assembly after the first twenty-five days of the session, shall become a law."

We think it follows from this provision that neither the repealing clause nor any other part of this act was in force prior to the 19th of July, 1889, and that the crime, having been committed in May of that year, was to be governed in all particulars, of trial and punishment, by the law then in force, except so far as the legislature had power to apply other principles to the trial and punishment of the crime. If these were conducted and administered under the law of 1889, which became a law after the commission of the offence, and its provisions so far as applied by the court to the case of the prisoner, were such invasions of his rights as to properly be called *ex post facto* laws, they were void.

It is unnecessary to examine all the points in which, according to the argument for plaintiff, the new statute was *ex post facto;* therefore we shall notice only a few of those which appear to us most deserving of attention, and in doing this we shall compare the new statute with the one which it superseded and repealed.

The first of these, and perhaps the most important, is that which declares that the warden shall keep such convict in solitary confinement until the infliction of the death penalty. The former law, the act of 1883, contained no such provision. It declared that every person convicted of murder in the first degree should suffer death, and every person convicted of murder of the second degree should suffer imprisonment in the penitentiary for a term of not less than ten years, which might extend to life; and it declared that the manner of inflicting the punishment of death should be by hanging the person convicted by the neck until death, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time sentence was pronounced, unless for good cause the court or governor might prolong the time. The prisoner was to be kept in the county jail under the control of the sheriff of the county, who was the officer charged with the execution of the sentence of the court. Solitary confinement was neither authorized by the former statute, nor was its practice in use in regard to prisoners awaiting the punishment of death.

This matter of solitary confinement is not, as seems to be supposed by counsel, and as is suggested in an able opinion on this statute, furnished us by the brief of the counsel for the State, by Judge Hayt, (in the case of Henry Tyson,) a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Cyclopædia, Volume XIII, under the word "Prison" this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected

with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. It became evident that some changes must be made in the system, and the *separate* system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.

The article then gives a great variety of instances in which the system is somewhat modified, and it is within the memory of many persons interested in prison discipline that some thirty or forty years ago the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe.

It is to this mode of imprisonment that the phrase solitary confinement has been applied in nearly all instances where it is used, and it means this exclusion from human associations; where it is intended to mitigate it by any statutory enactment or by any regulations of persons having authority to do so, it is by express exceptions and modifications of the original principle of "solitary confinement." The statute of Colorado is undoubtedly framed on this idea. Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants

must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in *Ex parte Wilson*, 114 U. S. 417; *Mackin* v. *United States*, 117 U. S. 348; *Parkinson* v. *United States*, 121 U. S. 281; and *United States* v. *De Walt*, 128 U. S. 393, is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained.

The qualifying phrase in this statute is but a small mitigation of this solitary confinement, for it expressly declares that no one shall be allowed access to the convict except certain persons, and these are not admissible unless their access to the prisoner is in accordance with prison regulations, prescribed by the board of commissioners of the penitentiary under section 2553 of the laws of Colorado in force since 1877. This section declares that "the board of commissioners of the penitentiary shall make such rules and regulations for the government, discipline and police of the penitentiary, and *for the punishment of prisoners confined*, not inconsistent with law, as they deem expedient." What these may be at any particular time is unknown. How far they may permit access of counsel, physicians, the spiritual adviser, and the members of his family, is a matter in their discretion, which they exercise by general rules, which may be altered at any time so as to exclude all these persons, and thus the prisoner be left to the worst form of solitary confinement.

Even the statutory amelioration is a very limited one. By the words "his attendants" in the statute, is evidently meant the officers of the prison and subordinates, who must necessarily furnish him with his food and his clothing, and make inspection every day that he still exists. They may be forbidden by prison regulations, however, from holding any conversation with him. The attendance of the counsel can only be casual, and a very few interviews, one or two, perhaps, are all that he would have before his death, and that of the physician not at all, unless he was so sick as to require

it, and the spiritual adviser of his own selection, and the members of his family, are all dependent for their opportunities of seeing the prisoner upon the regulations of the prison. The solitary confinement, then, which is meant by the statute, remains of the essential character of that mode of prison life as it originally was prescribed and carried out, to mark them as examples of the just punishment of the worst crimes of the human race.

The brief of counsel for the prisoner furnishes us with the statutory history of solitary confinement in the English law. The act 25 George II, c. 37, entitled "An act for the better preventing the horrid crime of murder," is preceded by the following preamble: "Whereas, the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some further terror and peculiar mark of infamy be added to the punishment of death now by law upon such as shall be guilty of the said offence" — then follow certain enactments, the sixth section of which reads as follows: "*Be it further enacted*, That from and after such conviction and judgment given thereupon, the jailor or keeper to whom such criminal shall be delivered for safe custody shall confine such prisoner to some cell separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailor or keeper, or his servants, shall have access to any such prisoner, without license being first obtained."

This statute is very pertinent to the case before us, as showing, first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as "a further terror and peculiar mark of infamy" to be added to the punishment of death. In Great Britain, as in other countries, public sentiment revolted against this severity, and by the statute of 6 and 7 William IV, c. 30, the additional punishment of solitary confinement was repealed.

The term *ex post facto* law, as found in the provision of the Constitution of the United States, to wit, that "no State shall

pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," has been held to apply to criminal laws alone, and has been often the subject of construction in this court. Without making extracts from these decisions, it may be said that any law which was passed after the commission of the offence for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, *Calder* v. *Bull*, 3 Dall. 386, 390; *Kring* v. *Missouri*, 107 U. S. 221; *Fletcher* v. *Peck*, 6 Cranch, 87; or which alters the situation of the accused to his disadvantage; and that no one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offence was committed, or by some law passed afterwards by which the punishment is not increased.

It seems to us that the considerations which we have here suggested show that the solitary confinement to which the prisoner was subjected by the statute of Colorado of 1889, and by the judgment of the court in pursuance of that statute, was an additional punishment of the most important and painful character, and is, therefore, forbidden by this provision of the Constitution of the United States.

Another provision of the statute, which is supposed to be liable to this objection, of its *ex post facto* character, is found in section 3, in which the particular day and hour of the execution of the sentence within the week specified by the warrant shall be fixed by the warden, and he shall invite to be present certain persons named, to wit, a chaplain, a physician, a surgeon, the spiritual adviser of the convict, and six reputable citizens of the State of full age, and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him to be present as aforesaid, and such persons shall not divulge such invitation to any person or persons whomsoever, nor in any manner disclose the time of such execution. And section six provides that any person who shall violate or omit to comply with the requirements of section

three of the act shall be punished by fine or imprisonment. We understand the meaning of this section to be that within the one week mentioned in the judgment of the court the warden is charged with the power of fixing the precise day and hour when the prisoner shall be executed; that he is forbidden to communicate that time to the prisoner; that all persons whom he is directed to invite to be present at the execution are forbidden to communicate that time to him; and that, in fact, the prisoner is to be kept in utter ignorance of the day and hour when his mortal life shall be terminated by hanging, until the moment arrives when this act is to be done.

Objections are made to this provision as being a departure from the law as it stood before, and as being an additional punishment to the prisoner, and therefore *ex post facto*.

It is obvious that it confers upon the warden of the penitentiary a power which had heretofore been solely confided to the court; and is therefore a departure from the law as it stood when the crime was committed.

Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of adminstering capital punishment the officer appointed to execute it had a right to select the time of *the day* when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offence was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.

There are other provisions of the statute pointed out in the argument of counsel, which are alleged to be subject to the same objection, but we think the two we have mentioned are

quite sufficient to show that the Constitution of the United States is violated by this statute as applied to crimes committed before it came into force.

These considerations render it our duty to order the release of the prisoner from the custody of the warden of the penitentiary of Colorado, as he is now held by him under the judgment and order of the court.

A question suggests itself, however, to the court which is not a little embarrassing, and which was not presented by counsel in the argument of the case. This consideration arises from the fact that there does not seem to be in the record before us any error in the proceedings of the court on the trial and the verdict of the jury, by which the party was convicted of murder in the first degree. It is only when the sentence or judgment of the court upon that verdict is entered that the error of the proceedings commences. When, in the language of the judgment of the court, the prisoner was ordered to be "kept by the warden of the penitentiary in solitary confinement until the day of his execution," and when the knowledge of the day and the hour of his execution was by the statute to be withheld from him, the Constitution of the United States was violated because the additional punishments were inflicted on him by reason of the direction of the statute, which we have just seen was an *ex post facto* law, and in those respects void as being forbidden by the Constitution of the United States.

If this were a writ of error to the Supreme Court of Colorado, as Kring's case was a writ of error to the Supreme Court of Missouri, our duty would be plain, namely, to reverse the judgment for the error found in it and remand the case to the state court for further proceedings. If such were the case before us our duty would be to reverse the judgment and remand the case to the court below to deal with the prisoner in the face of the fact that a verdict of guilty, which was valid and legal, remains unenforced. But under the writ of *habeas corpus* we cannot do anything else than discharge the prisoner from the wrongful confinement in the penitentiary under the statute of Colorado invalid as to this case.

The language of the act of Congress, however, seems to have contemplated some emergency of the kind now before us. Section 761 of the Revised Statutes declares that the court, or justice, or judge (before whom the prisoner may be brought by writ of *habeas corpus*) shall proceed in a summary way to determine the facts of the case by hearing the testimony and argument, and thereupon to dispose of the party as law and justice require.

What disposition shall we now make of the prisoner, who is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, because, within the language of section 753, he is in custody in violation of the Constitution of the United States, but who is, nevertheless, guilty, as the record before us shows, of the crime of murder in the first degree? We do not think that we are authorized to remand the prisoner to the custody of the sheriff of the proper county to be proceeded against, in the court of Colorado which condemned him, in such a manner as they may think proper, because it is apparent that while the statute under which he is now held in custody is an *ex post facto* law in regard to his offence, it repeals the former law, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted upon by the court below, and it is neither our inclination nor our duty to decide what the court may or what it may not do in regard to the case as it stands. Upon the whole, after due deliberation, we have come to the conclusion that the attorney general of the State of Colorado shall be notified by the warden of the penitentiary of the precise time when he will release the prisoner from his custody under the present sentence and warrant at least ten days beforehand, and after doing this, and at that time, he shall discharge the prisoner from his custody; and such will be the order of this court.

On consideration of the application for the discharge of the petitioner, James J. Medley, the writ of habeas corpus, directing J. A. Lamping, warden of the state penitentiary

of the State of Colorado at Cañon City, Fremont County, State of Colorado, to produce the body of the said James J. Medley before this court, and to certify the cause of his detention and imprisonment, having been duly issued and served, and the said J. A. Lamping, warden as aforesaid, having certified that said James J. Medley is detained in his custody under and by virtue of a writ issued out of the District Court of Arapahoe County, State of Colorado, and the cause of said imprisonment having been duly inquired into by this court upon the return of the said writ of habeas corpus heretofore issued herein, and counsel having been heretofore heard and due consideration having been had:

It is now here ordered by this court that the imprisonment of said James J. Medley, under said writ issued out of the District Court of Arapahoe County, State of Colorado, is without authority of law and in violation of the Constitution of the United States, and that the said James J. Medley is entitled to have his liberty. Whereupon it is hereby ordered that the said James J. Medley be, and he is hereby, discharged from said imprisonment.

It is further ordered that the said J. A. Lamping, warden as aforesaid, do notify the Attorney General of the State of Colorado of the day and the hour of the day when he will discharge the said James J. Medley from imprisonment, and that such notice be given at least ten days before the release of the prisoner.

Mr. Justice Brewer (with whom concurred Mr. Justice Bradley) dissenting.

I dissent from the opinion and judgment as above declared. The substantial punishment imposed by each statute is death by hanging. The differences between the two, as to the manner in which this sentence of death shall be carried into execution, are trifling. What are they? By the old law, execution must be within twenty-five days from the day of sentence. By the new, within twenty-eight days. By the old, confine-

ment prior to execution was in the county jail. By the new, in the penitentiary. By the old, the sheriff was the hangman. By the new, the warden. Under the old, no one had a right of access to the condemned except his counsel, though the sheriff might, in his discretion, permit any one to see him. By the new, his attendants, counsel, physician, spiritual adviser and members of his family have a right of access, and no one else is permitted to see him. Under the old, his confinement might be absolutely solitary, at the discretion of the sheriff, with but a single interruption. Under the new, access is given to him as a matter of right, to all who ought to be permitted to see him. True, access is subject to prison regulations; so, in the jail, the single authorized access of counsel was subject to jail regulations. It is not to be assumed that either regulations would be unreasonable, or operate to prevent access at any proper time. Surely, when all who ought to see the condemned have a right of access, subject to the regulations of the prison, it seems a misnomer to call this "solitary confinement," in the harsh sense in which this phrase is sometimes used. All that is meant is, that a condemned murderer shall not be permitted to hold anything like a public reception; and that a gaping crowd shall be excluded from his presence. Again, by the old law, the sheriff fixes the hour within a prescribed day. By the new, the warden fixes the hour and day within a named week. And these are all the differences which the court can find between the two statutes, worthy of mention.

Was there ever a case in which the maxim, "*De minimis non curat lex*," had more just and wholesome application? Yet, on account of these differences, a convicted murderer is to escape the death he deserves and be turned loose on society.

I am authorized to say that Mr. Justice Bradley concurs in this dissent.

Savage, Petitioner. No. 6, Original. Petition for a writ of *habeas corpus*. Argued and submitted January 15, 1890. — Decided

March 3, 1890. MR. JUSTICE MILLER delivered the opinion of the court. This case is in every respect the same as that of *In re Medley, Petitioner*. By petition to us we are advised that Savage was indicted by the grand jury of Arapahoe County for the crime of murder in the first degree, charged to have been committed on the 25th day of June, A.D. 1889, by killing one Emanuel Harbert; and that on the 23d of October thereafter he was found guilty by the jury of murder in the first degree. A similar judgment to that in the case of Medley was passed upon him, and he was remanded to the custody of the warden of the penitentiary of the State of Colorado under an order of precisely the same character as that in the case of Medley. It will thus be seen that the same statute involved in that case was the authority under which the court of Colorado rendered its judgment and committed the prisoner to the care of the warden of the penitentiary; that this statute came into force after the commission of the offence of which Savage was convicted, and is, therefore, *ex post facto* in its application to his case. The same order, therefore, that we have directed to be entered in Medley's case will be entered in this case, releasing the prisoner from the custody of the warden, after due notice to the attorney general of the State of Colorado.

On consideration of the application for the discharge of the petitioner, James H. Savage, the writ of habeas corpus, directing J. A. Lamping, warden of the state penitentiary of the State of Colorado at Cañon City, Fremont County, State of Colorado, to produce the body of the said James H. Savage before this court, and to certify the cause of his detention and imprisonment, having been duly issued and served, and the said J. A. Lamping, warden as aforesaid, having certified that said James H. Savage is detained in his custody under and by virtue of a writ issued out of the District Court of Arapahoe County, State of Colorado, and the cause of said imprisonment having been duly inquired into by this court upon the return of the said writ of habeas corpus heretofore issued herein, and counsel having been heretofore heard and due consideration having been had:

It is now here ordered by this court that the imprisonment of said James H. Savage under said writ issued out of the District Court of Arapahoe County, State of Colorado, is without authority of law and in violation of the Constitution of the United States, and that the said James H. Savage is entitled to have his liberty. Where-

Syllabus.

upon it is hereby ordered that the said James H. Savage be, and he is hereby, discharged from said imprisonment.

It is further ordered that the said J. A. Lamping, warden as aforesaid, do notify the Attorney General of the State of Colorado of the day and the hour of the day when he will discharge the said James H. Savage from imprisonment, and that such notice be given at least ten days before the release of the prisoner.

BRADLEY, J. and BREWER, J., dissenting.

Mr. Walter Van Rensselaer Berry and *Mr. Henry Wise Garnett* (with whom was *Mr. A. T. Britton* on the brief) for petitioner.

Mr. Henry M. Teller, and *Mr. Aaron W. Jones*, Attorney General of the State of Colorado, submitted on their brief.

JEFFERIS *v.* EAST OMAHA LAND CO.

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

No. 1539. Submitted January 13, 1890. — Decided March 10, 1890.

A fractional section of land, on the left bank of the Missouri River, in Iowa, was surveyed by United States surveyors in 1851, and lot 4 therein was formed, and so designated on the plat filed, and as containing 37.24 acres, the north boundary of it being on the Missouri River. In 1853 the lot was entered and paid for, and was patented in June, 1855, as lot 4. Afterwards, by ten mesne conveyances, made down to 1888, the lot was conveyed as lot 4, and became vested in the plaintiff. About 1853 new land was formed against the north line, and continued to form until 1870, so that then more than 40 acres had been formed by accretion by natural causes and imperceptible degrees within the lines running north and south on the east and west of the lot, and the course of the river ran far north of the original meander line. The defendant claimed to own a part of the new land by deed from one who had entered upon it. The plaintiff filed a bill to establish his title to the new land, claiming it as a part of lot 4. On demurrer to the bill; *Held*,

(1) The bill alleging that the land was formed by "imperceptible de-

Statement of the Case.

grees," the time during which the large increase was made being nearly 20 years, the averment must stand, notwithstanding the character of the river, and the rapid changes constantly going on in its banks;

(2) Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by its number conveys the land up to such shifting water line; so that, in the view of accretion, the water line, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line;

(3) Accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view, that, in order to be accretion, the formation must be one not discernible by comparison at two distinct periods of time;

(4) The patent having conveyed the lot as lot 4, and the successive deeds thereafter having conveyed it by the same description, the patent and the deeds covered the successive accretions, and neither the United States, nor any grantor, retained any interest in any of the accretion;

(5) Where a plat is referred to in a deed as containing a description of land, the courses, distances and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed.

THIS was a suit in equity, brought in the Circuit Court of the United States for the District of Nebraska, on the 9th of February, 1889, by The East Omaha Land Company, a Nebraska corporation, against Thomas Jefferis. The case was heard on a demurrer to the bill, which makes it necessary to state with particularity the allegations of the bill. They are as follows:

The lands which are the subject of the suit are of the value of $2000 or more. In 1851 the deputy surveyors of the United States, then engaged in surveying the public lands in township 75 north, range 44 west, of the fifth principal meridian, in the State of Iowa, ran, marked and made field-notes and plats of the meander line of the left bank of the Missouri River, and returned the said field-notes and plats to the surveyor general of Iowa, who filed the same in the General Land Office, and they were thereupon duly approved; and since that time no resurvey has been made by the United

States of the lands lying along, upon, or near said river, or of the premises which are the subject of the bill.

Section 21 in that township was properly surveyed and subdivided by the deputy surveyors, and the plats and notes thereof were duly made, returned and approved as aforesaid. By the surveys the section was found, and by the plats and notes thereof returned as fractional; and a part thereof, designated as lot 4, was formed, containing 37.24 acres, the north boundary thereof being on the Missouri River. The meander line of the river was described in the field-notes as beginning at meander corner No. 6, the same being at a point on the line between sections 16 and 17 in said township and range, about 100 feet north of the intersection of the exterior lines of said sections 16 and 17 and sections 20 and 21; thence south 71 degrees east, 2.68 chains to meander post No. 7, on the north line of lot 4; thence south 79 degrees 50 minutes east, 54 chains; thence north 85 degrees east, 4.50 chains; thence east 15 chains; thence north 87 degrees east, 5.25 chains to the corner of sections 21 and 22. A map was annexed, marked Exhibit A, being a true copy of the plat so made, returned and approved, showing the meander line of the river and the lines of the subdivisions of sections 16, 17, 21 and 22.

On the 10th of October, 1853, one Edmund Jefferis entered lot 4 at the United States Land Office for the district of land subject to sale at Kanesville, Iowa, paid the proper officer of the office the legal price thereof, and received therefor the usual register's certificate; and, on the 15th of June, 1855, the usual patent of the government was duly issued to him for the land. In the certificate and patent the land was described as lot 4 in fractional section 21, in township 75 north, range 44 west, of the fifth principal meridian, containing 37.24 acres, according to the official plat of the survey of the land returned to the General Land Office by the surveyor general. At the time of the entry, the meander line of the left bank of the river was the same, or nearly the same, as shown by such field-notes and plat.

On the 14th of July, 1856, said Jefferis duly conveyed the

land to Joseph Still and Joseph I. Town, describing the same simply as lot 4, in section 21, in township 75 north, range 44 west, of the fifth principal meridian. On the 21st of September, 1857, Town conveyed the undivided half of the premises, with warranty, to one McCoid, who, on the 16th of October, 1857, quit-claimed the premises to one Coleman. On the 25th of May, 1858, Coleman conveyed them, with warranty, to Mrs. Ruth A. Town. On the 27th of April, 1859, Joseph I. Town and Ruth A. Town conveyed them, with warranty, to one Boin, who, on the 30th of May, 1861, quit-claimed them to one McBride; and McBride, on the 30th of September, 1861, quit-claimed them to one Schoville. Schoville having died, his widow and heirs quit-claimed them to the plaintiff, on the 22d of March, 1888. On the 9th of March, 1888, Still quit-claimed the other undivided half of the premises to Lyman H. Town, who, on the 28th of March, 1888, conveyed the same to the plaintiff. In each of the deeds made by those several parties, the premises were described as lot 4 in fractional section 21, township 75 north, range 44 west, of the fifth principal meridian, and the deeds were duly recorded in the registry of Pottawattamie County, Iowa, in which county the premises were situated.

About the time of the original entry of lot 4 by Edmund Jefferis, new land was formed along and against the whole length of the north line thereof, and from that time continued to form until 1870, so that in that year, at a distance of 20 chains and more from the original meander line before described, and within the lines of the lot on the east and west running north and south, a tract of 40 acres and more had been formed by accretion to the lot, and ever since had been and now is a part thereof. The said land was so formed by natural causes and imperceptible degrees, that is to say, by the operation of the current and waters of the river, washing and depositing earth, sand, and other material against and upon the north line of the lot; and the waters and current of the river receded therefrom, so that the new land so formed became high and dry above the usual high-water mark, and the river made for itself its main course far north of the original meander line.

Such process, begun in 1853 and continued until 1870, went on so slowly that it could not be observed in its progress; but, at intervals of not less than three or four months, it could be discerned by the eye that additions greater or less had been made to the shore.

In 1877, the river, at a point more than a mile south of the north line of the lot, suddenly cut through its bank and made for itself a course through the same, leaving all of section 21 north of its bank. A plat, marked Exhibit B, was annexed, upon which was delineated the river both before and after such sudden change.

The river was and always had been navigable for steamers of large tonnage. The United States never claimed any interest in the land so formed by accretion to lot 4. The plaintiff submitted that by such several mesne conveyances, whereby the title to lot 4 had come to it, it had become seized in fee, not only of the land included within the boundaries of the lot at the time of such survey, but also of the land so formed by accretion thereto, so that the east and west boundaries of the lot were formed by the protraction of the east and west lines north to the left bank of the river, as the same was in 1877 when the river suddenly changed its course, and the north boundary of the lot was the said left bank at that time.

When the plaintiff became seized of the land, it entered into the same and made large and valuable improvements thereon; and it had projected the enterprise of redeeming the land and other land adjoining it, of improving the same so that the whole would be available for railroad and manufacturing purposes, of building railroad tracks, station-houses, depots, warehouses, and manufacturing establishments, and selling parcels of the land to others for such purposes, and had expended more than $20,000, and had in hand $100,000 which it purposed to expend in grading, and in building roads, bridges, etc.

In 1888 one Counzeman and others, without any authority of law, entered upon the land so formed by accretion, and for a time occupied it, but afterwards abandoned it. Recently, Counzeman had made to the defendant a deed of quit-claim

Statement of the Case.

purporting to convey a certain parcel of the land so formed by accretion to lot 4. The south line of the land so conveyed to the defendant was about two hundred feet north of the original meander line of lot 4, as that line was so run, marked, and platted by the United States surveyors; and the deed purported to convey about twenty acres, which were within the above-recited boundaries of the land formed by accretion to lot 4. When Counzeman entered upon the land and when he made the deed to the defendant, each of them well knew of the plaintiff's plan and purposes in respect thereof, and that they had no right so to enter; and the defendant threatened to, and, unless restrained by injunction, would, dispossess the plaintiff and seriously interfere with its plans and purposes. The defendant was insolvent and unable to answer for the damage to which he would subject the plaintiff by entering into the premises and dispossessing the plaintiff.

The bill waived an answer on oath, and prayed for an injunction restraining the defendant from entering into, taking possession of, or intermeddling with, any part of the premises conveyed to him by Counzeman, and for a decree declaring that the land so formed against lot 4, including that conveyed to the defendant, became and was a part of lot 4 and included within its description; that the title to it had become and was vested in the plaintiff; that the deed made to the defendant be delivered up to be cancelled; that he be perpetually enjoined from asserting the same or any title or interest thereunder against the plaintiff; and for general relief.

The defendant interposed a general demurrer to the bill, for want of equity.

The case was heard before Mr. Justice Brewer, then Circuit Judge, who filed an opinion on the 1st of March, 1889, directing that the demurrer be sustained. 40 Fed. Rep. 386. On a petition for a rehearing, which was heard by the same judge, he filed an opinion, 40 Fed. Rep. 390, directing that the demurrer be overruled. Thereupon a decree was entered, on the 13th of November, 1889, overruling the demurrer; granting a perpetual injunction restraining the defendant from entering into, taking possession of, or in any manner

intermeddling with, the premises, and from asserting any right or interest therein; and declaring that the land in question was formed by process of accretion and imperceptible degrees against the premises known and described as lot 4 of section 21 in township 75 north, of range 44 west, of the fifth principal meridian, in the State of Iowa, as the same was originally surveyed and platted by the surveyors of the United States, and became, by such accretion, a part of said lot and was included within such description, and the title thereto passed by such description from the original patentee of the United States to the plaintiff, by divers mesne conveyances, and is now vested in the plaintiff. It was further decreed, that the deed made to the defendant by Counzeman, purporting to convey the premises, be delivered up to the plaintiff, to be cancelled, and that the plaintiff recover its costs to be taxed. The premises upon which the decree operated were described in it as follows: Beginning at a point 1520 feet north of the southwest corner of lot 4 in section 21, township 75 north, range 44 west, of the fifth principal meridian, running thence north 660 feet; thence east 1320 feet, to the extension due north of the east boundary line of said lot 4, as originally surveyed and platted by the United States; thence south on that line 660 feet; and thence west to the place of beginning; containing 20 acres. The decree further stated that the defendant prayed an appeal to this court, and that it was allowed.

Mr. Finley Burke for appellant.

I. The allegations of the bill taken in conjunction with the known character of the Missouri River, and its bed, enable us to deny that the new-formed lands are accretions. The appellant does not wish to be understood as assuming that the court will take judicial notice of the character of the particular lands in question: only that it will take judicial notice of the characteristics of the Missouri River. *United States* v. *Lawton*, 5 How. 10, 26; *Peyroux* v. *Howard*, 7 Pet. 324.

The facts in relation to this river are matter of common knowledge. They are shown in public documents; in the

reports of surveys and soundings made by government authority and even in the works on geography used in the public schools. They are also shown by reference to histories and works of travel and description. They are within the knowledge of all persons living in this region. But, waiving for the present the common and general knowledge of these matters, the bill itself supplies us with such information as is needed for our present purpose.

It appears that between 1851 and 1877 the river moved north a distance of one mile. It is said that this was done so slowly as to be imperceptible at any one time. Then suddenly it cut through its banks at a point some miles south but yet further up the river as it then existed and left its old bed and courses and made for itself a new one at this great distance.

These allegations show that this river is one, the changes in whose channel are frequent, rapid and very great. Its course is tortuous, and it flows through a wide valley of soft, sandy loam. We also know that at certain seasons of the year it has a very rapid current and large volume. Its waters are turbid with mud and washings from the mountains. Much of the soil of the bed is of that character called quicksand, the particles of which glide easily upon each other, causing large tracts of land to fall into the river, thus cutting and changing its banks. The current of the river impinges first upon one side and then upon the other, so that sometimes in a single season new land of great extent is formed. The land which is washed away upon one side of the river is usually carried by the current a great distance and then thrown up as a sand-bar upon the other side.

Some care ought to be exercised in applying the doctrine of accretion in such a region. The law on this subject is borrowed from England where it was applied to tidal rivers. It is well known that the rivers of England in which the tide ebbs and flows are rivers in whose banks the changes are very slight and cover a long period of time.

The test of the applicability of the doctrine is, whether the land is formed so slowly as to be imperceptible. If the new

formation can be discerned the doctrine does not apply. Imperceptible, in this sense, means what is not discernible when the situations at two periods, somewhat apart, are compared. *Rex* v. *Yarborough*, 3 B. & C. 91; *S. C.* (House of Lords) 2 Bligh (N. S.) 147.

While it is true that a case can be imagined where the made land had formed in such a slow and gradual manner as to be accretion and be governed by the law thereof upon the banks of the Missouri River, yet taking the known character of that river in connection with the allegations of the bill, which show affirmatively that this river is one in which the changes are frequent, rapid and great, and that the land in question formed with a rapidity which, in England, would have been contrary to all ideas of accretion, we submit that the bill shows on its face, in connection with the facts of which judicial notice is taken, that the doctrine of accretion does not apply to the land in dispute. As "imperceptible" means, what is not discernible when the situation at two periods not widely apart is compared, it would seem to be a great hardship to apply the doctrine of accretion to such changes, where what is formed on one side and lost on the other is transferred so rapidly, and where the land is easily identified as being the quarter section or the fractional lot which, last year, belonged to a neighbor on the opposite side of the stream.

The words "slow" and "imperceptible," as understood by a conservative English landowner, mean quite different ideas from what they do to an active denizen of Omaha, Nebraska. The word "slow" as applied to changes in the banks of the Thames from Blackwall to its mouth may have quite a different meaning from that of the same word applied to changes in the Missouri River. The bill shows a change of a mile in about nineteen years, "imperceptible" at any one moment of time. The law of accretion can have no application to such changes.

II. Taking the allegations of the bill most strongly against the pleader we have a right to assume that some area, however narrow, had formed between the original lot four (4) and the river after the date of the survey and before the time

when the land was entered. If so, said strip belonged to the United States, and the accretions, if any, subsequently formed should go to the government. The right to alluvion depends on contiguity, and the accretions belong to the land immediately adjoining the water, however narrow it may be, or whatever may be the size of the parcel behind it. *Saulet* v. *Shepherd*, 4 Wall. 502; *Granger* v. *Swart*, 1 Wool. C. C. 88.

III. Conceding that the entry of Edmund Jefferis passed from the government to Edmund Jefferis all the land to the river, still the bill fails to show that the deed of Jefferis to Still and Town by apt words described the land which may have formed between the date of his entry and the date of the deed.

The bill states that by several mesne conveyances the complainant acquired the title to lot four (4) in the year 1886. It also states that between 1853 and 1877 some forty (40) acres of land were formed between the lot line and the river line of 1877, but it fails to state that any of the chain of deeds under and through which complainant claims title, contained descriptive words covering and including any part of these forty (40) acres of added land. The question is: What passed by the successive deeds of lot four (4) under which complainant claims?

If the land in question is to be regarded as accretion, we claim that it does not pass by a deed describing only the land to which such accretion has been made. *Granger* v. *Swart*, *ubi sup.*; *Lammers* v. *Nissen*, 4 Nebraska, 245; *Lamb* v. *Rickets*, 11 Ohio, 311; *Jones* v. *Johnston*, 18 How. 150.

Mr. J. M. Woolworth and *Mr. C. J. Greene* for appellee.

Mr. Justice Blatchford, having stated the case as above reported, delivered the opinion of the court.

The grounds upon which the Circuit Court proceeded in overruling the demurrer to the bill are stated by it in its opinion to be these: (1) It being alleged in the bill that the added land was formed by "imperceptible degrees," although the increase was great, resulting in the addition of many acres, yet the time during which it was made was nearly twenty

years, and an increase might have been going on, imperceptible from day to day and from week to week, which, during the lapse of so many years, might result in the addition of all the land; and hence the averment of the bill cannot be overthrown, notwithstanding what is known of the character of the Missouri River and of the soil through which it flows, and of the rapid changes in its banks which are constantly going on. (2) Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary; and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to the fixed side lines; so that, as long as the doctrine of accretion applies, the water line, no matter how much it may shift, if named as the boundary, continues to be the boundary, and a deed of the lot carries all the land up to the water line.

The propositions contended for by the defendant are these: (1) Taking the allegations of the bill with those facts in relation to the Missouri River of which the court will take judicial notice, it appears that the formation in question was not accretion. (2) Taking the allegations of the bill most strongly against the plaintiff, it must be assumed that some area, however narrow, had formed between the time when the survey was made, in 1851, and the time when the land was entered by the patentee, in October, 1853. (3) The patentee, by the deed made by him to Still and Joseph I. Town, conveyed only "lot 4;" and, while the successive grantees held the title to that lot, accretions were formed of greater or less extent, which were never conveyed to the plaintiff, the deeds to it calling only for lot 4. The substance of this contention is that, as the conveyance by the patentee to Still and Joseph I. Town described the land simply as "lot 4," it passed the title to that lot as it was at the date of the survey in 1851, and not at the date of the deed, in 1856, and thereby excluded the new land formed after the survey of 1851; and that, as accretions of greater or less extent were formed while the several successive grantees held the title, such accretions did not pass by their respective deeds, and the title thereto has not come to the plaintiff.

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It is distinctly alleged in the bill, that the new land is an accretion to that originally purchased by the patentee from the United States. The rule of law applicable to such a state of facts is thus stated by this court in *New Orleans* v. *United States*, 10 Pet. 662, 717: "The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain." And in *Banks* v. *Ogden*, 2 Wall. 57, 67, it is said: "The rule governing additions made to land bounded by a river, lake or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."

It is contended by the defendant that this well-settled rule is not applicable to land which borders on the Missouri River, because of the peculiar character of that stream and of the soil through which it flows, the course of the river being tortuous, the current rapid, and the soil a soft, sandy loam, not protected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks, sometimes in a large body, and makes for itself a new course, while the earth thus removed is almost simultaneously deposited elsewhere, and new land is formed almost as rapidly as the former bank was carried away.

But it has been held by this court, that the general law of accretion is applicable to land on the Mississippi River; and, that being so, although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law.

In *Jones* v. *Soulard*, 24 How. 41, it was held that a riparian proprietor on the Mississippi River at St. Louis was entitled, as such, to all accretions as far out as the middle thread of the stream; and that the rule, well established as to fresh-water rivers generally, was not varied by the circumstance that the Mississippi at St. Louis is a great and public water-course. The court said that from the days of Sir Matthew Hale all grants of land bounded by fresh-water rivers, where the expressions designating the water line were general, conferred the proprietorship on the grantee to the middle thread of the stream, and entitled him to the accretions; that the land to which the accretion attached in that case was an irregular piece of 79 acres, and had nothing peculiar in it to form an exemption from the rule; that the rule applied to such a public water-course as the Mississippi was at the city of St. Louis; and that the doctrine that, on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, had no application to the case, nor did the size of the river alter the rule.

In *Saulet* v. *Shepherd*, 4 Wall. 502, the doctrine of accretion was applied in respect of a lot of alluvion or *batture* in the Mississippi River fronting the city of New Orleans, in favor of the riparian proprietor; and it was held that the right to the alluvion depended upon the fact of the contiguity of the estate to the river, and that where the accretion was made to a strip of land which bordered on the river, the accretion belonged to such strip and not to the larger parcel behind it, from which the strip, when sold, was separated.

In *County of St. Clair* v. *Lovingston*, 23 Wall. 46, the same doctrine was applied to a piece of land situated on the east bank of the Mississippi River opposite St. Louis. It was there held that where a survey began "on the bank of the river,"

and was carried thence "to a point in the river," the river bank being straight and running according to such line, the tract surveyed was bounded by the river; that alluvion meant the addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land was contiguous; that the test of what was gradual and imperceptible was that, although the witnesses might see from time to time that progress had been made, they could not perceive it while the process was going on; and that it was alluvion whether the addition was made on a stream which overflowed its banks, or on one which did not. The authorities on the subject are collected in the opinion in that case.

The rule is as applicable to the Missouri River as it is to the Mississippi, whether the principle on which it rests be that the riparian owner is entitled to the addition to his land because he must bear without compensation the loss of land caused by the action of the water and any consequent expense of repair to the shore, or whether that principle be one of public policy, in that it is the interest of the community that all lands should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore.

In the present case, the land in question is described in the bill as a tract of 40 acres and more. How much, if any, of it was formed between the date of the original survey in 1851 and the time of the entry in October, 1853, cannot be told; nor how much was formed between 1853 and 1856, while the patentee owned the lot; and so in regard to the time when it was owned by each successive owner. There can be, in the nature of things, no determinate record, as to time, of the steps of the changes. Human memory cannot be relied on to fix them. The very fact of the great changes in result, caused by imperceptible accretion, in the case of the Missouri River, makes even more imperative the application to that river of the law of accretion.

The bill must be held to state a fact, in stating that the land in question was formed by "imperceptible degrees," and that the process, begun in 1853 and continued until 1870, resulting

in the production by accretion of the tract of 40 acres and more, "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." The fact, as thus stated, is, that the land was formed by imperceptible degrees, within the meaning of the rule of law on the subject, and it is not capable of any construction which would result in the conclusion that the land was not formed by imperceptible degrees.

In the Roman law, it was said in the Institutes of Gaius, Book II, § 70: "Alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use a common expression, a latent addition." Justinian says, Institutes, Book II, title 1, § 20: "That is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time."

The same rule was introduced into English jurisprudence. Bracton says, Book II, c. 2: "Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like." Blackstone says, 2 Com. 262: "And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss."

The whole subject was fully considered in England, in the case of *Rex* v. *Lord Yarborough*, in the King's Bench, 3 B. & C. 91; *S. C.* in the House of Lords, 2 Bligh N. S. 147 and 1 Dow & Cl. 178; *S. C.* sub. nom. *Gifford* v. *Lord Yarborough*,

in the House of Lords, 5 Bing. 163; where it was decided in effect that in cases of alternate accretion and decretion, the riparian proprietors had movable freeholds; that is, moving into the river with the soil as it was imperceptibly formed, and then again receding, when by attrition it was worn away. Lord Yarborough owned lands immediately adjoining the sea, to prevent the encroachment of which upon his lands he built sea walls on two sides. The ooze, sand and soil from the sea were gradually deposited outside of and against these walls, until, by the accretion, some 450 acres of land were made in a short time, which the Crown claimed against him. But the court of the King's Bench held, and the decision was affirmed by the House of Lords, that, the land being formed by the gradual and imperceptible action of the sea, Lord Yarborough and not the Crown was entitled to it. See, also, *In re Hull & Selby Railway*, 5 M. & W. 327; *Scratton* v. *Brown*, 4 B. & C. 485.

The doctrine of the English cases is, that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time.

In *New Orleans* v. *United States*, *supra*, the accretion was 140 feet in width, formed in 22 years. In *County of St. Clair* v. *Lovingston*, *supra*, the court says: "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. . . . The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." To the same effect are *Jones* v. *Johnston*, 18 How. 150; *Jones* v. *Soulard*, 24 How. 41; *Schools* v. *Risley*, 10 Wall. 91; *Halsey* v. *McCormick*, 18 N. Y. 147; *Mulry* v. *Norton*, 100 N. Y. 424; *Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *Camden & Atlantic Land Co.* v. *Lippincott*, 16 Vroom (45 N. J. Law), 405.

The accretion set forth in the bill is alleged to have taken place between 1853 and 1870; and it is not alleged that the sudden change in the course of the river in 1877 caused any accretion. There is no suggestion in the bill that the land made by the accretion can be identified as having been previously the land of any particular person. There can be no identification unless there is a sudden change, and that is the very opposite of an imperceptible accretion.

We come now to consider the question of what passed by the description in the patent of the land as lot 4, containing 37.24 acres, according to the official plat of the survey of the land, returned to the General Land Office by the surveyor general.

The bill alleges that in 1851, when the township was surveyed, the meander line of the river, as marked on the plat, ran along the bank of the river, and that at the time of the entry in 1853 the meander line of the left bank of the river was the same, or nearly the same, as that shown by the field-notes and on the plat made, returned and approved in 1851. On these facts it is contended for the defendant that the title to any new land which may have been made between 1851 and 1853, by accretion, did not pass to the patentee by the grant of lot 4 in the patent, but remained in the United States. The plaintiff, on the other hand, contends that the description in the patent of the land as lot 4 in effect made the river the boundary on the north, and passed the title of the United States to any new land that might have been formed before that time.

The bill states that the register's certificate and the patent described the land as lot 4, in fractional section 21, in township 75 north, range 44 west, of the fifth principal meridian, containing 37.24 acres, according to the official plat of the survey of said land, returned to the General Land Office by the surveyor general. That plat, of which a copy is annexed to the bill and marked Exhibit A, shows the Missouri River as the north boundary of lot 4, and that lot is marked on the plat as containing 37.24 acres.

It is a familiar rule of law, that, where a plat is referred to in a deed as containing a description of land, the courses, dis-

tances, and other particulars appearing upon the plat are to be as much regarded, in ascertaining the true description of the land and the intent of the parties, as if they had been expressly enumerated in the deed. *Fox* v. *Union Sugar Refinery*, 109 Mass. 292. This rule is applicable to government lands bounded by the Missouri River, as the same are surveyed and platted under the acts of Congress; and the patent passed the title of the United States to lot 4, not only as it was at the time of the survey in 1851, but as it was at the date of the patent in 1855, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of the patent.

No different rule is established by the acts of Congress which provide for the survey and sale of the public lands. The provisions found in section 2395 *et seq.* of the Revised Statutes, in regard to the survey of the public lands, are reënactments of statutes passed in 1796, 1800, 1805, 1820 and 1832. According to these provisions, section 21 being a fractional section, because the river cut through it on its north side, the east and west side lines of lot 4 were to be run north to the river. No provision was made for running the north boundary line of lot 4, but the river formed such north boundary without the running of any line there. The statute provided, that where the course of a navigable river rendered it impracticable to form a full township of six miles square, and in those portions of fractional townships where no opposite corresponding corners could be fixed, to which to run straight lines from established corners, the boundary lines should be ascertained by running from the established corners, due north and south or east and west lines, as the case might be, to the water course, Indian boundary line, or other external boundary of such fractional township.

In the present case, the plat was made in accordance with the statute, showing the river as the northern boundary of fractional section 21 and of lot 4 therein; and, as the patent referred to the official plat of the survey, and thus made that a part of the description of lot 4, that description made the river the boundary of lot 4 on the north.

In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, this court said: "Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction, subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field-notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary."

We are, therefore, of opinion, that the patent of June 15, 1855, which described the land conveyed as lot 4, according to the official plat of the survey, of which a copy is annexed to the bill, marked Exhibit A, conveyed to the patentee the title to all accretion which had been formed up to that date.

The case of *Jones* v. *Johnston*, 18 How. 150, is cited by the defendant as holding that a grantee can acquire by his deed only the land described in it by metes and bounds, and cannot acquire, by way of appurtenance, land outside of such description. But that case holds that a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object, such as a street or a wall; and it justifies the view announced by the Circuit Court in its opinion, that where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line. See, also, *Lamb* v. *Rickets*, 11 Ohio, 311; *Giraud's Lessee* v. *Hughes*, 1 G. & J. 249; *Kraut* v. *Crawford*, 18 Iowa, 549.

These views result in the conclusion, that the side lines of lot 4 are to be extended to the river not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent.

Opinion of the Court.

All the grantors in the deeds made subsequently to the patent, including the patentee, described the land in their successive deeds as lot 4. It is contended by the defendant, that this description conveys the land as it was at the date of the entry, or, at most, at the date of the patent; that as, from the allegations in the bill, it must be intended that some accretion was formed between July 14, 1856, the date of the deed by the patentee, and September 21, 1857, the date of the deed by Joseph I. Town to McCoid, the description of the land as lot 4 in the latter deed was not adequate to pass to the grantee the new land, and, therefore, all the land which was formed afterwards belonged to Still and Joseph I. Town, and not to McCoid; also, that if, in point of fact, there was no accretion between July, 1856, and September, 1857, there must have been accretion subsequently, while some of the successive grantees held the title prior to 1870.

But we think that in all the deeds the accretion passed by the description of the land as lot 4. In making every deed the grantor described the land simply as lot 4, and did not, by his deed, nor does it appear that he has since or otherwise, set up any claim to any accretion. It must be held, therefore, that each grantor, by his deed, conveyed all claim not only to what was originally lot 4, but to all accretion thereto. When McCoid, in 1854, conveyed his interest in the premises by the description of lot 4, as he had taken a deed of the undivided half of the premises by the same description from Joseph I. Town, in September, 1857, and had title thereby up to the river, his north line was the river, which was gradually adding land to his land. How much was added during the time he owned his undivided half he could not tell, and he conveyed his interest to Coleman without any reservation. The same is the case with each successive grantor, and each must be held to have passed by his deed his title to all the land up to the river, as the river was at the date of his deed. When each successive owner took his title, lot 4 was a water lot, having the rights of wharfage, landing and accretion; and although new land was formed during his ownership, yet when he conveyed the premises he conveyed them by the same

description by which he had received the valuable rights referred to.

The decree of the Circuit Court is *Affirmed.*

MR. JUSTICE MILLER did not take any part in the decision of this case.

HILL *v.* MEMPHIS.

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

No. 68. Argued November 6, 1889. — Decided March 10, 1890.

A power conferred by statute on a municipal corporation to subscribe for stock in a railway corporation does not include the power to create a debt, and to issue negotiable bonds representing it, in order to pay for that subscription: and this doctrine prevails in Missouri.

All grants of power to a municipal corporation to subscribe for stock in railways are to be construed strictly and not to be extended beyond the term of the statute.

The provisions in the general railroad law of Missouri, which went into effect June 1, 1866, respecting the loan of municipal credit to a railroad company, and of the act of the State of March 24, 1868, respecting the funding of the debts of municipalities, are to be construed in subordination to the provision of the constitution of the State then in force, prohibiting the legislature from authorizing any town to loan its credit to any corporation, except with the assent of two-thirds of the qualified voters, at a regular or special election.

THIS was an action against the City of Memphis, a municipal corporation of Missouri, alleged to have been known and designated on the first day of March, 1871, as the town of Memphis, and styled the Inhabitants of the Town of Memphis. It was brought to recover the amount of one hundred and thirty-eight coupons, each for eighty dollars, detached from certain railroad bonds purporting to have been issued by that town. These bonds, except in their number, were in the following form:

Statement of the Case.

"Number 4. UNITED STATES OF AMERICA. Dollars 1000.

"Eight per cent railroad bond. Town of Memphis, county of Scotland. Twenty years.

"Know all men by these presents that the town of Memphis, in the county of Scotland, in the State of Missouri, acknowledges itself indebted to the Missouri, Iowa and Nebraska Railway Company, a corporation existing under and by virtue of the laws of the States of Missouri and Iowa, formed by a consolidation of the Alexandria and Nebraska City Railroad Company (formerly Alexandria and Bloomfield Railroad Company), of the State of Missouri, and the Iowa Southern Railway Company, of the State of Iowa, in the sum of one thousand dollars, which sum the said town hereby promises to pay to the said Missouri, Iowa and Nebraska Railway Company, or bearer, at the Farmers' Loan and Trust Company in New York, on the first day of March, A.D. 1891, with interest thereon from the first day of March, 1871, at the rate of eight per cent per annum, which interest shall be payable annually, in the city of New York, on the first day of March in each year, as the same shall become due, on the presentation of the coupons hereto annexed. This bond being issued under and pursuant to an order of the board of trustees of the town of Memphis, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the State of Missouri, entitled 'An act to incorporate the Alexandria and Bloomfield Railroad Company, approved February 9, 1857.' In testimony whereof the said town of Memphis has executed this bond by the chairman of the board of trustees, signing his name thereto, and the clerk of said board of trustees under the order thereof attesting the same and affixing thereto the seal of said board. Thus done at the town of Memphis, in the county of Scotland, in the State of Missouri, this first day of March, A.D. 1871.

"[Seal. Town of Memphis, Scotland County, Missouri.]

"H. H. BYRNE,

"*Chairman of the Board of Trustees of the Town of Memphis.*

"Attest: WILLIAM L. KAYS, *Clerk.*"

The coupons, excepting in their number and dates, were in the following form:

"*Railroad Bond Coupon.* 80.

"MEMPHIS, MO., *March* 1, 1871.

"The town of Memphis, State of Missouri, will pay to the bearer on March 1, 1885, at the Farmers' Loan & Trust Company, in New York, eighty dollars, being *one year's interest* on Bond No. 4, for $1000.

"H. H. BYRNE, *Chairman.*"

The bond, on its face, purported to have been issued on the 1st day of March, 1871, by order of the board of trustees of the town of Memphis, for subscription to the stock of the Missouri, Iowa and Nebraska Railway Company, as authorized by an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved February 9, 1857. That act provided that the company should in all things be subject to the same restrictions, and be entitled to all the privileges, rights and immunities which were granted to the North Missouri Railroad Company by its act of incorporation, so far as the same were applicable, as fully and completely as if they were thereby reënacted. The fourteenth section of this latter act was as follows:

"SEC. 14. It shall be lawful for the county court of any county, in which any part of the route of the said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper measures to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; and (any) incorporated city, town, or incorporated company may subscribe to the stock to said railroad company, and appoint an agent to represent its interests, give its vote, and receive its demands (dividends), and may take proper steps

to guard and protect the interests in (of) such city, town, or corporation."

The plaintiff also relied as authority for issuing the bonds, though not recited in them, upon section 17 of the General Railroad Law of Missouri, which went into effect August 1, 1866. That section is as follows: "SEC. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city, or town in, or loan the credit thereof to, any railroad duly organized under this or any other law of the State *provided* that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription." Gen. Stat. Missouri (1866), 338. He also relied upon the act of March 24, 1868, entitled "An act to enable counties, cities and incorporated towns to fund their respective debts," which is as follows:

"*Be it enacted by the General Assembly of the State of Missouri, as follows:* SECTION 1. That the various counties of this State be, and they are hereby, authorized to fund any and all debts they may owe, and for that purpose may issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached; and all counties, cities or towns in this State which have or shall hereafter subscribe for the capital stock of any railroad company may, in payment of such subscriptions, issue bonds bearing interest at not more than ten per centum per annum, payable semi-annually, with interest coupons attached. The bonds authorized by this act shall be payable not more than twenty years from date thereof.

"This act to take effect from and after its passage.

"Approved March 24, 1868." Laws of 1868, 46.

Article 11 of the constitution of Missouri, which went into effect in 1865, declares that "the general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corpo-

ration, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therefor, shall assent thereto."

The town of Memphis was incorporated by act of the legislature of Missouri, November 4, 1857, but that act was repealed on the 31st of December, 1859. An attempt was made to show that the people of the same area of country, in the following year, organized themselves into a municipality under the general law of the State, by the name of "The inhabitants of the town of Memphis," and so continued until 1880; that by its trustees an election was ordered to determine whether it should subscribe $30,000 to the stock of the railroad in question; that such election was accordingly had; that the subscription was voted by a two-thirds vote; and that in pursuance of it the stock was subscribed and bonds of the town were issued. The evidence on these points was very unsatisfactory, but in the view taken of the want of power in the town to issue the bonds, it becomes immaterial. The court instructed the jury that on the face of the record produced before them they must find for the defendant, as no authority was shown, on the part either of the town or city of Memphis, to issue the bonds in question. The jury accordingly found for the defendant, upon which judgment was entered, to review which the case was brought here on writ of error. 23 Fed. Rep. 872.

Mr. John H. Overall and *Mr. F. T. Hughes* for plaintiff in error.

Mr. Henry A. Cunningham for defendant in error.

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

The act of the legislature of Missouri of February 9, 1857, to incorporate the Alexandria and Bloomfield Railroad Company, gives no authority to any town of the State to issue bonds for stock subscribed by it. The fourteenth section, which is the one upon which the plaintiff relies, empowers the county court of a county in which any part of the route of a

railroad may lie to subscribe to stock of the company, to invest its funds in that stock, to issue the bonds of the county to raise the funds to pay for the stock thus subscribed, to take proper steps to protect the interest and credit of the county and to appoint an agent to represent the county and receive its dividends. The same section also empowers any incorporated city or town to subscribe for stock of such railroad and to appoint an agent to represent its interest, give its votes and receive its dividends, and take proper steps to guard and protect its interest. But it does not authorize the town to issue any bonds for the stock thus subscribed. It leaves the town to provide for the payment of the stock in the ordinary way in which debts contracted by a town are met, that is, by funds arising from taxation. It is well settled that the power to subscribe for stock does not of itself include the power to issue bonds of a town in payment of it. All grants of power in such cases to subscribe for stock in railways are to be construed strictly and not to be extended beyond the terms of the law. Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such paper in the hands of innocent parties for value cannot be enforced without reference to any defence on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidences of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court.

In *Police Jury* v. *Britton*, 15 Wall. 566, 571, 572, it was held that the trustees or representative officers of a parish, county, or other local jurisidiction in Louisiana, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, had no implied authority to issue negotiable securities for the purpose of raising money or funding a previous debt. Whilst the court did not insist that express authority is in all cases required for municipal bodies to issue negotiable paper, as such power may be implied from other express powers, it held that such implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. "It is one thing," said the court, "for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated."

In *Mayor* v. *Ray*, 19 Wall. 468, 475, the power of municipal bodies to issue negotiable paper for debts contracted by it was largely considered, and from the nature and the purposes of such municipalities it was held that they could not make such paper in the absence of express authorization. After speaking of municipal corporations as subordinate branches of the domestic government of a State, instituted for public purposes only, having none of the peculiar qualities or characteristics of trading corporations created for purposes of private gain, except that of acting in a corporate capacity, the court said: "Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying

out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation." And again, p. 477: "If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised."

In *Claiborne County* v. *Brooks*, 111 U. S. 400, 406, this doctrine is reiterated and reaffirmed with emphasis. Said the court: "Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local policy and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." See also *Kelley* v. *Milan*, 127 U. S. 139; *Young* v. *Clarendon Township*, 132 U. S. 340, 347.

The same doctrine prevails in Missouri. It follows that there was no authority in the town of Memphis to issue the bonds from which the coupons in suit are detached, under the law referred to in the bonds as authorizing them.

Nor can any authority for the issue of the bonds be derived from section 17 of the General Railroad Law of the State, which went into effect June 1, 1866. Though that section in terms empowers the trustees of an incorporated town to loan its credit to any railroad company organized under a law of the State, and the issue of its bonds to such company may be considered as a loan of its credit, it must be construed in subordination to the constitution of the State which took effect the previous year, and prohibits the legislature from authorizing any town to loan its credit to any corporation unless two-thirds of the qualified voters of the town, at a regular or special election, shall assent thereto. No assent was ever

given by the voters of the town of Memphis to the issue in 1871 of its bonds to the Missouri, Iowa and Nebraska Railway Company, but only to its subscription to stock in that company; and no subsequent loan of credit by the issue of bonds to the company could be authorized by the legislature except under the restrictions of the constitution.

The same answer may be made to the claim of authority under the act of the State of March 24, 1868, enabling counties, cities and towns to fund their debts. The constitution of the State controls its construction and prevents the issue of any bonds by a town of the State without the previous assent of two-thirds of its voters expressed at an election, general or special, called for that purpose.

Judgment affirmed.

TRACY *v.* TUFFLY.

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

No. 134. Argued November 22, 25, 1889. — Decided March 3, 1890.

The third section of the act of the legislature of Texas entitled "An act in relation to assignments for the benefit of creditors, and to regulate the same and the proceedings thereunder," passed March 25, 1879, provides that "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." That section was amended by an act passed April 7, 1883, so as to provide that "such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due, and allowed in his favor as a valid claim against the estate of such debtor;" *Held*, that this legislation applied to limited partnerships formed under chapter 68 of the Revised Civil Statutes of Texas, adopted by an act passed March 17, 1879.

An assignment by a limited partnership consisting of one general partner

Statement of the Case.

and one special partner, for the benefit of its creditors, may be executed by the general partner; and such assignment need not embrace the individual property of the special partner.

An assignment by a limited partnership for the benefit of its creditors is not void because the verified schedule attached to the assignment embraces a debt of the special partner, which cannot, under the statute, be paid ratably with the claims of other creditors.

The only effect of the failure of a limited partnership to state fully in the published notice the terms of the partnership is that the partnership shall be deemed general.

Circumstances stated under which creditors may be estopped to deny the existence of a partnership as a limited partnership.

While repeals of statutes by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject which are to govern.

THE case, as stated by the court, was as follows:

The principal questions in this case arise under the laws of Texas relating to limited partnerships, and to assignments for the benefit of creditors. Before examining these laws, the facts out of which this litigation arises will be stated.

Prior to March 26, 1884, R. W. McLin and W. T. Tuffly were partners doing business at Houston, Texas, under the name of R. W. McLin & Co. On that day McLin died, his widow and two minor children surviving him. No administration was had upon his estate. At the time of his death the firm was largely indebted to various individuals and partnerships. Among the latter were Morrison, Herriman & Co., Dunham, Buckley & Co., and W. H. Lyon & Co., who are plaintiffs in error. After consultation with the agent of many of the creditors — the firms just named among the number — the surviving partner and the widow determined to form a limited partnership under the name of "W. T. Tuffly," which should assume the debts of R. W. McLin & Co. in consideration of the release, by creditors of the old firm, of the estate of R. W. McLin from liability for their debts. From a trial balance of the accounts of the old firm which Tuffly caused to be made, it appeared that after the payment of its debts the share belonging to R. W. McLin's estate was $6419.36. Mrs.

Statement of the Case.

McLin having sold and transferred to Tuffly all the goods and merchandise belonging to the old firm, they executed the following certificate of the formation of a special partnership:

"STATE OF TEXAS, *County of Harris:*

"We, W. T. Tuffly and Mrs. Christine E. McLin, hereby certify that we have formed a copartnership, under the firm name of W. T. Tuffly, under which firm name the business of such copartnership shall be conducted.

"The general nature of the business intended to be transacted is a general retail and wholesale, if they see proper, fancy and staple dry-goods and notion establishment in the city of Houston, Texas. W. T. Tuffly is and will be the general partner of such partnership, resident of the city of Houston, Texas, and Mrs. Christine E. McLin is and will be the special partner of such partnership, whose residence is also in said city of Houston, Texas.

"The said Mrs. Christine E. McLin has contributed the sum of six thousand four hundred and nineteen and 36-100 dollars to the common stock. The said partnership is to commence on the 16th day of April, 1884, and to continue for the space of two years, to end on the 16th day of April, 1886.

"W. T. TUFFLY.
"CHRISTINE E. MCLIN."

This certificate was duly acknowledged by Tuffly and Mrs. McLin on the day of its date, before a notary public of the county, who certified the fact under the seal of his office. And on the same day, as appears from the official certificate of that officer, W. T. Tuffly, as the general partner named in the certificate of partnership, certified, under oath, that Christine E. McLin, the special partner therein, "has contributed to the common stock of said partnership the sum specified in said certificate, and the said sum has in good faith actually been paid in cash." The record also contains the certificate of the county clerk, under the seal of his office, to the effect that the certificate of partnership, with the certificate of its authentication, was filed for registration in his office on the 25th day of

April, 1884, and was duly recorded on the 26th day of May of the same year.

In conformity with the direction of the clerk of the county court, the following notice was published in a designated newspaper for six successive weeks from April 26, 1884: "The undersigned give notice that they have formed a co-partnership under the firm-name of W. T. Tuffly, having the following terms, as will appear by their executed and recorded certificate: W. T. Tuffly is the general partner; Mrs. Christine E. McLin is the special partner, and has contributed to the common stock the sum of six thousand four hundred and nineteen 36-100 dollars. W. T. Tuffly. Christine E. McLin."

On the day of the formation of this partnership, April 24, 1884, numerous creditors of R. W. McLin & Co. — among the number, Morrison, Herriman & Co., Dunham Buckley & Co., W. H. Lyons & Co. — executed a written release in these words: "The undersigned, creditors of the late firm of R. W. McLin & Company, in consideration of the assumption of all the indebtedness of said late firm by the firm of W. T. Tuffly, composed of W. T. Tuffly, general, and Christine E. McLin, special partner, as appears by the certificates by them signed, hereby release the estate of R. W. McLin, deceased, from any and all liability on account of the obligations of said firm of R. W. McLin & Co., either by note or open account or otherwise."

W. T. Tuffly entered upon the business contemplated by the partnership between himself, as general partner, and Mrs. McLin, as special partner, and continued in its prosecution until the 23d of March, 1885, when he executed a writing of assignment, upon the construction and legal effect of which the decision of some of the questions in this case depends. It is in these words:

"State of Texas, *County of Harris:*

"Whereas the firm of W. T. Tuffly, composed of W. T. Tuffly, the general partner, and C. E. McLin, as special partner, finding it impossible to pay its debts as they mature, and being desirous to have a distribution of all the property of said firm

and the property of the said W. T. Tuffly, partnership and individual, and wishing to avail himself of the provisions of the general assignment law in such cases made and provided: Now, therefore, in consideration of the premises and one dollar to me in hand paid, I, W. T. Tuffly, hereby assign and convey and deliver possession of all and singular my property and effects, of whatever name and nature, both personal and real, which I own as copartner and individually, and intend to include all property of which or in which I have any interest whatever, wherever the same may be, to Louis Tuffly, as assignee, for the purposes aforesaid, taking possession of the same and sell the same, collect and convert the same, and when so sold, collected and converted, to appropriate the same ratably or in full payment, as the case may be, of all my debts and the debts of the firm of W. T. Tuffly, said assignee to proceed under the law aforesaid. This assignment is intended for the benefit of all such of my creditors only as will consent to accept their proportional share of said property and estate so hereby conveyed, and discharge me, as aforesaid, from their respective claims, said assignee to take lawful compensation for his services herein and expenses and counsel fees necessary to aid him and enable him to carry out the purposes of this conveyance.

"Schedules are hereto attached, and made as particular as I can do at this time, but in any particular where they may be incorrect or insufficient in detail they will be corrected by me.

"In witness whereof I hereunto set my hand, at Houston, this March 23d, 1885.

"W. T. Tuffly."

That deed of assignment was duly acknowledged, and to it were attached exhibits duly verified by the oath of W. T. Tuffly. These exhibits consisted of an inventory of the estate assigned and a schedule of the debts. In the latter appears a claim of Mrs. McLin of "$7798, notes, borrowed money." Louis Tuffly, the assignee, endorsed his acceptance of the trust on the back of the deed, and gave bond as assignee, which was approved by the judge of the 11th Judicial District of Texas, March 23, 1885, on which day the deed of assignment

and bond were filed for record in the proper office. The assignee took immediate possession of the stock of goods, wares and merchandise, belonging to the firm of "W. T. Tuffly," also of the furniture, shelves, counters and stationery in the store-house. The assignment was accepted by creditors (excluding Mrs. McLin) whose debts aggregated $7116.26. It was not accepted by Morrison, Herriman & Co., Dunham, Buckley & Co., or W. H. Lyon & Co. The assignee remained in possession of the property until March 31, 1885, on which day, under attachments sued out from the Circuit Court of the United States for the Eastern District of Texas, by the three firms just named, against the property of W. T. Tuffly, they were levied upon and taken by Tracy, marshal of the United States for that district. The latter refused to make a levy, and did not levy, until indemnifying bonds were executed in behalf of the attaching creditors; the latter knowing, when they sued out the attachments, that the property was in the possession of the defendant in error in virtue of the above deed of assignment.

Under the order of the court the attached property was sold and the proceeds of sale were brought into court and paid into its registry.

The present suit was brought by the assignee, in one of the courts of the State of Texas, against the marshal and the sureties on his official bond, the breach alleged being the illegal and wrongful seizure of the property in question, which was alleged to be of the value of $29,972.22. It was removed, upon the petition of the defendants, into the court below, upon the ground that their defence arose under and involved the construction of the Constitution and laws of the United States. *Bachrack* v. *Norton*, 132 U. S. 337. The plaintiffs in the attachment suits were, upon their motion, made parties defendant, as were, also, the various parties who executed indemnifying bonds to the marshal.

The result of a trial before a jury was a verdict and judgment for $17,000 against Tracy and the sureties on his official bond, and against the attaching creditors. There was, also, a verdict and judgment in favor of Tracy, upon the several in-

demnifying bonds given to him by those creditors, for the following amounts: $2500 against Dunham, Buckley & Co. and their sureties; $2600 against W. H. Lyon & Co. and their sureties; and $17,000 against Morrison, Herriman & Co. and their sureties. A motion for a new trial having been overruled, the defendants have brought the case here, and assign various errors of law as having been committed by the court below in its instructions to the jury, and in its refusal to grant instructions asked by the defendants.

The statutes of Texas relating to limited partnerships, and to assignments for the benefit of creditors are as follows:

By the Revised Civil Statutes of that State, which went into effect on the 1st day of September, 1879, it is provided that limited partnerships for the transaction of any mercantile, mechanical, manufacturing or other business, except banking or insurance, may be formed by two or more persons, with the rights and powers, upon the terms and subject to the conditions and liabilities, prescribed in chapter 68 of that revision.

Such partnerships may consist of one or more persons as general partners, and of one or more persons as special partners, the latter contributing in actual cash payments a specific sum to the common stock, but without liability for the debts of the partnership, beyond the fund so contributed by him or them to the capital. Art. 3443. The general partners only are authorized to transact business and sign for the partnership and to bind the same. Art. 3444. Persons desirous of forming such partnership are required to make and severally sign a certificate, containing: "1. The name or firm under which the partnership is to be conducted; 2. The general nature of the business to be transacted; 3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence; 4. The amount of capital which each special partner shall have contributed to the common stock; 5. The period at which the partnership is to commence and the period at which it is to terminate." Art. 3445.

The certificate must be acknowledged before, and certified by, an officer authorized to take acknowledgments of convey-

ances of land, be filed in the office of the clerk of the county court of every county in which the partnership shall have places of business, and be recorded at large in each of such counties, in a book to be kept for that purpose, open to public inspection. With the original certificate and the evidence of its acknowledgment must be filed an affidavit of one or more of the general partners, stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash. Arts. 3446, 3447, 3448. "No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed as above directed; and if any false statement be made in such certificate or affidavit all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." Art. 3449. "The partners shall publish the terms of the partnership, when registered, for at least six weeks immediately after such registry, in such newspapers as shall be designated by the clerk in whose office such registry shall be made, and if such publication be not made the partnership shall be deemed general." Art. 3450. The affidavit of the publication, by the publisher of the newspapers in which the notice is published, filed with the clerk, is evidence of the facts therein contained. Art. 3451. "Every alteration which shall be made in the names of the partners, in the nature of the business or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after any such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last article." Art. 3453. "The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word 'company,' or any other general term; and if the name of any special partner be used in such firm, with his privity, he shall be deemed a general partner." Art. 3454. "Suits in relation to

the business of the partnership may be brought and conducted by and against the general partners in the same manner as if there were no special partners." Art 3455. "No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the character of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if, after the payment of such interest, any profit shall remain to be divided he may also receive his portion of such profits." Art. 3456. "If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of the capital with interest." Art. 3457.

Article 3460, which is the subject of much discussion by counsel, is in these words: "Every sale, assignment or transfer of any property or effects of the partnership made by such partnership when insolvent or in contemplation of insolvency, or after, or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership; and every judgment confessed, lien created or security given by any such partnership under the like circumstances and with like intent shall be void as against the creditors of such partnership." Article 3463 is as follows: "In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the partnership shall be satisfied."

The revision of 1879 was adopted by an act passed March 17, 1879, the latter act going into effect July 24, 1879. It should be here stated that chapter 68 of the Revised Statutes is a reproduction, without material change, of the provisions of the act of May 12, 1846, entitled "An act for the regulation of limited partnerships." Laws of Texas, 1846, 279.

Statement of the Case.

On the 24th of March, 1879, the legislature passed an act, entitled "An act in relation to assignments for the benefit of creditors, and to regulate the same, and the proceedings thereunder." Gen. Laws, Texas, 1879, 57. The first section of that act provides: "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 so construed to pass all such estate, whether specified therein or not, and every assignment shall be proved or acknowledged and certified and recorded in the same manner as is provided by law in conveyances of real estate or other property." The second section requires the debtor to annex to the assignment an inventory showing a full and true account of all his creditors, their place of residence, the sum due each, the nature and consideration of each debt, any existing judgment, mortgage, or security for such debt, and the character of the debtor's estate of every kind (excepting such as the law exempts from execution) with the incumbrances thereon. To this schedule must be annexed the affidavit of the debtor that it is a just and true account to the best of his knowledge and belief.

The third section, upon which the assignment involved in this suit rests, is in these words:

"SECTION 3. 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." Gen. Laws, Texas, 1879, 57, 58.

The ninth section declares that "all property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the intent or design to defeat, delay or defraud creditors, or to give preference to one creditor over another, shall pass to the assignee by the assignment, notwithstanding such transfer."

The remaining sections of the act prescribe the duties of the assignee, and regulate the administration of the trust.

The third section of the act of 1879 was amended by an act approved April 7, 1883, so as to provide that "such debtor shall not be discharged from liabilities to a creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor." Gen. Laws, Texas, 1883, 46.

Mr. George Hoadly (with whom was *Mr. Frank S. Burke* on the brief) for plaintiffs in error.

I. The defendant in error, Louis Tuffly, is, I respectfully submit, in this dilemma. He brings this suit as assignee of W. T. Tuffly, a special partnership composed of W. T. Tuffly, general partner, and Christine E. McLin, special partner, but he is in this dilemma. If he assert that he is the assignee of a special partnership, then the assignment is void under section 3460 of the Revised Statutes of Texas. If he claim as assignee of a general partnership, he is confronted with these difficulties: *first*, that only one of the partners executed the assignment, the other being enrolled as a creditor to a large amount; and *secondly*, that the rulings of the court proceeded upon the theory that the partnership was special, not general, and cannot be sustained, if the conclusion be reached that this was really a general partnership.

II. The question of the legality of the assignment was presented by the general demurrer. The assignment is incorporated into the petition, and is upon its face illegal. The demurrer should have been sustained on the ground that the plaintiff counted on an assignment, which was expressly forbidden by the laws of the State of Texas. It admits the in-

solvency of the firm, that is, that it is unable to pay its debts in the ordinary course of business. *Toof* v. *Martin*, 13 Wall. 40; *Buchanan* v. *Smith*, 16 Wall. 277. It provides for a preference of a part of the creditors (those who shall become parties to it) over the others in the distribution of the assets. This is expressly forbidden by section 3460 of the Revised Statutes of Texas relating to limited partnerships, which is not repealed or affected by the act of March 24, 1879. The former relates to limited partnerships; the latter to general partnerships.

It may or may not be reasonable and just to require the creditors of an individual or of a general commercial partnership, for whose benefit an assignment has been made, to elect between taking the benefits of the assignment with release of debtor, or retaining the liability of the debtor and giving up all claim upon the assigned fund. Clearly, this would not be just where no such choice is given to the creditor. To render this fair to the creditor, he must have the right to elect between the two resources; either to take his share in the fund, or to hold the liability of the debtor. In case of a limited partnership he has no such alternative, for, in the *first* place, he originally trusted, so far as the special partner is concerned, only the fund. He never has had and cannot retain the liability of the special partner. His alternative is not between a share in the fund and retaining the liability of the partners, but between a share in the fund which has already been pledged to him, and retaining the liability, not of the partners, but of the general partner only. For this reason it may well be supposed that when the legislature of Texas undertook to pass a general assignment law, they did not provide in express words, or otherwise, for the case of limited partnership. This had already been done, and, therefore, needed words of express amendment or repeal, if it were their intention to make a change. As they did not intend to make a change, they used no such language.

The act of March 24, 1879, contains no repealing clause. It is true it was passed on the 24th of March, 1879, while the Revised Statutes were reënacted on the 21st of February, 1879,

but, as there are no repealing words in it of any kind, shape or form whatever, the repeal of section 3460 is, if it be such, by implication only. But repeals by implication are not favored. *Harford* v. *United States*, 8 Cranch, 109; *Wood* v. *United States*, 16 Pet. 342, 362; *McCool* v. *Smith*, 1 Black, 459; *Ex parte Yerger*, 8 Wall. 85, 105; *State* v. *Stoll*, 17 Wall. 425, 430; *Arthur* v. *Homer*, 96 U. S. 137, 140; *Ex parte Crow Dog*, 109 U. S. 556, 570; *Chew Heong* v. *United States*, 112 U. S. 536, 550.

Both laws took effect *eo instanti*, so that the act of March 24 could not have the effect to repeal the act of February 21 of the same year. Both laws went into force on the 24th day of July. On that day, at the same moment, they became laws of the State of Texas. The mandate of the State of Texas, taking effect, and therefore speaking legislatively, not from the date when it was passed by the legislature, but from the date when, under the constitution, it took effect, became law *eo instanti* with the act passed March 24, 1879. The two therefore are not in conflict; cannot be in conflict. Each is in force according to the fitness of its subject matter: one as regulating limited partnerships only; the other as applicable to assignments made by individuals, commercial partnerships and corporations.

III. But if otherwise, and this were a general partnership, W. T. Tuffly had no authority to make this assignment.

His sister, Mrs. Christine E. McLin, is not shown to have been absent or incapable of action, and the assignment itself, being an act out of the common course, not one for which the firm was formed, was not within the implied powers granted to Tuffly, as it certainly was not within the express powers which the articles of copartnership confer. *Moore* v. *Steele*, 67 Texas, 435; *Fore* v. *Hitson*, 70 Texas, 517; *In re Lawrence*, 5 Fed. Rep. 349; *Bank* v. *Carrollton Railroad*, 11 Wall. 624.

IV. The assignment did not purport to convey the firm property or the individual property of Mrs. McLin. Such assignment, made by an ordinary commercial partnership, and not including all the property of the assignors, both firm and

individual, was held by the Supreme Court of Texas to be void in *Donoho* v. *Fish*, 58 Texas, 164. See, also, *Coffin* v. *Douglass*, 61 Texas, 406.

V. The special partnership was invalid under the laws of Texas. Article 3442 of the Revised Statutes of Texas requires the special partner's contribution to be "in actual cash payments." In this case this was manifestly not complied with. The contribution of Mrs. McLin was simply of the amount which her deceased husband had owned in the copartnership. The court was requested to charge upon this subject, but refused to give the charge, and the defendants excepted. This charge is long, but it includes nothing which breaks its force or would justify the claim that any part of it might be properly refused because too extensive, and not merely limited to the point now in question. [It will be found in the margin.[1]]

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[1] "It is claimed by the plaintiff, Louis Tuffly, that the copartnership or the firm of W. T. Tuffly was a limited partnership composed of W. T. Tuffly as general partner, and Christine E. McLin as special partner. It is claimed by defendants that Tuffly and said Christine E. McLin were both general partners, and that said Christine E. McLin was a general and not a special partner, for the reason, among others alleged by them, that she did not comply with the requirements of the law governing limited partnerships.

"On this question you are instructed that limited partnerships may consist of one or more persons who shall be called the general partners, and of one or more persons who shall contribute in actual cash payments a specific sum as capital to the common stock, who shall be called special partners. They are also required to make and severally sign a certificate, which, among other things, shall contain the amount of capital which each special partner shall have contributed to the common stock.

"This certificate, after having been acknowledged by the parties in the same manner as conveyances of land are acknowledged, shall be filed in the office of the clerk of the county court of the county in which the principal place of business of the partnership shall be situated. At or before the time of filing this certificate the sum specified in the certificate to have been contributed by the special partner in the common stock must have been actually and in good faith paid in cash; and if this is not so actually and in good faith paid in cash at or before said filing, then all persons interested in such partnership shall be liable for all the engagements thereof as general partners, and no payment into the fund thereafter by the special partner can relieve him from the consequences of failure to pay within the

Counsel for Defendant in Error.

The last sentence of this charge is justified and required by *Donoho* v. *Fish*, 58 Texas, 164, *Coffin* v. *Douglass*, 61 Texas, 406, and *Shoe Company* v. *Ferrell*, 68 Texas, 638.

VI. Other unlawful preferences were created by this assignment: (1) To Mrs. McLin for borrowed money, $7798; (2) If it is to be treated as an assignment by the special partnership and the individual jointly, it is a conveyance which makes hotch-potch of the partnership and individual property, and appropriates them ratably to the partnership and individual creditors, contrary to law. Such attempt is void. If successful it would establish preference of the individual creditors. But this would render the whole assignment void. *Converse* v. *McKee*, 14 Texas, 20; *Rogers* v. *Nichols*, 20 Texas, 719; *Warren* v. *Wallis*, 38 Texas, 225; *De Forest* v. *Miller*, 42 Texas, 34.

VII. The limited partnership was not perfected by publication according to law.

Mr. W. C. Oliver for defendant in error.

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time above specified; so also the sum to be contributed by the special partner must have been actually and in good faith paid in cash, and cannot be contributed in property of any kind, however valuable it may be. If the proof shows you that Mrs. McLin's deceased husband, R. W. McLin, had a net interest, at or about the time of his death, in the firm of R. W. McLin & Co., and that, in consideration of the arrangement by W. T. Tuffly for full settlement of all claims against the said firm of R. W. McLin & Co. and the obtaining of a release of the estate of R. W. McLin from liability on account of the same, assigned and transferred to W. T. Tuffly all the goods, wares, and merchandise and other properties of said firm, and that the interest so conveyed constituted her contribution to the common stock to make her a special partner, then you are instructed that this would not be such contribution of actual cash as the law requires or contemplates, no matter what the outward form of the transaction was, and in such case Mrs. McLin would have thereupon become a general partner and liable as such, and no advance, loan, or payment thereafter made by her to W. T. Tuffly or to the firm would change her status from that of a general partner, and if you so find, then you are instructed that it was essential to the validity of the assignment that she should have joined in it and conveyed to the assignee her individual property not exempt, and that as she did not do so the assignment would be illegal and void, and that your verdict should be for the defendants."

Opinion of the Court.

MR. JUSTICE HARLAN, after stating the case as above reported, delivered the opinion of the court.

1. We have seen that article 3460 of the Revised Statutes of Texas declares void, as against the creditors of a limited partnership, every sale, assignment or transfer of any of its property or effects, made when such partnership was insolvent or contemplated insolvency, and with the intent to give a preference of some over others of its creditors. The first proposition of the defendants is that the assignment to the plaintiff of March 23, 1885 — which was confessedly made by a partnership unable to meet its debts as they matured, and, therefore, insolvent, *Cunningham* v. *Norton*, 125 U. S. 77, 90 — was void, as giving a preference to consenting creditors over those who did not consent. This contention is based upon the assumption that the act of March 24, 1879, as amended by that of 1883, has no application to limited partnerships; in other words, insolvent individual debtors and insolvent general partnerships may, but insolvent limited partnerships cannot, assign their property for the benefit, primarily, of only such creditors as will consent to take their proportional share of the effects assigned, and discharge the assignor or assignors. The bare statement of this proposition suggests the inquiry, why should the legislature make any such discrimination against limited partnerships? The same considerations of public policy that require legislation under which an insolvent individual debtor and an insolvent general partnership may turn over their property to such creditors as will release their debts, would seem to have equal force in the case of limited partnerships that are insolvent or contemplate insolvency. Counsel for the defendants suggests that the reason for the discrimination — which, he insists, is made by the statutes of Texas — is, that the creditors of a limited partnership trust only the liability of the general partner, and the fund contributed by the special partner, and when they lose recourse upon that fund they have recourse only to the liability of the general partner. We do not perceive, in this statement of the relations between a limited partnership and its credi-

tors, any just ground upon which to rest the supposed discrimination.

The argument, that the statutes of 1879 and 1883 have no application to limited partnerships, is based upon these propositions: That those enactments do not, in terms, repeal or modify article 3460 of the Revised Civil Statutes; that repeals by implication merely are not favored; that article 3460 constitutes a part of a title in the revision, which relates — as did the act of 1846, from which it was taken — exclusively to limited partnerships; and as the recent statutes do not, in terms, refer to limited partnerships, the duty of the court is to so construe the earlier and later statutes as, if possible, to give full effect to each according to the reasonable import of its words; a result, it is contended, that cannot be attained, unless the acts of 1879 and 1883 are interpreted as not embracing assignments by limited partnerships.

We have not been referred to any decision of the Supreme Court of Texas sustaining this view, and we cannot adopt any such interpretation. The recent enactments cover, substantially, the whole subject of assignments by insolvent debtors for the benefit of their creditors. The first section of the act of 1879 provides, as we have seen, that every assignment by an insolvent debtor, for the benefit of his creditors, shall provide for the distribution of all his real and personal estate, other than that exempted from execution, among all of his creditors, and, however made or expressed, the assignment shall have the effect, and be construed, to pass all such estate. This accomplishes all and more than was accomplished by article 3460 of the Revised Statutes. Will it be contended that this section applies only to assignments by individual debtors, and by general partnerships, and not to assignments by limited partnerships? That section, in terms, embraces "every assignment" by insolvent debtors for the benefit of their creditors. And the third section, enabling the debtor to surrender his estate for the exclusive benefit of creditors who will take their proportional share, and discharge him, embraces the case of "any debtor" who is insolvent or contemplates insolvency. The object of the act of 1879 was to encourage

insolvent debtors to make an assignment of their property for the benefit of creditors. *Cunningham* v. *Norton*, 125 U. S. 77, 81. It establishes a complete system for the administration of the estates of insolvent debtors conveyed for the benefit of creditors; and the mere fact that it does not, in terms, modify article 3460 of the Revised Statutes, or the section of the same purport in the act of 1846, will not justify the courts in excepting from its operation the cases of debtors constituting a limited partnership, and including within its provisions, debtors constituting a general partnership. The special object of its third section was to open the way for the discharge of insolvent persons from their debts. Creditors who would not consent to their discharge were left to stand upon their rights, and take the chance of collecting their debts in full, if the debtor got upon his feet, and was fortunate enough to acquire other property. The statute is remedial in its character and should be liberally construed so as to give effect to the legislative will. And while it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern. *United States* v. *Tynen*, 11 Wall. 88, 95; *Cook County National Bank* v. *United States*, 107 U. S. 445, 451. We are of opinion, therefore, that in so far as article 3460 forbids a limited partnership, when it is insolvent or contemplates insolvency, from making an assignment of its property for the benefit only of such creditors as will accept their proportional share of the proceeds of the effects assigned, and discharge their claims — the share received being sufficient to pay one-third of the debts of the consenting creditors — it is modified by the act of 1879, as amended by that of 1883.

2. If in error upon this point, the defendants contend that Tuffly had no authority in his own name to execute an assignment of the firm's property for the benefit of creditors; it not appearing that Mrs. McLin was absent, or incapable of acting in the matter, and the assignment being out of the common

course. While there is some conflict in the adjudged cases as to the circumstances under which one partner may assign the entire effects of his firm for the benefit of creditors, the Supreme Court of Texas, in *Graves* v. *Hall*, 32 Texas, 665, sustained the authority of one partner to make, in good faith, in the name of his firm, an assignment of the partnership property for the benefit of creditors. Besides, under the law of that State, in the case of limited partnerships, the general partners only are authorized to transact business and sign for the partnership, and bind the same, and suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. Rev. Stats. Texas, §§ 3444, 3445.

3. It is also contended that the assignment does not purport to convey the firm property or the individual property of Mrs. McLin, and was, for that reason, void under the decisions in *Donoho* v. *Fish*, 58 Texas, 164, and *Coffin* v. *Douglass*, 61 Texas, 406. In those cases it was held that an assignment by partners which did not purport to pass title to all the property owned by the partnership, and by the members thereof in their separate rights, and not exempted from forced sale, could not be sustained as a valid assignment under the act of March 24, 1879, and would interpose no obstacle to creditors collecting their debts by the usual process.

We do not assent to the defendants' interpretation of the assignment. It is inaptly expressed, but was intended to convey, and does convey, to the assignee all of the effects of the firm of "W. T. Tuffly," as well as the individual property of W. T. Tuffly. There was, it is true, proof tending to show that Mrs. McLin had individual property not exempt from execution, which was not embraced in the assignment. But the cases of *Donoho* v. *Fish* and *Coffin* v. *Douglass*, were not cases of limited partnerships, and do not decide that an assignment under the act of 1879 must embrace the individual property of a special partner. The statute authorizing the formation of limited partnerships exempts a special partner from liability for the debts of the partnership beyond the fund contributed

by him to the capital. The assignment in question covers the interest of Mrs. McLin as special partner, and need not have conveyed her individual property, which could not have been taken for the debts of the firm.

4. It is contended that an unlawful preference was given by the assignment in this: That Mrs. McLin was named in the schedule attached to the assignment as a creditor to the extent of $7798 for borrowed money. This, it is claimed, makes the assignment void under the provision that "in case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the parties shall be satisfied." Texas Civil Statutes, Art. 3463. We are of opinion that a deed of assignment, under the Texas statute, is not void because the verified schedule annexed to it may embrace a debt that cannot be paid ratably with the claims of other creditors. In *Fant* v. *Elsbury*, 68 Texas, 1, 8, 6, it was held that an assignment which on its face preferred some creditors over others, in violation of the 18th section of the act of 1879, was not, therefore, void. The court said: "By the express terms of that section the attempted preference and not the assignment is void. The estate is still administered under the act, and is distributed among all the creditors in proportion to their respective claims, notwithstanding the attempted preference." Again: "All that is necessary is, that the assignment be made for the benefit of creditors by an insolvent, or one contemplating insolvency, and the statute dictates everything requisite to be performed in order that the property conveyed may be distributed according to its own provisions, whether the assignor has so requested or not. Should the assignor prescribe a course to be pursued by the trustees different from that directed by the statute, his wishes would not be respected." See, also, *McCart* v. *Maddox*, 68 Texas, 456, to the same general effect.

5. It is contended that the publication of the notice of the formation of the partnership between Tuffly and Mrs. McLin was so defective that the partnership did not come into legal existence as a limited partnership. The certificate of partner-

ship contained, substantially, all that was required by article 3445. It was duly verified by the general partner and was duly registered in the proper office. The required certificate having been made, acknowledged, filed and recorded, and the required affidavit having been filed, the limited partnership was, under article 3449, to be deemed as formed. But article 3450 requires that the partners shall publish the terms of the partnership or registry in such newspaper as shall be designated by the clerk in whose office the registry shall be made, and if such publication be not made, the partnership shall be deemed general. Now, the point is made that the "terms" of the partnership were not set forth in the newspaper notice, and, consequently, the partnership was to be deemed general, in which event no valid assignment could be made, unless Mrs. McLin joined in it with Tuffly.

Precisely what the statute means by the "terms" of the partnership is not clear. The notice did state that W. T. Tuffly was the general partner, and Mrs. McLin the special partner, and that the latter had contributed to the common stock the sum of $6419.36. And it disclosed the fact that the certificate of the partnership had been executed and recorded. Without deciding whether the notice sufficiently disclosed the terms of the partnership, it is clear that the legal existence of the partnership did not depend upon the notice or its contents. The only effect of the failure to make the required publication was that "the partnership shall be deemed general." But that is immaterial in view of the finding of the jury in respect to certain facts, constituting an estoppel against the defendants, and which were submitted to them by the instructions. To these facts, and the instructions relating to them, we will next refer.

6. The jury were instructed: "If you shall find from the evidence that the limited partnership as stated and claimed by plaintiff was recognized as such in its inception by the three attaching creditors, defendants herein, and likewise during its existence was dealt with and credited as such by them, as well as sued therefor and its property attached as such after its assignment, and that its other creditors also treated and dealt

with it, and accepted its assignment to plaintiff as such, and that Mrs. McLin, named therein as the special or limited partner, and W. T. Tuffly, named therein as the general partner, and whose name constituted the firm name, always treated it as a special or limited partnership, and that Mrs. McLin loaned it money as claimed, and subsequently sued the plaintiff as its assignee therefor, then and in such case you likewise may deem the same a limited partnership and regard the assignment to plaintiff as valid.

"If you shall also find that the same was made at a time when the 'W. T. Tuffly' paper was maturing faster than it could be met in the ordinary and usual course of business, and that such assignment was made in good faith in contemplation of insolvency; and if you shall further find that the defendant Tracy, as United States marshal, seized the property so assigned, under and by virtue of the attachments of the three attachment creditors who have made themselves defendants herein, then you will find for the plaintiff herein as against defendant Tracy and the sureties on his official bond and the three firms of attaching creditors for the value of the goods as they were at the time and place of their seizure under such writs of attachment, such value to be ascertained from all the facts detailed in evidence before you.

"But if you shall otherwise find as to the facts constituting the rights of the parties as hereinbefore set forth, then and in such case your verdict will be for the defendants."

According to the bills of exceptions there was evidence tending to prove all the facts stated in these instructions. The attaching creditors, with other creditors, described them in the release executed by them at about the time of the formation of the limited partnership as constituting a limited partnership, in which W. T. Tuffly was the general, and Mrs. McLin the special, partner. If the attaching creditors thus recognized and dealt with W. T. Tuffly and Mrs. McLin as a limited partnership, they are estopped from insisting that there was no such partnership, or that the assignment was not valid as an assignment by a limited partnership. They cannot be permitted thereafter to raise the objection that the terms of

the partnership were not sufficiently stated in the published notice of its formation. Those terms were fully set forth in the recorded certificate of the partnership.

But as the defendants contended that their recognition of the limited partnership was in ignorance of material facts bearing upon that question, and therefore they were not estopped, the court, at their instance, further instructed the jury:

"If the proof shows you that Mrs. McLin never in fact contributed the amount to the common stock necessary to make her a special partner, or that she afterwards altered and diminished the amount of her capital stock, and that these facts, or either of them, were unknown to the attaching creditors, who are defendants herein, at the time they dealt with the firm and sued W. T. Tuffly, then you are instructed that neither the recognition and dealing by them with Tuffly and Mrs. McLin as a limited partnership, nor the suing of W. T. Tuffly in ignorance of said facts, estops or precludes them, or any of the defendants from showing that said partnership was never in fact legally formed as a limited partnership, for the reason above stated, nor from showing that it afterwards, by reason of the alteration and diminution of Mrs. McLin's capital stock, was rendered a general partnership."

This instruction gave the defendants the full benefit of all the facts upon which they could rely to defeat the estoppel referred to in the other instruction.

7. A considerable part of the discussion at the bar, and of the briefs of counsel, was directed to the question whether the court erred in refusing to give to the jury a certain charge which was prepared and submitted by the defendants. So much of that charge as constituted an argument rather than an instruction in behalf of the defendants may be omitted from this opinion. The material part of it was to the effect that if Mrs. McLin's husband had a net interest, at or about the time of his death, in the firm of R. W. McLin & Co., and that in consideration of the arrangement by W. T. Tuffly, for full settlement of all claims against the firm, and the obtaining of a release of R. W. McLin's estate from liability on ac-

count of the same, she assigned and transferred to W. T. Tuffly all the goods, wares, merchandise and other property of the firm, "and that the interest so conveyed constituted her contribution to the common stock to make her a special partner, this would not be such contribution of actual cash as the law requires or contemplates, no matter what the outward form of the transaction was, and in such case Mrs. McLin would have thereupon become a general partner and liable as such, and no advance, loan or payment thereafter made by her to W. T. Tuffly or to the firm would change her status from that of a general partner, and if you so find, then you are instructed that it was essential to the validity of the assignment that she should have joined in it and conveyed to the assignee her individual property not exempt, and that as she did not do so the assignment would be illegal and void, and that your verdict should be for the defendants."

We shall not extend this opinion by a discussion of the several propositions embodied in this instruction. It is sufficient to say: 1, The issues as to whether Mrs. McLin made the contribution to the common stock necessary to make her a special partner, or whether there was an alteration or diminution of her capital stock, were fairly submitted to the jury in the instruction that the court gave at the instance of the defendants; 2, The instruction now in question was in conflict with the first one given by the court upon its own motion; if given, it might have resulted in a verdict for the defendants, although the jury may have found that the partnership between Tuffly and Mrs. McLin was recognized by the attaching and other creditors, in its inception, and was dealt with by all of them during its existence, as a limited partnership, in which Mrs. McLin was known by them to be the special partner, and W. T. Tuffly the general partner.

Many other instructions were asked by the defendants which the court refused to grant. But it is unnecessary to discuss them, as what has been said is sufficient to indicate our opinion touching the essential issues in the case.

Upon the whole case we are of opinion that no error was committed by the court below, and the judgment must be

Affirmed.

LOUISIANA, *ex rel.* THE NEW YORK GUARANTY AND INDEMNITY COMPANY, *v.* STEELE.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 140. Argued January 23, 1890. — Decided March 10, 1890.

The auditor of the State of Louisiana was sued in his official capacity, in order to compel him, in that capacity, to act to raise a tax, authorized by a former law, but contrary to subsequent legislation, and to the present laws of the State; *Held*, it was a suit against the State.

THE case is stated in the opinion.

Mr. William Allen Butler and *Mr. W. W. Howe* for plaintiff in error.

Mr. B. J. Sage and *Mr. Alexander Porter Morse* for defendant in error. *Mr. W. H. Rogers*, Attorney General of Louisiana, filed a brief for the same.

MR. JUSTICE BRADLEY delivered the opinion of the court.

This case arose upon a petition filed in the Civil District Court for the Parish of Orleans in February, 1884, by The New York Guaranty and Indemnity Company, a corporation of New York, as relators, in the name of the State of Louisiana, for a mandamus to compel Allen Jumel, the auditor of public accounts of the State, to proceed under a certain act of the legislature, passed March 8, 1869, to require the several sheriffs throughout the State to levy a tax sufficient to pay the interest due on the state bonds authorized to be issued by said act in aid of the Mississippi and Mexican Gulf Ship Canal Company. Jumel having been succeeded in office by Oliver B. Steele, the latter, on application of the relators, was substituted as defendant by order of the court. Steele, in answer to the petition, set up, amongst other things, that taxation is an act of sovereignty which can only be performed by the legislative department of the government; that by the present

constitution and laws of Louisiana, the defendant, as auditor, has no power to raise said tax; that the act of 1869, referred to, has been repealed by an act No. 3, passed in 1874; and that by another act, No. 55, of 1874, the respondent and all other officers of the State are prohibited from complying with the mandamus, and deprived of all power and authority to assess, collect, or enforce the payment of the tax asked for by the relator, and the court is prohibited from entertaining jurisdiction of the suit.

The 7th section of the act of 1869, which the relators seek to have executed, is as follows:

"SEC. 7. *Be it further enacted, etc.* That in order to provide a fund for the semi-annual payment of interest upon the bonds issued in accordance with this act, and the final redemption of said bonds, should the Mississippi and Mexican Gulf Ship Canal Company fail to meet the obligations set forth in the fourth and sixth sections of this act, when the deficit in interest to the year 1879 (one thousand eight hundred and seventy-nine), or the deficit and the annual instalment of thirty thousand dollars ($30,000) from that date to the final redemption of said bonds, shall have reached the sum of one hundred thousand dollars ($100,000), and as often thereafter as the said deficit shall have reached that sum, the auditor is hereby directed to determine, by accurate calculation, what rate of taxation on the total assessed value of all movable and immovable property in the State will be sufficient for the purpose of paying said deficit in interest or annual instalments, or both, and it shall also be his duty to notify the several sheriffs and tax collectors of the rate of taxation as ascertained and fixed for the purpose aforesaid; and said tax, as ascertained and fixed, is hereby levied upon all the movable and immovable property that may be assessed in this State; and it shall be the duty of the several sheriffs and tax collectors to collect said tax, and the collection of the same shall be enforced as the law provides, or may hereafter provide, for the collection of taxes."

There is no question but that, by constitutional and legislative enactment of the State of Louisiana, the above provisions

of the act of 1869 have been repealed and abrogated; and that, as set forth in the answer, the auditor has no longer, under the state laws, any power to execute them. The contention of the relators is, that the repealing acts, and all acts abrogating the provision made by the act of 1869 in favor of the bondholders, are unconstitutional and void, as impairing the obligation of the contract. Conceding this to be true, the objection still remains that this is virtually a suit against the State. The auditor is sued in his official capacity, and it is sought to compel him to act in that capacity in order to raise the tax in question, contrary to subsequent legislation and the present laws of the State. The case is clearly within the principle of the decisions in *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443; and *North Carolina* v. *Temple*, just decided, *ante*, 22.

The judgment of the Supreme Court of Louisiana is

Affirmed.

Mr. Justice Harlan dissented.

BELL'S GAP RAILROAD COMPANY *v.* PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 1497. Submitted January 27, 1890. — Decided March 3, 1890.

The plaintiff in error failed to make a return of its loans to the state authorities as required by law, whereupon the auditor general, under direction of state law, made out an account against it containing the following charge: "Nominal value of scrip, bonds and certificates of indebtedness held by residents of Pennsylvania, $539,000 — tax three mills — $1617.00." The company appealed from this to the Court of Common Pleas, which decided in its favor, and the Commonwealth from thence to the Supreme Court of the State, which rendered a judgment in favor of the Commonwealth for $666. Among the grounds for the appeal was, that the tax was in violation of section one of the Fourteenth Amendment, because the assessment was for the nominal value, and not for the real value of

the bonds; because the owners of the bonds had no notice, and no opportunity to be heard; because the company was taxed for property that it did not own; and because the deduction of the tax from the interest due the bondholders in Pennsylvania took their property without due process of law, and denied to them the equal protection of the laws. The case being brought to this court from the state court by writ of error, a motion was made to dismiss for want of jurisdiction; to which was united a motion to affirm; *Held*,

(1) That there was clearly a federal question raised, and the writ could not be dismissed for want of jurisdiction;

(2) That although it was doubtful whether, under the rules, there was sufficient color for the motion to dismiss to justify the court in considering the motion to affirm, yet, as the Supreme Court of Pennsylvania, in its opinion did not seem to have expressly passed upon the federal question, which was clearly in the record, the court could consider that there was color for making that motion;

(3) That the provision for the assessment of the tax upon the nominal or face value of the bonds, instead of upon their actual value, was a part of the state system of taxation, authorized by its constitution and laws, and violated no provision of the Constitution of the United States;

(4) That the failure to give personal notice to the owners of the bonds involved no violation of due process of law, when executed according to customary forms and established usages, or in subordination to the principles which underlie them;

(5) That it was not true, in point of fact, that the corporation was taxed for property which it did not own.

The Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equal taxation.

Motions: (1) To revoke the allocatur and quash the writ of error; (2) To dismiss for want of jurisdiction; (3) To affirm the judgment below. The case is stated in the opinion.

Mr. William S. Kirkpatrick, Attorney General of the Commonwealth of Pennsylvania, and *Mr. John F. Sanderson*, Deputy Attorney General for the motions.

Mr. James W. M. Newlin opposing.

Mr. Justice Bradley delivered the opinion of the court.

Motion is made in this case to revoke the allocatur of the writ of error, and to quash the writ, and, in the alternative,

to affirm the judgment. The first motion is based on the assumption that the writ was improperly allowed by the judge, and questions the propriety of his action. It is probable that the counsel who makes the motion does not intend it in that sense, but is merely unfamiliar with the practice of this court, by which the ordinary proceeding to vacate a writ of error is a motion to dismiss it.

In the present case we think that the writ was demandable, and cannot be dismissed, as will more fully appear from the following statement:

By the law of Pennsylvania all moneyed securities are subject to an annual state tax of three mills on the dollar of their actual value, except bonds and other securities issued by corporations, which are taxed at three mills on the dollar of the nominal or par value. If the treasurer of a corporation fails to make return of its loans, as required by law, the auditor general makes out and files an account against the company, charging it with the tax supposed to be due. This account, if approved by the state treasurer, is served upon the corporation, which must pay the tax within a specified time, or show good cause to the contrary. If it objects to the tax, it is authorized, in common with all others who are dissatisfied with the auditor's stated accounts, to appeal to the Court of Common Pleas of the county where the seat of government is (at present Dauphin County), which appeal is served on the auditor general, and by him transmitted to the clerk of said court, to be entered of record, subject to like proceedings as in common suits. A declaration is then filed on the stated account in behalf of the State, and the cause is regularly tried.

In the present case, on failure of the company (The Bell's Gap Railroad Company) to make return except under protest, the auditor general made out an account against it containing the following charge:

"Nominal value of scrip, bonds, and certificates of indebtedness owned by residents of Pennsylvania $539,000 — tax three mills . . . . . $1617 00"

Opinion of the Court.

The company thereupon tendered an appeal, which was filed in the Court of Common Pleas of Dauphin County, a declaration was filed on the part of the State, and the cause was tried by the court, a jury being waived.

The appeal filed by the corporation (which was the basis of the proceedings in the court) contained eight grounds of objection to the tax. Most of these objections were founded upon the constitution, or laws of Pennsylvania, and need not be noticed here. The second objection, which refers to the Constitution of the United States, was as follows, to wit:

"II. The report of the company's treasurer was made under protest and does not constitute an assessment, and the tax sought to be imposed on so much of the company's loans as the Commonwealth claims to be held by residents of Pennsylvania for their nominal or face value, which varies from the market value on account of the differing rates of interest, etc., is illegal, and the said tax cannot be lawfully deducted by the company's treasurer from the interest payable to the holders of said loans, and the Commonwealth's demands contravene section one of the Fourteenth Amendment to the Constitution of the United States, for the following reasons:"

Amongst the reasons then assigned are:

1. That the nominal value of the bonds is not their real value;

2. That the owners of the bonds have no notice, and no opportunity of being heard;

3. That the company is taxed for property it does not own;

4. That the deduction of the tax from the interest payable to the bondholders is taking their property without due process of law, and denies to them the equal protection of the laws, since all other personal property in the State is taxed at its actual value, and upon notice to the owners.

The seventh objection is as follows: "VII. The tax is void as impairing the company's obligation to its creditors."

On the trial of the cause the State offered in evidence the stated account, and the plaintiff in error offered the appeal and specification of objections and an affidavit of its treasurer. The Court of Common Pleas decided in favor of the company,

but its decision was reversed on writ of error by the Supreme Court of Pennsylvania, and judgment was rendered in favor of the Commonwealth for $666, being the amount of tax on bonds shown to have been owned by residents of Pennsylvania.

It cannot be denied that the plaintiff in error, in its appeal and specification of objections to the tax, did raise a question under the Constitution of the United States. That question remained in the record as the foundation of the proceedings in the court, and, whether adverted to, or not, was necessarily involved in the final decision of the case. We think it clear, therefore, that the writ of error cannot be dismissed. Our only doubt is, whether, under our rules, there was sufficient color for the motion to dismiss, to justify us in considering the motion to affirm. As, however, the Supreme Court of Pennsylvania, in its opinion, does not seem to have expressly passed upon the federal question, although it was clearly in the record, we may consider that there was color for making the motion to dismiss.

On the merits we have no serious doubt.

1. *As to the assessment of the tax of three mills upon the nominal or face value of the bonds, instead of assessing it upon the actual value.* This might have been subject to question under the state laws; but the state courts have upheld the assessment as valid. We are to accept it, therefore, as part of the state system of taxation, authorized by its constitution and laws. Then, how does it violate any provision of the Constitution of the United States? It is contended that it violates the first section of the Fourteenth Amendment, which forbids a State to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the Fourteenth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt.

The general purpose and scope of the Fourteenth Amendment, and the general qualifications necessary to be applied to it, are well stated in *Barbier* v. *Connolly*, 113 U. S. 27, 31. Mr. Justice Field, in delivering the opinion of the court, there said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

With due regard to these considerations, we are clearly of opinion that the method of assessing the tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the Fourteenth Amendment to the Constitution.

2. *As to want of notice to the owners of the bonds.* What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face

value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when, and as, they receive the interest. If the State may assess the tax upon the face value of the bonds, notice *in pais* is not necessary. We think that there is nothing in this objection which shows any infraction of the Federal Constitution. It is urged that it is a taking of the bondholder's property without due process of law. We must confess that we cannot see it in this light. The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them. We see nothing in the process of taxation complained of, which is obnoxious to constitutional objection on this score. Stockholders in the national banks are taxed in this way, and the method has been sustained by the express decision of this court. *National Bank* v. *Commonwealth*, 9 Wall. 353.

3. *That the corporation is taxed for property it does not own.* This objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection.

The other objections are embraced in those which we have already considered, and need no further notice.

We would say, in conclusion, that there are several decisions of this court which virtually dispose of most of the questions involved in the present case. We refer particularly to *National Bank* v. *Commonwealth*, 9 Wall. 353; *The Dollar*

Names of Counsel.

Savings Bank v. *United States*, 19 Wall. 227, 240; *King* v. *United States*, 99 U. S. 229; *Hagar* v. *Reclamation District No. 1*, 111 U. S. 701; *Davidson* v. *New Orleans*, 96 U. S. 97; *Walston* v. *Nevin*, 128 U. S. 578, 581.

The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.

CHESTER CITY *v.* PENNSYLVANIA. Error to the Supreme Court of the State of Pennsylvania. No. 1498. Submitted January 27, 1890. Decided March 10, 1890. Motions were made in this case similar to those made in *Bell's Gap Railroad Co.* v. *Pennsylvania*. MR. JUSTICE BRADLEY delivered the opinion of the court. This case, so far as any federal question is concerned, is similar, in all substantial respects, to that of *Bell's Gap Railroad Co.* v. *Pennsylvania*, just decided, and must be governed by the decision in that case.

The motion to dismiss the writ of error is denied, and the judgment of the Supreme Court of Pennsylvania is affirmed.

Mr. James W. M. Newlin for the plaintiff in error.

Mr. William S. Kirkpatrick and *Mr. John F. Sanderson* for defendant in error.

Mr. M. E. Olmsted and *Mr. Wayne McVeagh*, on behalf of W. W. Jennings, plaintiff in error in No. 1242; *Mr. W. B. Lamberton* and *Mr. George R. Kœrcher*, on behalf of the North Pennsylvania Railroad Company, defendant in error in No. 1556; and *Mr. M. E. Olmsted*, on behalf of the Delaware Division Canal Company, The Lake Shore and Michigan Southern Railway Company, The New York, Lake Erie and Western Railroad Company, The Clearfield Bituminous Coal Corporation, The Delaware, Lackawanna and Western Railroad Company, and The Lehigh Valley Railroad Company, filed briefs entitled in *Bell's Gap Railroad Co.* v. *Pennsylvania* and *City of Chester* v. *Pennsylvania*.

Syllabus.

DEPUTRON *v.* YOUNG.

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

No. 1151. Submitted January 6, 1890. — Decided March 10, 1890.

An averment of diverse citizenship by the plaintiff, necessary to confer a jurisdiction, not being controverted by the defendant, must be taken as true under the practice in the courts of Nebraska.

When the jurisdictional allegations of the plaintiff are not traversed by the defendant, no question involving the capacity of the parties to litigate in the federal courts can be raised before the jury, or treated as within the issues they are empanelled to determine.

The objection, under section 5, of the act of March 3, 1875, c. 137, 18 Stat. 472, that parties to a suit have been improperly or collusively made or joined for the purpose of creating a case cognizable under the act, should be taken at the first opportunity; and delay in its presentation will be considered in examining into the grounds upon which it is alleged to rest.

A suit cannot properly be dismissed by a Circuit Court, as not involving a controversy within the jurisdiction of the court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

In Nebraska a tax deed, not executed by the county treasurer under his seal of office, is void.

In Nebraska a tax deed, though void on its face, is sufficient color of title to support an adverse possession to the property therein described.

The adverse possession which bars a recovery in an action of ejectment must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse.

Where the rightful owner of real estate is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title.

A power from an owner of real estate authorizing the donee to make and execute deeds to convey the real estate to purchasers, as the same may be sold to such purchasers in tracts by a third party who acts under a contract with the donor of the power, is a naked power to convey as sales may be made, and a deed made by the donee to a person who was not such a purchaser is a fraud upon the power.

In the case of a naked power not coupled with an interest, every prerequisite to the exercise of that power should precede it.

In Nebraska the title of a purchaser at an executive sale depends not alone

upon his bid or payment of the purchase money, but upon the confirmation of the sale by the court.

One purchasing at an execution sale in Nebraska submits himself to the jurisdiction of the court as to matters affecting that sale; and as the court has power during the term to vacate or modify its own orders or to rescind a decree affirming the sale, he is concluded by the result of the proceedings to confirm or annul it.

This was an action of ejectment brought in the Circuit Court of the United States for the District of Nebraska, June 14, 1884, by Rowena Young, a citizen of Ohio, against John C. Deputron, a citizen of Nebraska, to recover certain premises in the petition named. The defendant answered, denying plaintiff's ownership and right to possession; and setting up title under a tax deed and purchase in good faith and without notice for $10,000 paid, being the full value, and ten years' adverse possession. To this answer a reply, specifically denying its averments, was filed by the plaintiff. At the November term, 1885, of said court, a trial was had, which resulted in a verdict for the defendant and judgment thereon, which was set aside on motion of plaintiff, and a new trial awarded. In March, 1886, the cause was tried a second time, and a special verdict of forty-one findings rendered by the jury as set forth in the margin.[1]

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[1] 1st. That Jane Y. Irwin obtained title to said lands by patent from the United States December 15, 1862, and on the 9th of August, 1867, conveyed the same to William P. Young, who, on the 5th of February, 1874, reconveyed the same to Jane Y. Irwin, who, on the 11th day of June, 1884, conveyed said lands to the plaintiff, Rowena Young.

2d. On the 31st of March, 1874, Jane Y. Irwin and husband entered into a contract with N. S. Scott, Samuel Boyd and Milton La Master for the selling and subdivision of said lands.

3d. And said Scott, Boyd and La Master soon after entered upon said lands under said contract, and staked out the block corners and street intersections, being engaged in the survey on the lands in controversy and other lands for a period of about two months, finishing their survey about the last of May, 1874.

4th. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donavan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31st, 1874.

Statement of the Case.

The defendant excepted to the tenth, seventeenth and nineteenth findings, and moved to set aside each of the same, and

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5th. We find that there was no assessment of the land in controversy for taxes in the year 1867, nor was the same borne upon the tax-list of that year.

6th. We find the tax deed of June 12, 1871, executed by John Cadman, county treasurer, was not sealed by the county treasurer with his official seal, nor did the county treasurer then have an official seal.

7th. We find that the county treasurer's deed executed by R. A. Bain, dated September 15, 1871, was not sealed by the county treasurer, nor did the county treasurer then have an official seal.

8th. We find the forty acres of land sold by the sheriff to E. J. Curson and conveyed by deed October 10, 1877, was at that time of the value of $20,000.

9th. That the confirmation of sale was set aside by the District Court of Lancaster County, in which it had been made November 3, 1877, before E. J. Curson had made any conveyance to any one, and was never afterwards confirmed.

10th. The jury find that Nelson C. Brock and his grantees had mixed possession of the west half of the southwest quarter of section 24, township 10, range 6, in Lancaster County, Nebraska, for ten years prior to the commencement of this suit, but the jury find that parties claiming under defendant's grantors held portions of said property and parties holding under plaintiff's grantors held portions of said property, so that said possession was in controversy and disputed and mixed down to the year 1877.

11th. That up to the year 1876, the said defendants and their grantors had mixed possession of the land in dispute, to wit, the northeast quarter of the southwest quarter of section 24, township 10, range 6, but said land was open, vacant and unoccupied, except by the city pest-house, and was used as a common.

12th. The jury also find that parties held mixed possession of portions of the west half of the southwest quarter of section 24, township 10, range 6, during the years 1874 and 1875, who did not attorn to or acknowledge possession in either the plaintiff or the defendants or any one under or by whom they claim.

13th. The jury find that the conveyance from Jane Y. Irwin and John Irwin by William T. Donavan, attorney-in-fact, to J. P. Lantz was a fraud upon the power held by said Donavan, and was given by Donavan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such facts, and procured such conveyance to be made with such knowledge and design.

14th. That the said deed by Donavan to Lantz and the deed of same by Lantz to Little were executed at the same time and were parts of one transaction, and that the northeast quarter of the southwest quarter of section

for a judgment for the defendant and against the plaintiff upon the verdict as thus amended; and the plaintiff filed his

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24, township 10, range 6, was on the 25th day of October, 1879, worth $30,000, and that the balance of the land then by Donavan conveyed would exceed $70,000 in value at that time.

15th. That during the years 1874, 1875 and 1876, parties holding under the grantors of plaintiff held portions of the west half of the southwest quarter of section 24, township 10, range 6.

16th. We find that all the defendants had full knowledge of the revocation of the power of attorney aforesaid upon the record by Jane Y. Irwin, and of the facts therein stated prior to any purchase made by them or either of them.

17th. That one N. C. Brock, through whom the defendant traces one chain of his title on the 12th day of June, 1871, received from the county treasurer of Lancaster County, Nebraska, a tax deed of that date of the north half of and 20 acres off the west side of the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, the premises in controversy being in the northeast quarter of the southwest quarter aforesaid, which tax deed purported to be issued for the taxes assessed against the above-described parcels of land, respectively, for the year 1867, which tax deed was on the 13th day of June, 1871, recorded in the county clerk's office of Lancaster County, Nebraska.

18th. That on the 15th day of December, 1871, the county treasurer of Lancaster County, Nebraska, delivered to said Nelson C. Brock a second tax deed of that date covering the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, including the property in dispute, which deed was issued for the tax of the year 1868, and which tax deed was on the 18th day of December, 1871, recorded in the county clerk's office of Lancaster County, Nebraska.

19th. That on the 18th day of December, 1871, said Nelson C. Brock made, executed and delivered to one Charles T. Boggs a lease in writing of that date of the north half of and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, for the term of two years from that date, which lease contained a leave or license to the lessee to remove all buildings placed upon said premises by him on or before the termination of said lease, which said lease was recorded in the county clerk's office of Lancaster County, Nebraska, on the 2d day of January, 1872.

20th. That on the 18th day of December, 1873, the said Nelson C. Brock made, executed and delivered to said Charles T. Boggs a second lease in writing of that date of the north half and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska, for the term of two years from that date, which said lease contained a similar provision permitting the lessee to remove all buildings

motion for judgment on the verdict according to the prayer of the petition. On the 10th day of May, 1886, these motions

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and improvements by him erected or permitted to be erected on said premises off from the same at any time before the expiration of the said term therein granted, which lease was on the 5th day of January, 1874, recorded in the county clerk's office of Lancaster County, Nebraska.

21st. That in the month of December, 1871, the said Charles T. Boggs, claiming title under the said lease first aforesaid, entered into the mixed possession of the said premises by assuming control and ownership over the same, and by collecting rents from squatters and persons then located upon said premises, and subleased other portions of said premises, and continued to exercise mixed possession of said premises down to the time he yielded his mixed possession of the same to Samuel W. Little, and that he paid the rent to N. C. Brock for the said premises during the terms of the two leases above mentioned.

22d. That at the expiration of his term under said leases he yielded his mixed possession of the said premises to Samuel W. Little.

23d. That on the 18th day of May, 1874, said Nelson C. Brock and his wife, by their deed of quit-claim, conveyed all the said premises, the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, to Samuel W. Little, which deed was duly recorded in the county clerk's office of Lancaster County, Nebraska, on the 26th day of May, 1874.

24th. That in or about the month of May, 1873, Charles T. Boggs subleased the north half of the southwest quarter of section 24, township 10, range 6 east, to one D. A. Gilbert, who, on or about that date, entered upon the mixed possession of the same and erected a ranch for cows, or milk ranch, on the northwest quarter of said quarter section, all the said north half of said southwest quarter being at the time he entered therein wholly vacant and unoccupied lands, and that he continued under said lease in the mixed possession and occupation of the same until in or about the year 1878, when he moved off his cattle ranch and surrendered his mixed possession of the same at the instance of S. W. Little, having during that period attorned and paid rent to Charles T. Boggs.

25th. That in the year 1876 Samuel W. Little began breaking up and actually improving the northeast quarter of said quarter section and erected windmills and placed other valuable improvements thereon, planted trees and shrubbery and set out hedges and other fences, and thence, until he delivered his mixed possession of the said property to his several grantees, had the mixed possession of the said premises, said northeast quarter of the southwest quarter of section 24, township 10, range 6 east.

26th. That on the 19th day of May, 1877, in the District Court of Lancaster County, in the State of Nebraska at the April term of the said court, in a certain action therein pending, wherein Milo H. Sessions was plaintiff and John Irwin and Jane Y. Irwin were defendants, a judgment was ob-

coming on to be heard, were submitted to the court on briefs to be filed within sixty days, and on the 24th day of June,

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tained in the said action in favor of the said M. H. Sessions and against said John Irwin and Jane Y. Irwin by the consideration of said court, wherein it was considered by said court that the said plaintiff therein should recover from and against the said defendants, John Irwin and Jane Y. Irwin, the principal sum of $350, besides costs therein, taxed at the sum of $41.38, and for which said sums execution was awarded out of the said court; that thereafter execution was issued upon said judgment against the said John Irwin and Jane Y. Irwin, and the same coming to the hands of the sheriff of the said county, for want of goods and chattels whereon to levy the said writ, he seized and caused to be appraised, advertised and sold as the property of the said Jane Y. Irwin the northeast quarter of the southwest quarter of section 24, township 10, range 6, to one E. J. Curson for the sum of $30; that thereafter he made due return of his said sale unto the said District Court; and afterwards, on the 2d day of October, 1877, the following proceedings were had in the said court, to wit: "*M. H. Sessions* against *John Irwin and Jane Y. Irwin.* This case comes on upon motion of plaintiff for confirmation of sale heretofore had in this case, and it is hereby ordered by the court that cause be shown by Tuesday next, October 9th, why sale should not be confirmed."

That afterwards, on the 10th day of October, 1877, that being the 9th day of the October, 1877, term of said court, the following proceedings were had in said action therein: "*Milo H. Sessions* v. *John Irwin and Jane Y. Irwin.* This case comes on upon the motion of plaintiff for confirmation of sale heretofore had under former order of this court, and the court, upon a careful examination of the proceedings thereof, finds that the same have been had in all respects in conformity to law and the orders of this court. It is ordered that the said proceedings and sale be, and they are hereby, approved and confirmed; and it is further ordered by the court that the said sheriff convey to the purchaser by deed in fee simple the lands and tenements so sold." That afterwards and on the 10th day of October, 1877, pursuant to the foregoing proceedings, Sam. McClay, sheriff of said county, made, executed and delivered to said E. J. Curson, purchaser, a sheriff's deed of conveyance of the said premises, the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, in Lancaster County, Nebraska; which deed was by the said E. J. Curson filed and recorded in the county clerk's office of Lancaster County, Nebraska, on the 10th day of October, 1877, at 5 o'clock, P.M.

27th. That on the 9th day of November, 1877, said Elijah J. Curson and Anna M. Curson, his wife, by deed of general warranty and for the consideration of the sum of $30, expressed to be in hand paid, granted, bargained, sold and conveyed the said premises, the northeast quarter of the southwest quarter of section 24, in township 10, range 6 east, to Samuel W. Little; which deed of conveyance was, on the 26th day of November, 1877,

1886, the court entered an order, by agreement of the parties, that the time to settle and sign a bill of exceptions be, and the

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filed and recorded in the county clerk's office of Lancaster County, Nebraska.

28th. On the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donavan to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31st, 1874.

29th. That on the 25th day of October, 1879, the said Jane Y. Irwin and John Irwin, by W. T. Donavan, their attorney-in-fact, for the purported consideration, as expressed upon the face of said deed, of $1000, made, executed and delivered to one John P. Lantz their warranty deed conveying the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, and all that portion of the west half of the said southwest quarter of section 24, township 10, range 6 east, lying north of the centre line of R Street, in the city of Lincoln, extended east through said lands; and also the following-described parcels of land, situated in the southwest quarter of said southwest quarter of section 24, township 10, range 6, aforesaid: Commencing at the southwest corner of said section 24, thence running east 520 feet; thence north 460 feet; thence west 520 feet; thence south 460 feet to the place of beginning; and also commencing at a point 460 feet east of the southeast corner of block No. 38, in the city of Lincoln, and 470 feet north of the south line of O Street, in said city of Lincoln; thence running east 760 feet; thence north 400 feet; thence west 760 feet; thence south 400 feet, to the place of beginning; which said deed was recorded in the county clerk's office of Lancaster County, Nebraska, on the 25th day of October, 1879, at 4 o'clock and 25 minutes P.M.

30th. That on the 25th day of October, 1879, said John P. Lantz and Hannah Lantz, his wife, by their deed of general warranty and for the consideration of $1000, as expressed in said deed, paid by Samuel W. Little to said John P. Lantz, conveyed the property in the last finding above described to the said Samuel W. Little; which deed was, on the 25th day of October, 1879, at 4 o'clock and 30 minutes P.M., recorded in the county clerk's office of Lancaster County, Nebraska.

31st. That neither Jane Y. Irwin nor John Irwin, nor any one for them, ever paid any taxes on any portion of the north half and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east.

32d. That Nelson C. Brock and Samuel W. Little and their respective grantees of any property in dispute herein have paid all taxes assessed against the said property since the entry thereof to the year 1884, under claim of title to said premises.

33d. That on the 9th day of August, 1867, John Irwin and Jane Y. Irwin, by their deed of general warranty, conveyed to one William P. Young the north half of the southwest quarter and the southwest quarter of the southwest quarter of section 24, township 10, range 6 east, for the purported

same was thereby, extended to the second Monday in November following. The record contains no such bill of exceptions.

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consideration expressed on the face of the said deed of $490: which said deed was filed and recorded in the county clerk's office of Lancaster County, Nebraska, on the 10th day of August, 1867.

34th. That on the 9th day of January, 1875, said Samuel W. Little, by a deed of quit-claim, pursuant to an arrangement made between Jane Y. Irwin and one George Smith and said Samuel W. Little, made, executed and delivered, for the consideration of $100, a part of the southwest quarter of the southwest quarter of section 24, township 10, range 6 east; that said S. W. Little had consented to the entry of said George Smith upon the said parcel of land under the contract for the purchase of the same from Messrs. Scott, Boyd and La Master.

35th. That in the year 1873 one Hickman entered upon the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, under a lease from Charles T. Boggs, and erected thereon stables for a milk ranch and paid rent thereon for said premises at the rate of $12 per annum, and continued to occupy the said premises for such purposes and for feeding and herding his stock thereon for a period of about two years.

36th. That from May 31, 1874, continuously down to the time of the commencement of this suit, June 14, 1884, Charles T. Boggs and Samuel W. Little and his and their lessees and grantees, under claim of title thereto, held mixed possession of all of the north half of the southwest quarter of section 24, township 10, range 6 east, and that no other person occupied the same or entered thereon under claim of title to any part thereof.

37th. That on the 25th day of September, 1883, Samuel W. Little and Mary D. Little, by their deed of general warranty and for the consideration of the sum of $10,500, sold and conveyed to the defendant, John C. Deputron, all that part of the northeast quarter of the southwest quarter of section 24, township 10, range 6 east, described as follows, and being the premises in dispute: Beginning at a point in the centre of R Street, in said city, 150 feet east of the east line of 17th Street; thence east along the centre of R Street 600 feet to the centre of 19th Street; thence north, at right angles with R Street, 1400 feet; thence west, parallel with R Street, 750 feet, to the east line of 17th Street extended north through R Street; thence south along said east line of 17th Street 790 feet; thence east, parallel with R Street, 94 feet; thence south, parallel with 17th Street, 247 feet; thence east, parallel with R Street, 38 feet; thence south, parallel with 17th Street, 163 feet; thence east along Leighton's north line 18 feet; thence south along Leighton's line 200 feet to the place of beginning, containing 22.15 acres of land; also part of the said northeast quarter of the southwest quarter of section 24, township 10, range 6 east, described as follows: For a starting point begin at a point 400 feet east of Grand Avenue and 200 feet north of R Street, at C. M. Leighton's northwest corner, running thence north 410 feet; thence east 94 feet; thence south 247 feet; thence east

Statement of the Case.

On the 9th day of November, 1887, Deputron filed his petition, alleging that Rowena Young was not the real party in interest, and that the title of the property in controversy was collusively and fraudulently transferred to her for the sole purpose of vesting apparent jurisdiction in the federal court; that the case did not really and substantially involve a dispute or controversy properly within its jurisdiction; and that Rowena Young had been improperly and collusively made a plaintiff for the purpose of creating a case cognizable under the laws of the United States; and praying that the cause be dismissed; to which the plaintiff answered, denying any fraud and collusion, and averring that she was the real party interested. On the 16th day of November, 1888, the following order was entered:

"This cause coming on for hearing on the petition and application of the defendant to dismiss for want of jurisdiction, was tried by the court, Messrs. Hall and Webster appearing for the plaintiff, and Messrs. Lamb, Ricketts, and Wilson and Harwood, Ames and Kelly for the defendant; whereupon, after hearing the evidence and argument of counsel, and being fully advised in the premises, it is now, on this day,

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38 feet; thence south 163 feet; thence west along Leighton's north line to the place of beginning, the north and south limits to be parallel with Grand Avenue and the east and west limits to be parallel with R Street; which said deed was recorded on the 6th day of September, 1883, in the county clerk's office of Lancaster County, Nebraska.

38th. That said Samuel W. Little delivered to the said John C. Deputron the mixed possession of the said premises at the date of the execution of the said deed, and that the said John C. Deputron thence and hitherto has held the mixed possession of the same.

39th. That the value of the said premises at the present time is the sum of forty thousand dollars.

40th. We find that John C. Deputron, defendant, is a brother-in-law of S. W. Little, his grantor, and that there is no proof of any consideration paid by Deputron to Little for such conveyance.

41st. That the value of the land claimed by John C. Deputron, defendant, being 22.15 acres was worth (40,000) forty thousand dollars.

January 29, 1875, S. W. Little was holding said premises as purchaser at tax sale under certificate of purchase May 26, 1874, for tax of 1872.

If the court is of the opinion that on these facts the plaintiff is entitled to possession of the property in dispute, then we find for the plaintiff.

ordered and adjudged by the court that said petition and application be, and the same are hereby, denied; to which ruling and order of the court, said defendant, by his attorneys, then and there duly excepted."

An opinion on the merits was given by the circuit judge, December 17, 1888, 37 Fed. Rep. 46, and, thereupon, the motion of the defendant for judgment was overruled, the motion of the plaintiff for judgment sustained, and judgment entered that the plaintiff recover from the defendant the real property described in the petition and the costs of the action. A bill of exceptions containing the petitions, answers and proceedings, and evidence adduced upon the question of jurisdiction, was signed and filed in due time. The pending writ of error was then sued out from this court.

Mr. Walter J. Lamb, *Mr. Arnott C. Ricketts* and *Mr. Henry H. Wilson* for plaintiff in error.

Mr. John F. Dillon, *Mr. Samuel Shellabarger*, *Mr. R. S. Hall* and *Mr. Joseph R. Webster* for defendant in error.

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

It is contended that the Circuit Court erred in entering judgment on the special verdict because the citizenship of the parties was not found by the jury. But that fact stood admitted on the record. The plaintiff averred in her petition that she was "a citizen and resident of the State of Ohio," and that the defendant was "a citizen and resident of the State of Nebraska." The answer set up three defences: (1) An affirmative claim of title under a tax deed; (2) Ten years' adverse possession; (3) "And this defendant, further answering, denies that the said plaintiff is the owner of the premises described in her petition; and this defendant also denies that the plaintiff is entitled to the possession of the said premises, and prays to be hence dismissed with his costs, to be taxed." The averment of diverse citizenship was not controverted by the answer,

and as the petition would have been insufficient without that allegation, the averment must be taken as true under the practice in the courts of record in Nebraska. Neb. Code Civ. Proc. §§ 134, 135; Comp. Stat. 1885, p. 645.

Clearly, where the jurisdictional allegation is not traversed, no question involving the capacity of the parties in the cause to litigate in the Circuit Court can be raised before the jury, *Railroad Co.* v. *Quigley*, 21 How. 202, 214; or treated as within the issues they might be impanelled to determine. The Circuit Court properly proceeded to judgment, although the special verdict contained no finding upon this point.

After the case had been twice tried on its merits, and stood on the special verdict upon motions by the parties for judgment in their favor respectively, the defendant assailed the jurisdiction of the court by petition, upon the ground that the title had been placed in the plaintiff collusively and with the view of enabling suit to be brought in the United States Court, when in fact the plaintiff did not own the property and had accepted the title only for the collusive purpose aforesaid. Prior to the passage of the act of 1875, such a question could only be raised by a plea in abatement in the nature of a plea to the jurisdiction; but the fifth section of that act provided that if "it shall appear to the satisfaction of said Circuit Court at any time after such suit has been brought that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit; but its order dismissing the cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472. The application here was made more than a year and a half after the second trial, and although the petitioner avers that he "did not have knowledge of the above facts before the trial of this cause," we remark in passing that such an objection ought to be raised at the first opportunity, and delay in its presentation should be consid-

ered in examining into the grounds upon which it is alleged to rest.

The issue of fact raised upon this petition was tried by the Circuit Court without a jury, and the application denied. No question of law was reserved by the defendant during the hearing, but he entered an exception to the final order, and now asks us to hold that it was the duty of the Circuit Court to dismiss the case because collusively brought. We do not care to enter upon a discussion as to how far in an action at law, where there are no special findings upon an issue of fact such as this, a party has the right to demand a review of the final order of the Circuit Court on the merits, as, upon the evidence in this record, we are content with the conclusion arrived at. In *Barry* v. *Edmunds*, 116 U. S. 550, it was held that a suit cannot properly be dismissed by a Circuit Court of the United States, as not involving a controversy within the jurisdiction of the court, unless the facts when made to appear on the record create a legal certainty of that conclusion. "Nothing less than this," said Mr. Justice Matthews, "is meant by the statute when it provides that the failure of its jurisdiction, on this account, 'shall appear to the satisfaction of said Circuit Court.'"

The question was whether the conveyance by Jane Y. Irwin to Rowena Young was colorable merely. The plaintiff testified positively that she was the real owner of the land, and that it was conveyed to her by her sister, Mrs. Irwin, partly in consideration of what Mrs. Irwin owed her, and partly because she herself had a share in it; that "the land was entered with money coming out of my father's estate belonging in part to me, being the joint fund of Jane and myself." And her testimony is corroborated by that of her brother, William P. Young.

We have carefully examined the evidence and especially the matters urged as constituting badges of colorable transfer, but do not find any substantial ground for overthrowing the deed, or questioning the passing of the title. Such conflict as exists has been determined by the Circuit Court, and it would subserve no useful purpose to restate the circumstances

in detail, as we think the facts fell far short of establishing petitioner's contention.

Upon the rendition of the special verdict the defendant moved to set aside the 10th, 17th and 19th findings as not supported by the evidence, and for judgment upon the verdict as so amended, but the court overruled the motion, and entered judgment for the plaintiff upon the special verdict as returned. We cannot review the action of the court in reference to the findings objected to, and, no exceptions having been saved, are restricted to the question whether there was error in giving judgment for the plaintiff upon the facts as found.

From the first finding it appears that Jane Y. Irwin "obtained title to said lands by patent from the United States December 15, 1862, and on the 9th of August, 1867, conveyed the same to William P. Young, who, on the 5th of February, 1874, reconveyed the same to Jane Y. Irwin, who, on the 11th day of June, 1884, conveyed said lands to the plaintiff, Rowena Young." This made out the title of defendant in error, and to prevent her recovery the plaintiff in error was obliged to sustain one or more of his affirmative defences, in respect to which he had the burden of proof.

These defences were: Claim under two tax deeds, coupled with ten years' adverse possession; conveyance by Jane Y. Irwin, by William T. Donavan as her attorney-in-fact; sheriff's deed on execution sale to Curson, deed of Curson to Little, and of Little to plaintiff in error.

As to the tax deeds, it was found that one was issued upon a sale made for the taxes of a year when the land was not assessed for taxes, and that neither of them was "sealed by the county treasurer with his official seal, nor did the county treasurer then have an official seal." The Circuit Court held that under the decisions of the Supreme Court of Nebraska, these tax deeds were void for want of the seal, and cited many decisions of that court to that effect. In *Gue* v. *Jones*, 25 Nebraska, 634, 637, January term, 1889, the court say: "At the trial the defendant produced a tax deed covering the premises in question, issued to Smith by the treasurer of Douglas County, August 4, 1865, for the taxes of 1862. This deed

was objected to by the plaintiff on several grounds, among others, that it was not executed under the official seal of the treasurer. The act of 1861, under which the deed was executed, provides, at section 60, 'that such conveyance shall be executed by the county treasurer, under his hand and seal;' then follows the statutory form of such deed, concluding with the words of attestation, 'In testimony whereof the said . . . treasurer of said county has hereunto set his hand and seal, on the date and year aforesaid. [Seal.]' The statute has been substantially carried forward throughout all the changes of the revenue laws to the present day. Under its provisions it has been held by this court in cases too numerous for citation, of which several are cited by counsel for defendant in error, that *a tax deed not executed by the treasurer under his seal of office is void.* It will not be expected that this line of decision can be departed from now. The deed introduced in the case at bar, if legal and proper in all other respects, as to which we pass no opinion, is open to the fatal objection that it does not purport to have been executed by the county treasurer under his seal of office."

No title, therefore, was transmitted by these deeds; but a tax deed, though void upon its face, is sufficient color of title in Nebraska to support an adverse possession to the property therein described; *Gatling* v. *Lane*, 17 Nebraska, 77; while a tax certificate is not. *McKeighan* v. *Hopkins*, 14 Nebraska, 361, 364. The possession, however, which bars a recovery, must be continuous, uninterrupted, open, notorious, actual, exclusive and adverse. *Armstrong* v. *Morrill*, 14 Wall. 120, 145. From the findings it appears that Little was holding in January, 1875, which was within ten years prior to the commencement of this suit, under a tax certificate; that up to the year 1876 the possession of the land in dispute was "mixed," but it "was open, vacant and unoccupied except by the city pest-house, and was used as a common;" that some portions of the whole tract were in possession of squatters, some portions in possession of parties holding under Mrs. Irwin, and a part in the possession of the grantee in the tax deeds or under him; and the jury find the possession of the premises deliv-

ered to the defendant and held by him to have been only a mixed possession. Where the rightful owner is in the actual occupancy of a part of his tract, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession; and where the possession is mixed, the legal seisin is according to the legal title, so that in the case at bar there could be no constructive possession on the part of the defendant or his grantors, even if that might exist if he had had actual possession of a part, and no one had been in possession of the remainder. *Hunnicutt* v. *Peyton*, 102 U. S. 333, 368; *Barr* v. *Gratz*, 4 Wheat. 213, 223. Nothing is clearer upon the face of this record than that the jury refused to find the possession relied on by defendant to have been actual, undisputed, exclusive, open, notorious and adverse, but found, on the contrary, that the possession was mixed. The judgment cannot be reversed on the ground of error in this regard.

The plaintiff in error also asserted title under a conveyance by Donavan as her attorney-in-fact. The 2d, 3d, 4th, 13th, 14th, 16th, 28th, 29th, 30th, 37th and 40th findings present the facts on this branch of the case, and establish that on the 31st day of March, 1874, Jane Y. Irwin entered into a contract with Scott, Boyd and La Master for the subdivision and sale of this and other land, and that they entered upon, platted and surveyed it by the last of May, 1875; that, (4th and 28th,) "on the 12th of August, 1875, Jane Y. Irwin and her husband executed a power of attorney to William T. Donavan, to enable him to make conveyances to purchasers when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31, 1874;" that on the 25th day of October, 1879, a deed was executed by Donavan, as attorney-in-fact, for tracts which included that in dispute, to one Lantz, for "the purported consideration, as expressed upon the face of said deed, of $1000," and on the same day Lantz, "for the consideration of $1000, as expressed in said deed, paid by Samuel W. Little to said John P. Lantz," conveyed the same to Little; that these deeds were parts of one transaction, and the entire

property conveyed was worth over $100,000; that the conveyance by Donavan to Lantz "was a fraud upon the power held by said Donavan, and was given by Donavan and taken by Lantz with the intention of defrauding Jane Y. Irwin, and that Samuel W. Little had full knowledge of such fact, and procured such conveyance to be made with such knowledge and design;" that the defendant had full knowledge of the revocation of the power of attorney aforesaid upon the record by Jane Y. Irwin and of the facts therein stated prior to any purchase by him, that Little and wife, for the recited consideration of $10,500, sold and conveyed to Deputron, who was a brother-in-law of Little, "and that there is no proof of any consideration paid by Deputron to Little for such conveyance." It is not pretended that the deed to Lantz was made to carry out or effectuate any sale of the property which had been made by Scott, Boyd and La Master, and the findings show that it was made in fraud of the power of attorney and with the intention of defrauding Jane Y. Irwin. We cannot agree with the counsel for plaintiff in error that it is to be inferred that the power to Donavan was a power to convey generally and at discretion. We do not understand the language of the fourth and twenty-eighth findings, which are identical, as merely indicating the purpose for which the power of attorney was given, but regard it as expressing the limitations of the power. It was the scope of the power that the jury must have had in mind in stating that it was executed to enable Donavan to make conveyances to purchasers "when sales were made by Scott, Boyd and La Master, and to facilitate their operations under their contract of March 31st, 1874." We think it sufficiently clear that it was only a naked power to convey when a sale had been made. The deed by Donavan was a fraud upon the power, because it was in violation of the authority thereby vested. The rule is well settled that "in the case of a naked power, not coupled with an interest, the law requires that every prerequisite to the exercise of that power should precede it. The party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the

party claiming under it is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which the validity of the deed might depend." *Williams* v. *Peyton's Lessee*, 4 Wheat. 77; *Ransom* v. *Williams*, 2 Wall. 313, 319. It behooved the plaintiff in error to have the power made part of the findings, if the conclusion we have reached as to its contents was open to dispute, and not to have accepted the fourth and twenty-eighth findings without objection. In the language used in *Williams* v. *Peyton's Lessee*, the power was a link in his chain which was essential to its continuity, and which it was incumbent on him to preserve. The findings in reference to this power not only do not justify the contention of plaintiff in error, but are inconsistent with it, for the Donavan deed was not simply found fraudulent in fact, but "a fraud upon the power." This, coupled with the finding that the power was to enable Donavan to convey when sales were made by Scott, Boyd and La Master, shows that Donavan's act, when compared with the words of the power, was not warranted by the terms used. Nor under those findings is there any ground for the assumption that Deputron believed that Scott, Boyd and La Master had made sale of the property to Lantz or Little.

Even if the power had been general the conveyance was found fraudulent, and no estoppel arises in favor of plaintiff in error in the absence of findings that he paid value without notice.

It is impossible to conclude that the Circuit Court erred in putting aside this attempt to bolster up the title by the deed of Donavan.

In addition to the Donavan deed and the tax deeds, it is urged on behalf of the plaintiff in error that he made out title under a sale on execution. One Sessions on May 19, 1877, recovered a judgment in the District Court of Lancaster County, Nebraska, against Jane Y. Irwin, upon which execution was issued and levied on forty acres, of which the premises in controversy were a part, and sale made to one Curson for $30, which sale was confirmed October 10, 1877, and a

deed of the forty acres made by the sheriff and recorded on the same day, the land being worth at that time $20,000. The order confirming the sale was set aside by the court November 3, 1877, before Curson "had made any conveyance to any one, and was never afterwards confirmed." On the 9th of November, 1877, Curson conveyed this land for $30 to S. W. Little, which deed was recorded on the 26th day of November.

The opinion of the Circuit Court upon this point is as follows: "It is the settled law of Nebraska that the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase money, but upon the confirmation of the sale; also that one purchasing at an execution sale submits himself to the jurisdiction of the court as to matters affecting that sale, and that a court has power during the term to vacate or modify its own orders or to rescind decrees. *Phillips* v. *Dawley*, 1 Nebraska, 320; *Bank* v. *Green*, 10 Nebraska, 134; *Volland* v. *Wilcox*, 17 Nebraska, 50; *Gregory* v. *Tingley*, 18 Nebraska, 318, 322. It follows from these facts and decisions that the sale, though temporarily confirmed, was finally set aside, and that no rights of a third party accrued during the time that the sale was apparently confirmed. Hence this chain of title presented by defendants must fail." We are entirely satisfied that this expresses the law on the subject in the State of Nebraska. In *State Bank* v. *Green*, 10 Nebraska, 130, 134, the Supreme Court of Nebraska says: "Under our law governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not certainly divested." The final order confirming is subject to review as the confirmation of a sale in equity is, *Parrat* v. *Neligh*, 7 Nebraska, 456, 459; and the purchaser submits to the jurisdiction of the court as to all matters connected with such sale or relating to him in the character of purchaser. This order of confirmation was vacated before there was any change in the relation of the parties, and the sheriff's deed fell with it. Counsel for plaintiff in

error refers to section 508 of the Civil Code, which reads as follows: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but, in such case, restitution shall be made by the judgment creditor, of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale." Comp. Stat. 1885, p. 695. This section relates to the judgment, as to which the purchaser is not affected by irregularity or error, and to which he is not a party; but we are considering the order of confirmation, which may be reviewed on appeal, *Parrat* v. *Neligh*, *ubi sup.*; though the merits of the original case are not open to reëxamination. *Bank of Lincoln* v. *Scofield*, 9 Nebraska, 499.

The cases cited by the circuit judge show that the purchaser can move for confirmation or to set the sale aside, and can appeal from the order thereon; that he may be compelled to perform his bid, and that he is concluded by the result of the proceedings to confirm or annul the same. And see *Paulett* v. *Peabody*, 3 Nebraska, 196, 197; *Shann* v. *Jones*, 4 C. E. Green (19 N. J. Eq.) 251; *Requa* v. *Rea*, 2 Paige, 339; *Barker* v. *Richardson*, 41 N. J. Eq. (14 Stewart) 656. That such is the rule in Nebraska is quite convincingly shown by the case of *Sessions* v. *Irwin*, 8 Nebraska, 5, which was an appeal by Curson from the order setting aside the confirmation and the sale under consideration here, which order was, however, affirmed. If Sessions, the judgment creditor, received $30 from Curson, respecting which there is no finding, he became Curson's debtor to that amount, and, as argued for defendant in error, Curson might have a right to be compensated out of the moneys collected upon the judgment, but the operation of the order setting aside the confirmation was to defeat any claim of title on the part of Curson or his grantee. This accords with the decisions and settled practice of the state courts in reference to sales under process issuing out of them.

Finally, it is said that the judgment embraces property not described in the petition. The description was "the west half of the northeast quarter of the southwest quarter of section twenty-four."

Syllabus.

The jury found title thereto in defendant in error, and also by the 37th finding described what was stated to be "the premises in dispute" by metes and bounds, as conveyed to Deputron. The judgment, though using somewhat different language, conforms to the finding. There was no motion to set aside the verdict and for a new trial, nor can we discover that any suggestion of mistake in its terms was made below.

The governmental subdivision would be, if accurate, eighty rods long by forty rods wide, and the finding and judgment describe a tract fourteen hundred feet in length by seven hundred and fifty feet in width, less a parcel in the southwest corner, but excess in acreage frequently occurs in government surveys, and as the finding is that the description there given and followed in the judgment is the description of the premises in dispute, we perceive no ground for interference.

There being no error, the judgment is

Affirmed.

HENDERSON BRIDGE COMPANY *v.* McGRATH.

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

No. 63. Argued November 4, 1889. — Decided March 17, 1890.

M. contracted with a bridge company to construct the road for a railway, according to specifications and profile, from the end of its bridge to Evansville, about six miles. The road was to run on bottom lands, with an uneven natural surface, and the profile showed part trestle and part embankment. It was contemplated that the material for the embankments was to be taken from borrowing-pits along the line. The specifications fixed prices for excavation, for filling and for trestling, and provided that the relative amounts of trestle and earthwork might be changed at the option of the engineer without prejudice. During the progress of the work the company decided to modify the plan by abandoning the trestling in the line of the road, substituting for it a continuous embankment, and by making a draining ditch along the whole line, running through the borrow-pits. In order to serve its intended purpose this ditch was required to be of a regular downward grade, with properly sloping sides. Some of the borrow-pits were found to be

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too deep, and others too shallow, and it was found that they had been excavated without reference to the slope at the sides. There were highways and private roads crossing the line at grade. The contract did not indicate how the approaches of these roads were to be constructed; but when the change was determined on, it was decided to make them of trestle. This work was more expensive than the trestle provided for in the contract. The company directed its engineer to have these modifications carried out, and the contractor was notified of this. He made no objection to the substitution of embankment for trestling; but as to the ditch, he objected that it was not in the contract. A conversation followed, in which the contractor understood the engineer to say that it would be paid for at excavation prices from the surface down, but the company claimed that it was only intended as an expression of the opinion of the engineer, which, it said, was made without authority. As to the trestle approaches the contractor was informed that he would be paid what was right. The work was constructed in all respects according to the modified plans. In settling, the contractor claimed to be paid for the ditch as excavation from the surface down. The company claimed that the material taken from the borrow-pits should be deducted from the total. There were about 2800 feet in all of the trestle approaches. The contractor accepted payment for 2100 feet at the contract price, and as to the remaining 700 feet claimed to be paid according to what the trestles were reasonably worth. The company claimed that they should be paid for at the contract price; *Held*,

(1) That the construction of the ditch was outside of the original contract;

(2) That the fact that it passed through the borrowing-pits did not modify that fact;

(3) That the engineer had authority to agree with the contractors that they should be paid for it as excavation from the surface down;

(4) That it was right to leave it to the jury to determine whether such an agreement was made between the contractors and the local engineer, acting for the company;

(5) That it was properly left to the jury to decide whether the company agreed to pay for the trestle approaches what they were reasonably worth;

(6) That as the agreement was to pay, not a fixed price, but what the trestling was reasonably worth, which the law would have implied, it was immaterial whether the agent of the company had or had not authority to make it.

THIS was an action at law brought by the defendants in error against the plaintiff in error in the Circuit Court of Vanderburgh County, Indiana, and removed into the Circuit Court of the United States for the District of Indiana.

The Henderson Bridge Company was a corporation of the

State of Kentucky, organized for the purpose of building a bridge over the Ohio River from the city of Henderson, Kentucky, to the Indiana bank of the river, and a railroad thence to the city of Evansville, Indiana, a distance of about nine miles.

On the 8th of July, 1884, a contract was made between the company and the defendants in error for the grading, masonry and trestling of the railroad for a distance of something over six miles, measuring from Evansville to the bridge, designated as sections 1 to 6 inclusive, and a part of section 7, each section being one mile long. No formal written contract was executed between the parties; but the agreement arrived at consisted of, (1) specifications and profile of the work to be done, on the part of the company; (2) proposals on the part of the contractor; and (3) acceptance of the proposals by the company.

The specifications prepared by the chief engineer of the defendant classified the work as "Clearing and grubbing," "Excavations," "Embankments," "Masonry," and "Pile Trestle."

Defendants in error completed the work about the 1st of March, 1885, and the company accepted it. On the final settlement a controversy arose as to the amount of the balance due the defendants in error, after crediting the partial payments made as the work progressed; and this suit was brought to recover the amount of $23,667, claimed by them to be due, which the company had refused to pay.

The bills of exception taken below, however, and the errors assigned, narrow the controversy in this court to two items — one being in respect to a drainage ditch, which was ordered to be made; the other in regard to the value of certain extra pile-work. Our statement of the case will be confined to an examination of those points.

(1) The work contracted for lay, all except the two sections nearest to Evansville, through the bottoms of the Ohio River, which were subject to overflow. On that portion in the bottoms the profiles showed several stretches of trestling which aggregated 1486 feet. The specifications, however, provided

that "the quantities marked on profile are approximate, and not binding. The relative amounts of trestle and earthwork may be changed at option of the engineer without prejudice."

While the work was in progress the company determined to modify the plan so as to omit the trestle and make a continuous embankment with underlying drain-pipes. This modification necessitated a different system of surface drainage; and it was determined that the borrow-pits (that is to say, the excavations along the line of the railroad from which the earth was taken to form the embankment) should form a drainage ditch on the eastern side for about two-thirds of the way. Mr. Hurlburt, who was the company's third engineer in rank, and had immediate supervision of the work in the field, was directed to have these modifications carried out.

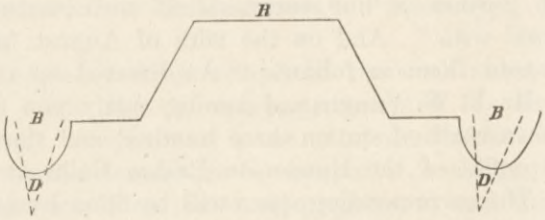
In consequence of this change of the plan, Mr. Vaughan, the company's chief engineer, on the 16th of August, 1884, telegraphed O. F. Nichols, the resident engineer at Henderson, directing him to notify the defendants in error that "all trestle on portion of line embraced in their contract will be dispensed with." And on the 26th of August following Nichols wrote them as follows: "As directed by the chief engineer, Mr. F. W. Vaughan, I hereby notify you that the trestle shown north of station three hundred and thirty-three (333) on profile of the Henderson Bridge Railroad will be omitted. The corresponding space will be filled by solid embankment. Arrangements have been completed for additional borrow-pits necessary to complete these embankments." No objection was made to that change by the defendants in error.

In regard to the ditch, however, it was different. Defendants in error maintained that no such ditch was called for either by the specifications or by the profile, and that, therefore, they were under no contract to make it. They claimed further, and there was testimony in the record to the point, that on the day after the receipt of Mr. Nichols' letter, Hurlburt, the local engineer in charge, came to see them, and notified them that they would be required to make said ditch on the eastern side of the embankment from section three to section seven, inclusive, for the purposes of draining the borrow-

pits, such ditch to be two feet wide on bottom in section three, three feet at bottom in section four, four feet wide on bottom in section seven, and to run through the borrow-pits, and have a slope of one and a half feet, horizontal measurement, to one foot perpendicular. Defendants claimed further that they objected, on the ground that they could not make the ditch without compensation, and that thereupon Hurlburt replied that they would be paid for it at the same price they had bid for excavation, and that it would be estimated *from the top of the ground* down.

The company, on the other hand, denied both the fact of the making of such alleged supplementary contract, and the authority of the engineer, Hurlburt, to make it. It maintained that the evidence showed only an expression of opinion made by Hurlburt.

The annexed rude diagram of a cross-section of the work will illustrate the situation.



Defendants in error did not deny the fact of the coincidence, as stated, between the ditch and the borrow-pits, but they justified by saying that the basis of measurement adopted in their contract, while it was to a certain extent arbitrary, yet was not a cheating or improper basis, for the reason that it was a commutation, and was necessitated by the introduction of the continuous parallel ditch. The digging of such a ditch introduced, they claimed, an entirely new element into the work; it peremptorily demanded the careful maintenance of the ditch level throughout its whole extent, and required long hauls of dirt; and whereas, before the ditch was ordered, the excavation was made entirely with reference to the con-

venience of depositing the dirt in the embankment, afterwards it had to be made with reference to the ditch.

(2) The defendants in error were required to make certain trestle approaches on one side of the road for some of the road crossings, and farm crossings, into which were put 2800 lineal feet of piling. The profile did not indicate that these approaches were to be made of piling; and defendants in error claim that they were not, therefore, included in the bid, but were made under a new agreement that they should be paid for "as was right." The contract price for trestles was 30 cents per lineal foot, but the evidence of defendants in error tended to show that the construction of these trestles was worth from 60 cents to $1.50 per lineal foot.

The engineer's estimate for February, 1885, contained this item: "Secs. 3, 4, 5, 6, 7. Piles driven, 2108 lineal feet, 30 cents per lineal foot, $630.90." This was part of the piling in controversy; and on this estimate the defendants in error settled with the company for February and receipted it. The company then claimed that said settlement and receipt, and the original agreement as to value in the bid accepted, conclusively fixes the price at 30 cents per lineal foot for the whole 2800 feet; while the defendants in error, on the other hand, claimed that the receipt in February was merely for a payment for 2108 lineal feet, and that they could, as to the other 700 feet, still prove value on a *quantum meruit.*

Under these forms of the controversy, not necessary to be further adverted to here, the case was tried below. On the trial the court instructed the jury as follows: "The taking out of the trestles and the requirement of earthwork in their place created no basis for a claim for extra compensation; so that, for the purpose of the question we are now coming to, the case is the same as though the specifications and profile in the first instance had shown continuous embankment. The bridge company, having come to the conclusion to make this embankment, deemed it proper to make a change in the requirements in respect to ditches, but there is no reservation in the contract in regard to that. Of course, the general terms of the contract in respect to the right of the engineer to oversee

the work may embrace the power to direct reasonable changes in regard to ditches, but there is nothing authorizing the bridge company to substitute a continuous ditch for the ditches defined upon the original profile; so when they determined to require this continuous ditch to be made, it necessarily put the parties into a position for negotiation on the subject, and Mr. Hurlburt, the engineer in charge, being authorized to have this ditch constructed, had incidental authority to agree upon the price or mode of measurement."

The defendant at the time excepted to so much of that instruction as is contained in the following words, viz.: "But there is nothing authorizing the bridge company to substitute a continuous ditch for the ditches defined upon the original profile; so when they determined to require this continuous ditch to be made, it necessarily put the parties into a position for negotiation on the subject, and Mr. Hurlburt, the engineer in charge, being authorized to have this ditch constructed, had incidental authority to agree upon the price or mode of measurement."

The court also gave the jury the following instructions, viz.: "But when it was proposed to make a continuous ditch on the east side of the track at the same time the embankment was being made, that introduced a new element into the problem. If the parties were to make an embankment and ditch also, it became desirable to take the dirt for the embankment from such localities as would be most effective in producing the ditch, and it necessarily resulted from this state of things that a party making embankment would, or might at least, make embankment and ditch at the same time. He might be taking earth out for the purpose of making embankment which he could have taken from another place more economically if he was not intending to make this ditch. It follows that earth taken from the same place may represent embankment, and also ditch. The excavation made might be borrow-pit, and it might be ditch, and consequently it became proper for the parties concerned to adopt some system by which they would compute the respective amounts to be credited to each phase of the work.

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The same work being effective, both towards making the embankment and making the ditch, to treat it as all embankment or as all ditch, would be unjust. So it was for the parties, the bridge company and plaintiffs, to agree upon some plan upon which they could make a computation; and so I instruct you upon the facts as they appear without dispute that it was within the power of Mr. Hurlburt, the resident engineer, who was superintending the construction of the work, to make a contract with the plaintiffs, who were under contract to make the embankment for the making of this ditch, to agree that they should do this work, and how much of the excavation should be deemed to be for the purpose of embankment and how much for the ditch."

The defendant also excepted at the time to so much of that instruction as is in the words following, viz.: "And so I instruct you upon the facts as they appear without dispute that it was within the power of Mr. Hurlburt, the resident engineer, who was superintending the construction of the work, to make a contract with the plaintiffs, who were under contract to make the embankment for the making of this ditch, to agree that they should do this work, and how much of the excavation should be deemed to be for the purpose of embankment and how much for the ditch."

The court also gave to the jury the following instructions, viz.: "From the duty imposed upon him as resident engineer of the defendant arose Mr. Hurlburt's power to make an adjustment of the question. Plaintiffs claim he did make arrangements with them, by which it was agreed that the portion of excavation to be regarded as such should be considered as starting from the lower level of the ditch along its whole length and be measured at a certain slope to the surface of the earth as it was before work was commenced, and upon that they claim 37,256 cubic yards of excavation as ditch. Defendant claims that Hurlburt did not make any such agreement, and this is an issue of fact which the jury must determine upon the evidence. I will say, however, that under the circumstances, Mr. Hurlburt did have power to make the agreement if he saw fit so to do. If you find that

he did so, and that the measurements he returned are correct, then the plaintiffs are entitled to compensation accordingly for 37,256 cubic yards at 18 cents per cubic yard." And to the giving of that instruction the defendant at the time excepted.

The court also gave to the jury the following instruction: "If Mr. Hurlburt did not make such agreement with these parties, but simply told them what mode of measurement he thought would be adopted, but that it would have to be left to the chief engineer in the end, it would follow that the work was done without any special agreement, and you will be compelled to estimate it upon its fair and reasonable worth. You will, then, consider from the proof how much excavation was made for the ditch, and how much more to make the embankment than if the continuous ditch had not been required, and for the number of yards of earth excavated in consequence, allow 18 cents per cubic yard. In this view the figures of Mr. Hurlburt, though relevant, would not be conclusive as evidence. If he made the agreement, as the plaintiffs claim he did, and his estimates were correct, that is an end of the question. If he did not make the agreement and the question was left open, then you must determine the number of yards excavated for the ditch upon the proof and allow accordingly the contract price of 18 cents a yard."

The defendant at the time excepted to so much of that instruction as is in the following words, viz.: "If he made the agreement, as the plaintiffs claim he did, then that is an end of the question."

The defendant requested the court, in writing, to give to the jury the following instruction, viz.: "As to the ditch claimed by plaintiffs to have been made by them on the easterly side of the railroad of defendant, the plaintiffs are entitled to recover only for so much excavation as was actually done for the purpose of making such ditch, excluding any portion of the borrow-pits dug exclusively for the purpose of making the embankments, and that the jury can find for plaintiffs only the contract price of 18 cents per cubic yard for the excavation, which they may find from the evidence was so made for

the purpose of making such ditch." But the court refused to give that instruction; whereupon the defendant at the time excepted.

As to the claim of the defendants in error for a price extra to the original contract for the trestles built by them the court gave to the jury the following instructions: "The next item is the piles in the bridges. The contract price for piles is 30 cents per lineal foot. The profile and specifications, as originally drawn, or as they now stand, show considerable trestle work, and show generally highway crossings across the track at different places, but there is no statement in the specifications or in the profile with respect to what kind of crossing it shall be, whether of earth or of timber. There is a dispute between the parties arising out of this fact upon the question whether these bridges, made for the purpose of carrying highways over the embankment, are within the contract. The contract in that respect is ambiguous. The court, looking at the contract, cannot say what kind of crossing was intended. There is no proof of custom in this case sufficient to settle this point. We are therefore left to the construction which the contractors themselves have adopted, as shown by their conduct under the contract. When parties have made an ambiguous contract and have acted under it, and their joint actions show their understanding of it, courts and juries will follow the construction thus indicated. In this case the evidence shows that in respect to 2100 feet, in round numbers, the plaintiffs themselves treated the piles as coming within the terms of the contract in respect to price by receipting for that price upon the estimates. There has been evidence before the jury — I cannot rehearse it — as to what was said between the engineer of defendant and plaintiffs at the time this work was done. Perhaps the plaintiffs made some protest against doing this work at the price stated, but, nevertheless, they went on and did the work under that price and receipted for it, and I think the jury should accept that as conclusive upon that point. A subordinate engineer, working in behalf of a corporation, as Mr. Hurlburt was, has no right to waive the effect of receiving pay upon monthly estimates under a con-

tract like this. Such a contract would have but little force or value if a subordinate agent has the power to waive the terms, and this contract declares the estimates made by the engineer and furnished to the parties to be final, except for fraud or mistake. If the defendant had been an individual instead of a corporation he could have been there in person and waived the contract by saying we will leave that open; we will not make that conclusive; but I instruct you that this subordinate agent, Mr. Hurlburt, working for the bridge company, a corporation whose affairs must have been conducted by agents appointed to act for it — Mr. Hurlburt acting in this capacity — could not waive this stipulation in the contract, that the monthly and final estimates should be conclusive. Therefore, in respect to the piling included in the estimate, about 2100 lineal feet, plaintiffs have precluded themselves from claiming extra pay. In respect to the work on the embankment, the act of accepting pay at the contract price raises a presumption that that was the proper price for the whole amount, and, in the absence of proof to the contrary, the contract price should govern; but the presumption is not conclusive as to the 700 feet of piling not in the estimates, and if you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles should be paid for at what they were reasonably worth, and not by the contract price, you may allow the reasonable value as shown by the proof on the subject."

The defendant at the time excepted to so much of that instruction as is contained in the following words, viz.: "But the presumption is not conclusive as to the 700 feet of piling not in the estimates, and if you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles should be paid for at what they were reasonably worth, and not by the contract price, you may allow the reasonable value as shown by the proof on the subject."

The defendant in writing requested the court to give the jury the following instruction, viz.: "Where any of the work done by plaintiffs and sued for in their complaint has been included in any of the monthly estimates of such work read to

them, and such work is therein valued at the contract price, such fact is conclusive evidence that such work was done under the contract and the prices fixed there final and conclusive."

But the court refused to give that instruction; to which ruling of the court the defendant at the time excepted.

It was claimed that, by reason of those instructions, the jury were authorized to find, and did find, for the defendants in error, for the alleged ditch, five thousand six hundred and thirty-six dollars and fifty-five cents, and for the piling eight hundred and fifty dollars, in excess of any rightful claim they had; and to that extent the plaintiff in error, which was the defendant below, averred the verdict to be erroneous.

The verdict of the jury upon which the judgment was rendered was for $13,470 in favor of the defendants in error.

The assignments of error were: (1) That the court erred in refusing to charge the jury in behalf of the defendant below, as stated; and (2) that the court erred in those parts of the charge given, which were objected to by the defendant below, as stated.

Mr. S. B. Vance (with whom was *Mr. James M. Shackelford* on the brief) for plaintiff in error.

Mr. Curran A. DeBruler (with whom was *Mr. Alexander Gilchrist* and *Mr. Daniel B. Kumler*, on the brief) for defendants in error.

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

The main questions to be determined in the first branch of this case are these:

(1) Did the modification of the original specifications and profile, made in August, 1884, fall within the original contract, or did it create a feature in the work to be done, so different from that originally contracted for as to put the defendants in error in a position to make as to that feature a new contract?

(2) Did the engineer, Hurlburt, have authority to make such new contract?

(3) Did the court err in refusing to charge, as prayed, "that the plaintiffs [below] are entitled to recover only for so much excavation as was actually done for the purpose of making such ditch, excluding any portion of the borrow-pits dug exclusively for the purpose of making the embankments"?

We shall briefly consider those questions *seriatim*.

First. A careful examination of the specifications and profile, and of the testimony in the case, all set forth in the bills of exceptions, satisfies us that the requirement to construct a continuous drainage ditch parallel to the embankment, four and one-third miles long, and of the dimensions ordered, did create a new problem in the work not covered by the original contract. The ditch was required to have a fall of nearly two feet to the mile; to be two feet wide at the bottom at one end, and to increase in size to six-feet bottom width at the other end; and throughout, the sides were required to be scaled one and one-half foot horizontal measure to one foot perpendicular. The testimony shows that in one portion, at least, it was nine feet deep. It was made to drain off the water from the prescribed area, and to take the place of the county ditches. On this point McGrath, one of the defendants in error, testified that "to make the borrow-pits serve for a ditch it was necessary to haul the earth from the high ground, where the embankment was low, to the low grounds, where the embankment was high, whereas but for the ditch, the earth from the embankment would have been taken directly from the sides; that this in many places necessitated a longer haul of earth, and increased the cost of the embankment."

Wasson, who was a sub-contractor, testified that before the change was made he "had taken earth from borrow-pits about twenty inches deep, and afterwards had to dig to the depth of nine feet to make the ditch, and was required to haul this extra excavation, some of it six hundred feet."

Robinson testified that "if the work was changed so as to require a continuous ditch, it could not be done as cheaply as

it could if done as provided for in the specifications, because where the embankment would be low you would have to make a shallow borrow-pit, and in making a continuous ditch you would have to deepen that borrow-pit to bring it to the ditch level and would have to carry the dirt forward, necessitating a haul. There was no continuous ditch contemplated in the profile of the work."

Fisher, a witness for defendants in error, testified that "he was a civil engineer of thirty-five years' experience, and largely as railroad engineer. If the specifications provided that the earth for embankment should be borrowed equally from both sides, and then a continuous ditch should be required to be made on one side of the embankment, it would necessitate a greater haul and would be more expensive. In consequence of the ditch a greater amount of earth would have to be taken from the side on which the ditch is made. One cannot work to such an advantage in a narrow ditch as in a broad borrow-pit. The deeper you go, the harder the earth is to work."

Outside of the testimony of the witnesses, it is manifest that to dig earth on a surface rolling and broken, as the profile shows the surface to have been in this instance, for the sole purpose of constructing a level embankment, and without regard to the depth or extent or level of the pits thereby made, is a very different problem from the digging with the double view of the construction of such an embankment, and the making of a continuous ditch with prescribed directions and uniform bottom level for a length of more than four miles.

It is true that, as the plaintiff in error says, the profile shows ditching in these same sections, covered by the original contract, to the amount of 4660 cubic yards; but it also is true that those ditches were of a very different character, and imposed no such burden on the contractor as did the one in question. Indeed, the plaintiff in error itself treated the modification as a serious change, and especially so considered the ditch, before the controversy arose. In the correspondence between the two engineers of the company, which determined on it, it is spoken of as a new system.

Second. We also think the engineer, Hurlburt, had authority to make a new contract for the ditching. The plaintiff in error insists that a subordinate engineer has no such authority by virtue of his employment. That may be conceded; but it is not the ground assumed by the defendants in error. They contend that Hurlburt was specially authorized to make the contract; and support that position by quoting the second engineer Nichols, who says, "that the plan of drainage suggested in my letter to Mr. Vaughan was accepted by him, *and Mr. Hurlburt was directed to have it carried out.*" This view is fortified by the fact that in Vaughan's letter to Nichols whereby the proposed changes were sanctioned 16th of August, 1884, and numerous items of adjustment and arrangement made necessary by such changes suggested, Vaughan, himself, clearly recognized the situation as one admitting of new terms with the contractors. He wrote, *inter alia*, of the change, "this solid bank business" he called it, "we might get a low rate for extra earth in consideration of the same."

In *Damon* v. *Granby*, 2 Pick. 345, the inhabitants of the town of Granby had voted that certain persons thirteen in number should be a committee to procure a master builder, and superintend the building of a meeting-house for the town. On the trial of the case, which was an action of debt by the builder of the meeting-house on the contract made with the committee, the defendants objected that the superintending committee had no authority to contract for the building of the house. The court held that the vote of the inhabitants gave to this committee the authority to enter into the contract. "To superintend the building of the house," says the court, "includes the power to make the necessary contracts," etc. See also Story on Agency, § 79.

Third. Nor do we think the court below erred in refusing to charge the jury that the defendants in error were only entitled to recover for such excavation as was actually done for the purpose of making such ditch, as distinguished from such portion of the ideal ditch as coincided in space with the borrow-pits, as portions thereof. In some cases, nay, in most cases, that would be a proper charge, perhaps, but not in this

case. Here the plaintiffs below claimed before the jury, as a matter of fact, that they held a valid contract with the defendant below, by the terms of which they were entitled to pay for the whole volume of the ditch (calling it "imaginary" in part makes no difference), from the bottom up to the original ground surface through its whole length; and that, whether said volume coincided with the spaces of borrow-pits or not. It was for the jury to say whether such contract did in fact exist. It was not for the court to assume and instruct the jury as a matter of law that it did not exist. Such a contract was not legally impossible. It was not claimed that the contractors defrauded the company, or in any way took advantage of it; and the basis of measurement, even if artificial and to an extent "imaginary," is not legally unreasonable, in view of the testimony of the witnesses as to the onerous and complicated labors of such a ditch. As a substitute and equivalent for all the items of demand — in increased volume of excavation, increased hauls, increased hardness of earth to be worked, etc., it may have been a very proper system. We cannot say that it was not.

As to the second branch of the case, viz., that in respect to the piling, it is objected by the plaintiff in error that the instruction of the court was erroneous for the following reasons: First. Because in speaking of the 700 feet still not paid for, the court said: "If you find upon the proof that there was an agreement between plaintiffs and Mr. Hurlburt that these piles should be paid for at what they were reasonably worth," etc.; while there was no evidence tending to show that Hurlburt made the agreement therein supposed. But there was such evidence. Ryan, one of the plaintiffs below, had testified that "we had no contract for this work, and before we began it I had a conversation with Mr. Hurlburt about it. I wanted to know what we would be paid for it, and he said that Mr. Vaughan would do what was right." This was claimed to be a contract for reasonable compensation. It was for the jury to say whether the conversation was with a contractual intent or not. The court had no right to assume as a matter of law that it was not, and refuse a

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charge on that aspect of the case. Second. Because Hurlburt had no authority to make a contract in reference to this matter. But the contract spoken of, being for a compensation on a *quantum meruit*, and not for a specified price, it is immaterial whether Hurlburt had such an authority or not. If, as the representative of the company, he had made no express promise to pay, the law would imply one. There is no question as to his power to direct the work, and no claim that he exceeded his authority in directing the crossings to be made of trestle and pile work. Such being the case, we do not consider it necessary to discuss the abstract question of whether the language used by the court was technically accurate as applied to the case; if it was not, there was yet no material error — none that could have injured the defence.

We do not think that the acceptance of thirty cents for some of the trestles precluded the plaintiffs as to the value of others.

The judgment of the court below is

Affirmed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* THIRD NATIONAL BANK OF CHICAGO.

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

No. 174. Argued January 8, 1890. — Decided March 17, 1890.

A corporation in debt cannot transfer its entire property by lease, so as to prevent the application of it, at its full value, to the satisfaction of the debts of the company; and when such transfer is made under circumstances like those shown in this case, a court of equity will decree the payment of a judgment debt of the lessor by the lessee.

Where, in a court of equity, an apparent legal burden on property is challenged, the court has jurisdiction of a cross bill to enforce, by its own procedure, such burden.

The court which denies legal remedies, may enforce equitable remedies for

Statement of the Case.

the same debt; and an application for the latter is not foreign to a bill for the former.

A cross-bill may be amended so as to work a change in the ground of the relief sought, when the proofs which make it necessary are furnished by the original complainant in support of allegations in his bill.

A lessee of a railroad, receiving money to be expended on the leased property, and misappropriating it by spending it on another property, cannot, by afterwards spending an equal amount of its own money on the leased property, deprive a creditor of the lessor of an equitable right growing out of the misappropriation.

A misappropriation of money by a corporation being proved, and an equitable claim against the wrongdoer being established, and it appearing that the pleadings raise no issue as to the amount of the misappropriation, and that the officers of the corporation can furnish no information on this point, it is no error to hold that it was in excess of the claim.

In 1865, by a special act of the legislature of Illinois, the Chicago and Pacific Railroad Company was organized as a body corporate, with authority to construct and operate a railroad from the city of Chicago to the Mississippi River, at a point near Savanna, both points being within the State of Illinois. In 1872 it executed a trust deed upon its property to secure $3,000,000 of bonds. On March 9, 1876, judgment was rendered against it in the United States Circuit Court for the Northern District of Illinois for the sum of $3499.73, in favor of Horace Tabor. Execution was first issued upon this judgment September 9, 1876. On May 27, 1876, suit was brought to foreclose the deed of trust. After a decree in such foreclosure, and on May 1, 1879, the property was sold on an order of sale, for $916,100, to John I. Blair and others. Subsequent to April 2, 1880, but within the year prescribed by statute, the Chicago and Pacific Railroad Company redeemed the property from the sale under the foreclosure decree, the Chicago, Milwaukee and St. Paul Railway Company having advanced the money therefor. On the 19th of February, 1880, which was after the foreclosure sale but before the redemption, the Third National Bank of Chicago brought suit in the same court against the Chicago and Pacific Railroad Company, upon notes given by the company to the bank for money loaned. On the 3d of April, 1882, judgment was rendered in that suit, in favor of the bank, for $36,165.36; and on the

15th of July, of the same year, execution was issued thereon. On the 25th day of June, 1881, which was after the redemption from the foreclosure sale, the property of the Chicago and Pacific Railroad Company was sold, under an execution issued upon the Tabor judgment, to Albert Keep, to whom the certificate of sale was executed. The property so sold was described as follows:

"All and singular the railroad of the Chicago and Pacific Railroad Company, as the same is now surveyed, laid out, constructed and located in the counties of Cook, DuPage, Kane, DeKalb, Ogle and Carroll, in the State of Illinois, including the road-bed, stations, or station-houses, depot grounds, rails, ties, fences, bridges, viaducts and culverts, and all other buildings and structures, as well as engine houses, machine and other shops used in connection with said railroad."

On June 4, 1882, Albert Keep, the purchaser, assigned the certificate of sale to Alexander Mitchell, the president of the Chicago, Milwaukee and St. Paul Railway Company. The judgment debtor, not redeeming within the year, the bank, as judgment creditor, on September 25, 1882, redeemed from the execution sale by the payment to the marshal of the necessary sum, $5304.20, and this redemption money was paid to and received by Alexander Mitchell. The statute of Illinois, with reference to such redemptions, provides as follows:

"Sec. 20. If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns, may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in the following manner: Such creditor, his executors, administrators or assigns, may sue out an execution upon his judgment or decree, and place it in the hands of the sheriff or other proper officer to execute the same, who shall indorse upon the back thereof a levy of the premises desired to be redeemed; and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of eight per centum per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns;

whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated a certificate of such redemption, and shall advertise and offer the premises for sale under said execution as in other cases of sale on execution." 21 Starr and Curtiss, Ill. Stat. 1398, c. 77, § 20.

The proceedings had were in conformity with this section, and the marshal advertised the sale accordingly, on October 24, 1882. As heretofore stated, the redemption by the Chicago and Pacific Railroad Company was with money advanced by the Chicago, Milwaukee and St. Paul Railway Company. This advancement was made in pursuance of these proceedings. On April 1, 1880, which was subsequent to the commencement of the suit by the bank, resolutions were passed by the stockholders of the Chicago and Pacific Railroad Company, authorizing the leasing of its property and franchises to the Chicago, Milwaukee and St. Paul Railway Company, and also the execution of a new mortgage; and on the next day, the first-named company executed its lease to the last-named company, and the two companies executed a joint trust deed upon the same property to secure the payment of $3,000,000 of bonds, payable in thirty years. By the lease, which was for 999 years, the lessor (which will for convenience be called the Pacific Company) not only disabled itself from performing the functions and discharging the duties of its incorporation, but also transferred all its property and franchises to the lessee (hereafter called the Milwaukee Company). The consideration of the lease was $1.00, and the performance of the covenants of the lease by the lessee. The Pacific Company was largely indebted outside of the amount secured by the trust deed; it therefore surrendered to the Milwaukee Company all the means it had of discharging its indebtedness. Among the recitals in the lease were these:

"Whereas certain other parties to whom the said party of the second part was so as aforesaid indebted have prosecuted their several demands in the Superior and Circuit Courts of Cook County, and other courts of the State of Illinois, and have procured divers judgments thereon, which now remain

unpaid and unsatisfied of record, and are a lien upon the property of the said party of the first part, and other of said demands still remain unliquidated ; and whereas the said party of the second part, at the request of the said party of the first part, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of said party of the first part to the Mississippi River; . . . and also to pay all taxes, charges, or assessments imposed or assessed, or which may be hereafter imposed or assessed, upon the property or premises of the party of the first part."

And among the covenants of the lessee were these:

" The said party of the second part, in consideration of the said demise and lease so as aforesaid made by the said party of the first part, hereby covenants and agrees that it will take up, pay, cancel, satisfy and discharge the said three thousand bonds of one thousand dollars each at maturity thereof, and will pay, cancel and discharge each and every of the coupons or interest warrants attached to the said bonds, and each of them, as the same shall become due and payable, so as aforesaid to be made and issued to the parties of the first and second parts and will, during the continuance of this lease, at all times save the said party of the first part free and harmless therefrom, and from the mortgage so as aforesaid to be executed by the said parties of the first and second parts to the Farmers' Loan and Trust Company, on the second day of April, 1880, . . . and the said party of the second part shall and will, at its own proper cost and expense, preserve and keep the railway and premises hereby demised, and every part of the same, in thorough repair, working order and condition, and supplied with rolling-stock and equipment, so that the business of the said demised railway shall be preserved, encouraged and developed. . . . The said party of the second part hereby covenants, promises and agrees to and with said party of the first part that at the end of said term, or other sooner determination of this said lease, the said party of

the second part shall redeliver and surrender up to the party of the first part, its successors or assigns, the said demised railway and premises in as good order and condition as the same shall be delivered to the said party of the second part under this lease, and with such additions, betterments and improvements as shall have been made thereto."

The bonds were sold at ninety-seven cents, and the amount necessary to redeem from the foreclosure sale was about $1,100,000. Out of the proceeds of these bonds the Milwaukee Company not only completed the construction of the entire road authorized by the charter of the Pacific Company, from Chicago to the Mississippi River, but also constructed a bridge over the Mississippi River, so as to connect this road with its own line in Iowa.

[On[1] the 18th October, 1882, the two railroad companies filed the original bill in this suit, to enjoin the sale on execution under the statute above recited. The bank answered, and also filed a cross-bill, in which the relief prayed for was: that the judgment in favor of the Third National Bank, together with the amount paid for the redemption from the sale to Albert Keep, "may be decreed to be a valid and subsisting lien, created in favor of said Third National Bank, upon all the property of the said Chicago and Pacific Railroad Company;" and that "the court should decree that the same creates an equitable lien, and incumbrance upon the property of the said Chicago and Pacific Railroad Company;" and also "that a receiver of said property may be appointed according to the course and practice, with the usual powers of receivers in like cases; that such receiver may be let into and take possession of said Chicago and Pacific Railroad Company, with all its property, depot grounds, fixtures and appurtenances, and all the rents, issues and profits thereof; that he may have power to operate and manage the said road; that he may have power to apply the revenues and all the rents,

[1] For the better understanding of the points in the argument for the appellant, the reporter has added to the facts as stated by Mr. Justice Brewer, the clauses in brackets. They are substantially repeated in the opinion.

issues and profits thereof to the payment of your orator's said judgment and the amount of redemption money, interest and costs thereon, paid by it under said sale to Albert Keep;" also that the said Chicago and Pacific Railroad might be decreed to be sold with its franchises, property, fixtures and appurtenances, under the order and direction of the court, and that out of the proceeds thereof, the cross-complainant might have satisfaction of its said judgment and the amount paid by it for redemption.

To this cross-bill the original complainants and the trustees under the new mortgage were made parties. To this the plaintiff demurred and, the demurrer being overruled, answered. Proofs were taken, after which the defendant filed an amended cross-bill, asking that the prayer for general relief in the cross-bill be amended as follows: "Or that the said Chicago, Milwaukee and St. Paul Railway Company may be decreed to pay to your orator the amount paid by your orator upon the redemption of the property of the Chicago and Pacific Railroad Company from the sale made on execution issued on the judgment of Horace Tabor, with interest and costs, and the amount of said judgment recovered by your orator against the said Chicago and Pacific Railroad Company with interest and costs, by a short day to be specified in said decree."

The court in its decree, ordered "that the Chicago, Milwaukee and St. Paul Railway Company pay in to the clerk of this court, within thirty days, a sum of money sufficient to satisfy the judgment, costs and interest rendered in favor of the Third National Bank of Chicago against The Chicago and Pacific Railroad Company, including also the amount, with interest, paid by the Third National Bank of Chicago to the United States marshal for the Northern District of Illinois, to redeem from the sale to Albert Keep as aforesaid; and it is further ordered, adjudged and decreed, that in case the Chicago, Milwaukee and St. Paul Railway Company shall fail to pay said sum of money aforesaid within said thirty days, the Third National Bank of Chicago may move the court for the appointment of a receiver, with the usual power of receivers,

to take possession of the said leased property and to operate it until the amount due to the said Third National Bank of Chicago upon its judgment as aforesaid, with costs and interest thereon, and the amount, with interest thereon so paid by the Third National Bank of Chicago to the United States marshal for the Northern District of Illinois, to redeem from said sale to Albert Keep, is paid out of the earnings of said road, and for any other proper relief."

From this decree the Chicago, Milwaukee and St. Paul Railway Company appealed.]

Mr. E. Walker for appellant.

I. The cross-bill is not germane to the original bill, and the court erred in permitting it to be filed, and in overruling the plaintiff's demurrer thereto.

A cross-bill is a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is usually brought, either to obtain a necessary discovery of facts in aid of the defence of the original bill, or to obtain full relief to all parties touching the matters of the original bill. *Young* v. *Colt*, 2 Blatchford, 373.

A cross-bill is a matter of defence, and is confined to the matters in litigation in the original suit. If it brings before the court other distinct matters and rights it is no longer entitled to be deemed a cross-bill, but is an original suit and no decree, founded upon such matters, would be made upon the hearing of the cause. *Gallatian* v. *Cunningham*, 8 Cow. 361; *Walden* v. *Bodley*, 14 Pet. 156.

It is treated as an auxiliary suit, or as a dependency upon the original suit. *Slason* v. *Wright*, 14 Vermont, 208; *Cross* v. *De Valle*, 1 Wall. 5. And can be sustained only on matters growing out of the original bill. *Thompson* v. *Shoemaker*, 68 Illinois, 256; *Lund* v. *Skanes Bank*, 96 Illinois, 181; *Gage* v. *Mayer*, 117 Illinois, 632; *Daniel* v. *Morrison*, 6 Dana, 182; *Crabtree* v. *Banks*, 1 Met. (Ky.) 482; *Slason* v. *Wright*, 14

Vermont, 208; *Rutland* v. *Paige*, 24 Vermont, 181; *Ayers* v. *Carver*, 17 How. 591; *Pindall* v. *Trevor*, 30 Arkansas, 249; *Eve* v. *Louis*, 91 Indiana, 457; *Cartwright* v. *Clark*, 4 Met. 104; *Kemp* v. *Mackrell*, 3 Atk. 812; *Cross* v. *De Valle*, 1 Wall. 5; *Rubber Co.* v. *Goodyear*, 9 Wall. 807; *The Dove*, 91 U. S. 381, 385.

No decree can be founded upon new and distinct matters introduced by a cross-bill which were not embraced in the original suit. *May* v. *Armstrong*, 3 J. J. Marsh, 260; *S. C.* 20 Am. Dec. 137; *Daniel* v. *Morrison*, 6 Dana, 186; *Gallatian* v. *Cunningham*, *ubi sup.*; *Field* v. *Schieffelin*, 7 Johns. Ch. 250; *S. C.* 11 Am. Dec. 441; *Josey* v. *Rogers*, 13 Georgia, 478; *Andrews* v. *Hobson*, 23 Alabama, 219; *Gouverneur* v. *Elmendorf*, 4 Johns. Ch. 357; *Griffith* v. *Merritt*, 19 N. Y. 529.

II. The amendment to the cross-bill filed by leave of the court after the hearing, and to support the decree, was not germane either to the original bill or the cross-bill, as originally filed, and, by the introduction of new and distinct charges and an additional and entirely new prayer for relief, introduced into the cause issues not contemplated in either the original bill or the original cross-bill, and the answers filed thereto, and the court therefore erred in permitting the amendment to be filed and in founding its decree thereon.

An amendment will not be allowed at hearing, and much less, after case is heard, which contains anything that will prejudice or surprise defendant, or that will in anywise change the issues. *Moshier* v. *Knox College*, 32 Illinois, 155; *Farwell* v. *Meyer*, 35 Illinois, 40; *Hewitt* v. *Dement*, 57 Illinois, 500, 502; *Booth* v. *Wiley*, 102 Illinois, 84, 100; *Am. Bible Society* v. *Price*, 115 Illinois, 623, 666; *The Tremolo Patent*, 23 Wall. 518, 527; *Hardin* v. *Boyd*, 113 U. S. 756; *Snead* v. *McCouil*, 12 How. 407; *Oglesby* v. *Attrill*, 14 Fed. Rep. 214; *Land Co.* v. *Elkins*, 20 Fed. Rep. 545.

If the courts below abuse their discretion in permitting amendments at hearing, their action will be reviewed. *Jefferson County* v. *Ferguson*, 13 Illinois, 33, 35; *Mason* v. *Bair*, 33 Illinois, 194; *Booth* v. *Wiley*, 102 Illinois, 84, 100; *Gordon* v. *Reynolds*, 114 Illinois, 118, 123.

III. The cross-bill, as amended, is not germane to the original bill, and the court erred in founding a decree upon it as amended.

This proposition is, of course, supported by all the authorities cited under first proposition, and by the authorities cited under first branch of second proposition.

IV. The decree is not supported by the evidence.

Mr. Huntington W. Jackson and *Mr. John H. Thompson* for appellees.

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

Upon the facts can the validity of the decree requiring the Milwaukee Company to pay to the bank, within a specified time, the amounts of the two judgments held by it be successfully questioned? We think not. It would perhaps be difficult to point out any separate clause in the lease by which the Milwaukee Company obligated itself to pay the judgment in favor of the bank, and yet there is force in the contention that, taken as a whole, the instrument casts this burden upon the company. A part of the subject matter of the contract was claims against the Pacific Company. One recital is of the foreclosure debt; immediately following is one of the existence of claims, some of which had been sued on and passed into judgment and become liens, others still unliquidated; followed by the recital that the purpose of this arrangement is the redemption from said foreclosure sale, and the protection of the property from all the aforesaid valid judgment liens. Narrowly, the valid judgment liens referred to may include only those already existing, mentioned in the preceding recital; or, broadly all valid judgment liens perfected on the claims named in that recital, whether already in judgment or not. If these were all the provisions, the narrow construction might be preferred; but the further and express covenants of the Milwaukee Company were to pay and discharge fully the proposed indebtedness of $3,000,000, and to return at the end of the

lease, to the lessor, the demised property. Does not this indicate that the understanding and intent were that the Milwaukee Company should discharge all judgment liens founded upon existing claims, whether such liens had already been perfected, or should be created in subsequent suit? A judgment after a lease does not of its own right defeat the lease, or deprive the lessee of his interest and possession; but it operates against the lessor, and whatever interest, great or small, is retained in the leased premises. The purpose of this stipulation was not the protection of the lessee, but of the lessor. It was not that the lessee should be able to retain and enjoy the possession during the terms of the lease; but that the property should be freed from all burdens, so that at the termination of the lease the lessor might retake and enjoy it. The scope of the contract was not the payment of the debts of the lessor, for a mere debt, never passing into judgment, casts no burden upon the interest of lessor or lessee in the property, and the removal of all burdens was apparently the intent of the contracting parties. But again, the express lien on the lessor's property amounted only to about $1,100,000; yet, by the arrangement, a new lien was created from which nearly $3,000,000 was received, all of which sum passed into the hands of the lessee. Will not equity, for the payment of the debts of the lessor, follow this surplus into the hands of the lessee? Can a corporation in debt transfer its entire property by lease, so as to prevent the application of the property, at its full value, to the satisfaction of its debts? *Central Railroad* v. *Pettus*, 113 U. S. 116, 124; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 366. We do not care to pursue an inquiry into this question at length, or consider what limitations would surround this doctrine as applied generally, preferring to notice a single matter, which is significant and decisive. The contracting parties arranged not merely for the discharge of the foreclosure lien, but for the completion of the road for which the lessor's franchise was granted. The lessee not only performed these stipulations, but with moneys arising from the sale of these bonds built, for its own benefit, a bridge across the Mississippi River, connecting this road with its line

in Iowa, and thus making a continuous line of road to Omaha. Neglecting to pay the debts of the lessor, it appropriated a large amount of the proceeds of the trust deed upon the lessor's property to its own benefit, and the improvement of its own property. Here clearly was a diversion of funds, which the creditors of the lessor might follow in equity. This is only the application of familiar doctrine. The properties of a corporation constitute a trust fund for the payment of its debts; and, when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow the funds so diverted. The Milwaukee Company, from securities on the property of the Pacific Company, received nearly three millions of dollars; part it used for the benefit of the lessor company, and part it appropriated to its own benefit. Can it do this, and let the lessor company's debt go unpaid? Equity answers this question in the negative, and such was the ruling of the circuit judge. 26 Fed. Rep. 820.

Entertaining no doubt upon these matters, we pass to the consideration of certain questions of equity pleadings and procedure and evidence upon which the counsel for appellant largely relies. It will be remembered that after its redemption from sale under the Tabor judgment, the bank, following the provisions of the statute, advertised the property for sale on the execution issued upon its own judgment. The railroad companies filed their bill in equity in the Circuit Court to restrain such sale. The bank, besides its answer, filed a cross-bill, which, after setting out the facts, prayed that its judgment might be decreed a valid equitable lien and encumbrance upon the property of the Pacific Company; that a receiver might be appointed, with power to apply the revenues to the judgment; and that the property be sold in satisfaction thereof, and for general relief. It is objected that such cross-bill was not germane to the original bill, and was, therefore, improperly filed. The case of *Railroad Companies* v. *Chamberlain*, 6 Wall. 748, fully answers this objection. In that case a bill was filed to set aside the judgment. One of the defendants, owner of the judgment, filed a cross-bill, praying that the judgment might be decreed a valid lien, and the

property sold to satisfy it. The court dismissed both bills, the latter on the ground that the former having been dismissed on its merits, the latter could not be maintained, because the parties litigating were both citizens of the same State. This last ruling was reversed by this court, Mr. Justice Nelson, delivering the opinion, saying: "We think that the court erred in dismissing the cross-bill. It was filed for the purpose of enforcing the judgment, which was in the Circuit Court, and could be filed in no other court, and was but ancillary to and dependent upon the original suit — an appropriate proceeding for the purpose of obtaining satisfaction." In that case the original bill was to set aside a judgment — here, to restrain an execution sale under a judgment; but this difference does not affect the principle. Where in a court of equity an apparent legal burden on property is challenged, the court has jurisdiction of a cross-bill to enforce by its own procedure such burden. The court which denies legal remedies may enforce equitable remedies for the same debt; and an application for the latter is not foreign to a bill for the former.

Again, it is objected that an amendment to the cross-bill was allowed at the hearing, which changed the nature of the issues, and was therefore improper. This is the most serious question in the case. The amendment conformed the cross-bill to the proofs, and was in accord with the view of the law applicable to the facts, as indicated by the circuit judge, and as already approved by us in the fore part of this opinion; but it did work a change in the ground upon which relief was sought. The cross-bill, as originally framed, relied upon the fact that by redemption from the foreclosure sale by the mortgagor, the lien of the foreclosure decree was wholly removed, leaving the Tabor judgment as a first lien upon the property; that, by the redemption from the sale under the Tabor judgment, the bank became possessed of that lien; and that, holding that lien and its own judgment lien, it was entitled to enforce those liens in equity if not by execution at law. The misappropriation of a part of the proceeds of the $3,000,000 of bonds by the Milwaukee Company was not distinctively or separately alleged or counted on

as the basis of relief. The amendment introduced this matter into the cross-bill; but the fact was distinctly stated in the original bill filed by the railroad companies, for it alleged "that said lessee, with the means provided by the execution of said last-named trust deed and bonds, and the proceeds of the sale thereof, by and with the consent of your orator, the Chicago and Pacific Railroad Company, has completed the construction of the entire road authorized by its charter, from the city of Chicago to the Mississippi River, and has also constructed a bridge across the Mississippi River at or near Savanna." And proof of this was given by the railroad companies in their evidence. The fact was thus developed by the railroad companies, both by their bill and their proofs, and the amendment to the cross-bill was simply to enable the cross-complainant to avail itself of what had been alleged and proved by the original complainants. So, although thereby was presented a new and independent basis of relief, we think it must be held that there was no error in permitting the cross-complainant to avail itself of the fact thus furnished by its adversaries.

It is also objected that after this amendment, thus introducing new issues, the defendants to the cross-bill asked leave to file an answer thereto, which was denied; but the answer which was tendered contained no defence to the matter thus presented. It averred in substance that the Milwaukee Company had expended upon the road of the Pacific Company more than the entire proceeds of the $3,000,000 of bonds, to wit, about $4,000,000; but it contained no denial of the fact that it had used, as alleged, a part of the proceeds of the bonds in the construction of the bridge across the Mississippi River; in other words, it sought to excuse its misappropriation of a part of the proceeds of those securities by the fact that it had afterwards spent a large amount of its own money in improving the property of the Pacific Company. But that did not excuse the misappropriation, or release it from liability therefor. The misappropriation gave to the bank, at the time at which it was made, the right to pursue the misappropriated proceeds into the hands of the Milwaukee

Company. That right the Milwaukee Company could not thereafter defeat by spending money on the property of the Pacific Company; and it was unnecessary to enter into any inquiry as to the reasons for this subsequent expenditure, or as to how far the necessities of its own business on the through line from Chicago to Omaha compelled further improvements on that portion of the line east of the Mississippi River.

Still again, it is objected that there was no testimony showing how much of the proceeds of these bonds was expended in the construction of the bridge across the Mississippi River. The original bill alleged that the bridge was constructed out of the proceeds of these bonds; and it might almost be assumed that the construction of a bridge across such a great river would cost far more than the amount of the bank's claims. But further in the hearing, the president of the Pacific Company (who is also the counsel in this case) was examined as a witness, and testified as to the construction of the bridge out of the proceeds of these bonds; that the Pacific Company had parted with all its property and had no earnings or income; that it was impossible for him to give any detailed statement of the manner in which the proceeds of the $3,000,000 of bonds was expended; and that he did not know whether any of the employés of either company could furnish such statement. Inasmuch, therefore, as the original bill alleged the construction of this bridge out of the proceeds of these bonds; as the answer to the amendment to the cross-bill did not deny the fact of such misappropriation, or aver that it was less than the amount of complainant's claims; and as the principal officer of the Pacific Company was unable to tell how much was thus expended, and did not know of any one who could furnish the information, we do not think the court erred in assuming that the amount of such misappropriation was in excess of the bank's claims, and rendering a decree accordingly.

We see no error in the record and the decree is therefore

Affirmed.

BANIGAN *v.* BARD.

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

No. 1354. Submitted January 8, 1890. — Decided March 17, 1890.

An officer in a corporation who is leading in its management, who is active in securing the passage of a resolution authorizing an issue of preferred stock, who subscribes for such stock and pays his subscription and takes his certificate and votes upon it at shareholders' meetings for over two years, and induces others to take such stock, cannot, when the company becomes insolvent, recover back the money paid by him on his subscription, on the ground that the statutes of the State only authorized an issue of general shares.

THE case is stated in the opinion.

Mr. Tilton E. Doolittle for plaintiff in error.

Mr. Jeremiah Halsey for defendant in error.

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 Connecticut. The suit was brought by Charles Bard, receiver of the Hayward Rubber Company, which was a corporation organized under the laws of the State of Connecticut, and located in the town of Colchester in the county of New London. Being in an insolvent condition its affairs were placed in the hands of said Bard as receiver for the purpose of winding it up. Bard brought this suit in his character of receiver, in the Superior Court of New London County, and, on the application of Banigan, it was removed into the Circuit Court of the United States for the District of Connecticut. The case was heard there by the court without the intervention of a jury, upon a stipulation by the parties that this should be done.

There is filed in the record what purports to be a finding of facts and opinion of the court, 39 Fed. Rep. 13, in which the

opinion and the statement of the evidence are mingled together in a way which it is difficult to separate, and which, if there were any objection to it, might not be found in accordance with sections 649 and 700 of the Revised Statutes of the United States. But as there does not seem to be any controversy about the special finding of facts, and as there is a bill of exceptions in the case which very fairly presents the only question at issue, we proceed to examine into it.

It appears that the Hayward Rubber Company prior to the year 1879 had been a profitable concern and paid large dividends, its last being made in 1881. Thereafter its business deteriorated and became unprofitable. Its capital stock was $400,000, and the par value of its shares was $25 each. In January, 1883, the stockholders, in endeavoring to secure some competent person to oversee and direct the management of its business, entered into negotiation with defendant, Banigan, who was president and general agent of the Woonsocket Rubber Company, and who was a well-known and successful manufacturer, the result of which was that they sold him four hundred shares of the stock at $12.50 per share. Mr. Banigan was appointed general agent of the company by the directors, and had full control of the manufactory, subject to their approval. He entered upon the oversight of the business, laid out and arranged for new buildings, bought new machinery, ordered new lasts, tools, rolls and cutting machinery, and had automatic sprinklers put in the mill, all at an expense of some $120,000.

In March, 1885, a committee of the directors, of which Mr. Banigan was a member, sent out a circular recommending an increase of the capital by the issue of preferred stock to the amount of $100,000, saying that it was advisable to have a unanimous vote in favor of the proposition, asking for proxies, and enclosing resolutions which were to be submitted to a stockholders' meeting, April 2, 1885. This meeting authorized the issue of preferred stock to the amount of $100,000, entitled to cumulative dividends at 8 per cent per annum, which issue took precedence of all dividends on the common stock and any future additions thereto. The order in regard

to the issue of preferred stock was passed by a unanimous vote of the shares present or represented at the meeting, being 13,400 shares. The whole number of shares was 16,000. Each stockholder had the privilege of subscribing to said stock in proportion to the number of shares of existing stock owned by him. Mr. Banigan subscribed for 702 shares of the preferred stock, and on April 2 paid the company for it $17,550, and received a certificate for said shares, which contained in substance the provisions of the resolution voted. Shares to the amount of $25,000 in all were subscribed for. Banigan voted upon this stock at one or two annual meetings, and on June 26 thereafter he wrote to Potter, Lovell & Co., note brokers of Boston, enclosing a statement of the company's affairs, and saying that it had arranged to issue $100,000 preferred stock, but "only one-quarter of it has yet been issued, which I have taken principally." No claim for repayment of this $17,550 was made until 1888. Meantime Mr. Banigan continued to be the general agent of the company until it went into the hands of a receiver on August 9, 1887.

A considerable part of the evidence recited in the statement of facts by the court, and in its opinion, had relation to the question of the claim for salary or compensation for services which Mr. Banigan set up as a set-off to his admitted indebtedness to the corporation, which latter amounted to $26,051.93, being the balance due on account of sales made by Banigan for the Hayward Rubber Company, as its agent. But as the allowance made by the court to the defendant for his salary, of $10,000, which with the interest amounted to $12,035.83, is not in controversy, because the plaintiff has taken no writ of error to that judgment, and as the sum of $26,051.93 is not in controversy by Banigan, no further consideration of those matters which relate to the salary is necessary, and the only question raised before us is that growing out of the refusal of the court to allow Banigan the sum of $17,550, which he had paid for the preferred stock of the company, as a set-off to his indebtedness, which is not otherwise disputed.

The court below upon that subject says: "The claim for $17,550 rests upon a question of law. The contention of defendant is that, inasmuch as the statutes of Connecticut simply allow a joint stock company to increase its capital stock, and the articles of association gave no authority to make preferred stock, it was beyond the power of the Hayward Rubber Company to create such a class of stock, and there was a total failure of consideration for the contract; that no estoppel can exist against the assertion of the invalidity of the stock; and that the defendant is entitled to recover the amount paid by him from the corporation."

The court then concedes the proposition that under the laws of Connecticut there was no authority to issue this preferred stock, but the judge further says: "I am not favorably impressed with the doctrine that, as against the assignee or receiver of an insolvent corporation, the owner of preferred stock, who has voluntarily subscribed and paid for it, for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can recover the amount paid. In *Winters* v. *Armstrong*, 37 Fed. Rep. 508, Judge Jackson guards against such a broad principle, and it is not in accordance with the teaching of *Scovill* v. *Thayer*, 105 U. S. 143."

He also says that if defendant can recover an amount from the insolvent estate in a case where there is no claim of an unfulfilled condition, it must be upon a theory of the rescission of the contract, because the stockholder received nothing of value. He then adds: "This rescission must be made within a reasonable time. In this case Mr. Banigan paid for his stock April 2, 1885, and was still a stockholder when the receiver was appointed, August 9, 1887. I do not think that the preferred stockholder who voluntarily creates stock of this kind — for this Mr. Banigan virtually did — can hold it for twenty-eight months in the hope of dividends, and then, upon finding the company insolvent, come in as a creditor and receive back his money." He accordingly refused to allow the claim of Banigan for the money paid for this stock.

Opinion of the Court.

Perhaps but little can be added to what was said by the judge of the Circuit Court. It may be well to call attention a little more pointedly to the fact that when Mr. Banigan attempted, a year after the insolvency of the corporation, to return his stock and demand the money which he had paid for it, and at the time he filed this claim as a set-off in the Circuit Court, the corporation with which he dealt, and of which he was in effect the dominant spirit, had ceased to have existence for any other purpose than winding up its affairs, and all this matter had passed into the hands of the receiver, who represented especially the interests of creditors. It is in the face of the claim of these creditors, who must largely lose at any rate, that Mr. Banigan's claim is to be considered, and we are of opinion that, having received certificates for this stock, on which he voted in control of the company, and which increased his power in regard to that control, and having been the chief agent in causing the issue of this stock and giving it credit and currency by his actions, he cannot now be permitted to withdraw the money which he had paid, from the fund out of which these creditors are to be paid.

The force of this proposition is increased by the length of time elapsing between the payment of the money and the twenty-eight months in which Mr. Banigan held this stock, and voted upon it, and took the chances of its finally being a valuable investment. As its validity was a question of law, he must be presumed to have known it as well as anybody else. The cases of *Scovill* v. *Thayer*, 105 U. S. 143, and the very recent case of *Aspinwall* v. *Butler, Receiver of the Pacific National Bank of Boston*, 133 U. S. 595, while they are not so precisely analogous to the present case as to be considered conclusive of it, do yet enforce the general principle, that a person subscribing for stock under circumstances almost similar to the present, is bound for the obligations which the law imposes upon the holders of such stock for the benefit of the creditors of the insolvent corporation. We base our decision in the present case upon the view that Mr. Banigan, who was a controlling spirit in the Hayward Rubber Company, was active in passing the resolution which authorized the issue of

Counsel for Parties.

the stock and inducing other persons to take it, and in giving credit to the corporation on the ground that such stock had been taken and that he had actually paid his money in to the company, which its creditors had a right to consider as so much of its paid-up capital; that he held this stock for over two years, when the corporation was in struggling circumstances; that he voted upon it at two elections; and that he cannot now be permitted to recover back the money paid by him, from the effects of the insolvent corporation, which by law are devoted to the *bona fide* creditors of the institution.

Judgment affirmed.

TOLEDO, DELPHOS AND BURLINGTON RAILROAD COMPANY *v.* HAMILTON.

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

No. 184. Argued January 10, 1890.— Decided March 17, 1890.

A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter either directly by a mortgage given by the company, or indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.

Whether a mechanic's lien could, under the statutes of Ohio in force at the time of the attempted filing of a lien in this case, be placed upon a railroad, *quære.*

The priority of a mortgage debt upon a railroad has been sometimes displaced in favor of unsecured creditors, when those debts were contracted for keeping up a railroad, already built, as a going concern; but those cases have no application to a debt contracted for original construction.

A mortgage with words of general description conveys land held by a full equitable title as well as that held by a legal title.

IN EQUITY. The case is stated in the opinion.

Mr. John M. Butler and *Mr. Robert G. Ingersoll* (with whom was *Mr. Clarence Brown* on the brief) for appellants.

Mr. A. W. Scott and *Mr. John H. Doyle* for appellee.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

The question in this case arises between a mortgagee and a party claiming a mechanic's lien upon the mortgaged premises, as to priority of payment. The facts are these: On January 17, 1880, The Toledo, Delphos and Burlington Railroad Company executed and delivered its first mortgage to the Central Trust Company of New York, to secure the payment of $1,250,000 six per cent bonds. The description of the property conveyed by this mortgage is as follows: "Unto the Central Trust Company of New York, and to its successor or successors in trust, and for the uses and trusts hereby created, all and singular the line of railroad of the said party of the first part, as the same now is or hereafter may be constructed, between Toledo, Lucas County, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio; and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana, to the city of Kokomo, Indiana; being about one hundred and eighty miles in length; together with all and singular the right of way; road-bed, made and to be made; its track, laid or to be laid; between the terminal points aforesaid; together with all supplies, depot grounds, rails, fences, bridges, sidings, engine-houses, machinery, shops, buildings, erections, in any way now, or hereafter, appurtenant unto said described line of railroad; together with all the engines, machinery, supplies, tools and fixtures, now, or at any time hereafter, owned or acquired by said party of the first part, for use in connection with its line of railroad aforesaid; and all depot grounds, yards, sidings, turn-outs, sheds, machine shops, leasehold rights and other terminal facilities now, or hereafter, owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls and income and revenue to be levied and derived therefrom."

The Trust Company accepted the trust created by this mortgage, and the bonds were issued by the railroad company, certified by the trustee, and sold on the market. The

mortgage was, within a few days after its execution, duly recorded in the proper counties. In October, 1883, default having occurred in the payment of interest, the Trust Company brought suit to foreclose. There being a conflict of interest between the bondholders under this and those under a terminal trust mortgage subsequently executed by the railroad company, a committee of bondholders under the first mortgage, consisting of James M. Quigley, Charles T. Harbeck and John McNab, was appointed to represent the interest of such bondholders; and by order of the court duly made co-complainants. Thomas H. Hamilton, appellee, intervened, and filed his petition claiming a mechanic's lien. On March 20th, May 9th and June 2d, 1883, respectively, he had entered into three several contracts with the railroad company for the erection of a dock on the Maumee River, in the city of Toledo. Under these contracts he had built the dock, and, receiving only partial payment, had filed a claim for a mechanic's lien for the balance. The lot on which the dock was built was a part of the railroad property covered by the first mortgage above referred to. The Circuit Court sustained his claim of lien, and decreed prior payment of the amount due him out of the proceeds of the sale of the railroad property as an entirety. No question is made as to the amount due him by the railroad company for the work he did; but the contention of the appellants is that he is not entitled to priority of payment. His claim of priority depends upon either a legal right given by his mechanic's lien, or an equitable right arising from the construction of the dock and consequent improvement of the railroad property. The master, who reported upon the intervening petition, based his award of priority upon the latter ground, holding that the fact of construction, and consequent improvement of the railroad property, gave an equitable right to priority of payment, while the court, giving the same priority, rested it upon the fact of a mechanic's lien. We think that the views of neither the master nor the court can be sustained, and that it was error to give appellee priority over the mortgagee. It will be noticed, and it is a fact which lies at the foundation of this case, that the contracts for the

construction of the dock were not made till more than three years after the execution and record of the mortgage. The record imparted notice to Hamilton, and to all others, of the fact and terms of the mortgage; and the question is thus presented, whether a railroad company, mortgagor, can, three years after creating by recorded mortgage an express lien upon its property, by contract with a third party displace the priority of the mortgage lien. It would seem that the question admits of but a single answer. Certainly as to ordinary real estate, no one would have the hardihood to contend that it could be done; and there is in this respect no difference between ordinary real estate and railroad property. A recorded mortgage, given by a railroad company on its road-bed and other property, creates a lien whose priority cannot be displaced thereafter, directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction.

It is enough to refer to the decisions of this court. In the case of *Dunham* v. *Railway Company*, 1 Wall. 254, 267, there was presented a question of priority between a mortgagee and a contractor who had expended money and labor in building a railroad, under a subsequent agreement with the company that he should have possession of the road until he was fully paid, and who had never surrendered the possession and the priority of the mortgage was sustained. Upon this point the court observed: "Counsel of respondents concede that the mortgage to the complainant was executed in due form of law, and the case also shows that it was duly recorded on the ninth day of March, 1855, more than eight months before the contract set up by the respondents was made. All of the bonds, except those subsequently delivered to the contractor, had long before that time been issued, and were in the hands of innocent holders. Contractor, under the circumstances, could acquire no greater interest in the road than was held by the company. He did not exact any formal conveyance, but, if he had, and one had been executed and delivered, the rule would be the same. Registry of the first mortgage was notice

to all the world of the lien of the complainant, and in that point of view the case does not even show a hardship upon the contractor, as he must have known when he accepted the agreement that he took the road subject to the rights of the bondholders. Acting as he did with a full knowledge of all the circumstances, he has no right to complain if his agreement is less remunerative than it would have been if the bondholders had joined with the company in making the contract. No effort appears to have been made to induce them to become a party to the agreement, and it is now too late to remedy the oversight. Conceding the general rules of law to be as here laid down, still an attempt is made by the respondents to maintain that railroad mortgages made to secure the payment of bonds issued for the purpose of realizing means with which to construct the road, stand upon a different footing from the ordinary mortgages to which such general rules of law are usually applied. Authorities are cited which seem to favor the supposed distinction, and the argument in support of it was enforced at the bar with great power of illustration, but suffice it to say, that in the view of this court the argument is not sound, and we think that the weight of judicial determination is greatly the other way. *Pierce* v. *Emery*, 32 N. H. 484; *Pennock* v. *Coe*, 23 How. 130; *Field* v. *The Mayor of New York*, 2 Selden, 179; *Seymour* v. *Canandaigua &c. Railroad*, 25 Barb. 284; Red. on Railways, 578; *Langton* v. *Horton*, 1 Hare Ch. 549; *Matter of Howe*, 1 Paige, 125, 129; *Winslow* v. *Mitchell* [*Mitchell* v. *Winslow*], 2 Story, 630; Domat, 649, Art. 5; 1 Pow. on Mort. 190; *Noel* v. *Bewley*, 3 Sim. 103."

See, also, on this general proposition, the cases of *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Dillon* v. *Barnard*, 21 Wall. 430, 440; *Porter* v. *Pittsburg Steel Co.*, 120 U. S. 649, and 122 U. S. 267; *Thompson* v. *Whitewater Valley Railroad*, 132 U. S. 68. Reference may be had to a decision of the Supreme Court of Ohio, the State in which this lien was attempted to be created and enforced, *Choteau* v. *Thompson*, 2 Ohio St. 114, 126, 127, in which the court, speaking of a mechanic's lien, says: "The lien does not override or interfere

with prior *bona fide* liens. The idea that the builder, or material man, may have a lien upon the house to the exclusion of a mortgagee, or judgment creditor, whose lien attached before the house was erected, altered or repaired, is inadmissible, and could not, in practice, be carried out." And again: "We do not suppose that the law relating to mortgages, or to judgments and executions, was in any way affected by the enactment of the lien law. And we are of opinion, as before stated, that liens under this law do not, in any case or in any manner, interfere with prior *bona fide* liens." So that if a mechanic's lien could have been placed upon the railroad, or any part thereof, under the Ohio statute, and by the proceedings taken was in fact perfected, it would not operate to displace the priority of the earlier mortgage.

To what extent, if at all, a mechanic's lien could, under the statutes of Ohio in force at the time Hamilton attempted to file his lien, be placed upon a railroad, or any part of it, may be a matter of doubt. *Rutherfoord* v. *Cincinnati & Portsmouth Railroad*, 35 Ohio St. 559; *Smith Bridge Company* v. *Bowman*, 41 Ohio St. 37; Revised Statutes of Ohio, 1880, sections 3184 and 3185 and sections 3207 to 3211 inclusive; also Laws of 1883, amended sections 3207 to 3211, inclusive, and Laws of 1884, page 126. It is unnecessary in this case to express any opinion about the matter, for if a mechanic's lien was effected, it was subordinate to the lien of the prior mortgage. There was no statute in force at the time the mortgage was executed, giving any priority to subsequent mechanic's liens; and by the mortgage the mortgagee took its vested priority, beyond the power of the mortgagor or the legislature thereafter to disturb.

Neither did the fact of the construction of the dock, and the consequent improvement of the mortgaged property, give, as reported by the master, to Hamilton an equitable lien prior in right to the lien of the mortgage, or furnish equitable reasons why the legal priority belonging to the mortgage should be displaced. It is true cases have arisen in which, upon equitable reasons, the priority of a mortgage debt has been displaced in favor of even unsecured subsequent creditors.

See *St. Louis, Alton &c. Railroad* v. *Cleveland, Columbus &c. Railway*, 125 U. S. 658, 673, in which many of these cases are collected and the equitable principles underlying them stated. But those principles have no application here. The work which Hamilton did was in original construction, and not in keeping up, as a going concern, a railroad already built. The amount due him was no part of the current expenses of operating the road. There was, as to him, no diversion of current earnings to the payment of current expenses.

The distinction is so well expressed by Mr. Justice Blatchford, in giving the opinion of the court in the case of *Porter* v. *Pittsburg Steel Co.*, 120 U. S. 649, 671, that it is sufficient to quote his language: "The claims of the appellees are for the original construction of the railroad. This is not a case where the proceeds of the sale of the property of a railroad, as a completed structure, open for travel and transportation, are to be applied to restore earnings which, instead of having been applied to pay operating expenses and necessary repairs, have been diverted to pay interest on mortgage bonds and the improvement of the mortgaged property, the debts due for the operating expenses and repairs having remained unpaid when a receiver was appointed. The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or material. When these claims accrued, the road of the company had not been opened for use. The claims accrued, after the mortgage had been executed and recorded, and after $1,000,000 of the bonds secured by it had been issued and pledged to innocent *bona fide* holders for value. We are not aware of any well-considered adjudged case, which, in the absence of a statutory provision, holds that unsecured floating

debts for construction are a lien on a railroad superior to the lien of a valid mortgage duly recorded, and of bonds secured thereby, and held by *bona fide* purchasers for value. The authorities are all the other way."

It is urged by the appellee, in objection to the force of these propositions, as applied to the facts in this case, that at the time this mechanic's lien was created the legal title was not in the railroad company, but in one George W. Ballou; that as the mortgagor had no legal title, the mortgage created no legal lien; that while by the decree of foreclosure the legal title was transferred to the mortgagor, it was transferred subject to the burden of the mechanic's lien; and the cases of *Williamson, Trustee*, v. *New Jersey Southern Railroad*, 28 N. J. Eq. (1 Stewart,) 277, also 29 N. J. Eq. (2 Stewart,) 311; and *Botsford* v. *New Haven, Middletown &c. Railroad Co.*, 41 Conn. 454, are especially relied upon. But the facts in those cases are very different from those in this. In the New Jersey case, the defendant railroad company had executed a mortgage with the "after acquired property" clause in it, duly recorded. It was also the owner of a large majority of the stock in the Long Branch and Sea Shore Company, and was in possession of and operating the latter company's road. No consolidation in fact of the two companies had taken place; but being in possession of the latter company's road, it had contracted for the building of certain docks, walls and piers, at the terminus of such road. Having failed to make payment for such work, a mechanic's lien was perfected upon the latter company's road. Upon a suit to foreclose the mortgage given by the defendant railroad company, the chancellor, laying hold of the fact that the defendant railroad company was the owner of this large majority of the stock — was in possession of and operating the latter company's road — decreed that such road, with its property and franchises, belonged to the defendant railroad company, and as after acquired property was subject to complainant's mortgage, but subordinate to the mechanic's lien. On review in the Court of Errors and Appeals, as reported in 29 N. J. Eq., *supra*, the decision of the chancellor was sustained, the court saying: "Until

that decree was signed, the right of the complainant in the lands of the Sea Shore Company under his mortgage was a mere unexecuted equity to have the benefit of such equities as his mortgagor had in the premises, without any legal title in himself or in his mortgagor upon which his mortgage as a conveyance could operate. . . . When the decree of the chancellor was signed, which established the lien of complainant's mortgage on the property of the Long Branch and Sea Shore Company, Berthoud & Co. had, by force of the provisions of the mechanic's lien act, acquired a lien on the premises which related back to the commencement of the building, and was entitled to priority over all conveyances, mortgages or encumbrances subsequent thereto. This lien was not displaced by the chancellor's decree, which, in the absence of fraud, could be effective only to bring under the complainant's mortgage the lands of the Sea Shore Company, subject to such liens as were lawfully acquired while the legal estate was in that company. The chancellor's decree adjudging the validity and priority of the claim of Berthoud & Co. should be affirmed." Unquestionably such ruling was correct. The owner of a majority of the stock in a railroad corporation has no title to the road. The title is in the corporation, and he is not the corporation. A mortgage by the owner of such stock is no lien upon the road, and does not prevent the casting of any legal lien upon it. So that, while for the many equitable reasons stated in the opinion, the decree vested the property in the latter road in the defendant railroad company, yet it perfected and transferred that title, subject to all legal liens then existing upon it. As the Court of Errors and Appeals well said, until that decree was signed the right of the complainant, the mortgagee, was a mere unexecuted equity, to have the benefit of such equities as his mortgagor had in the premises.

In the Connecticut case the facts were these: After giving the mortgage the railroad company desired to erect a depot on land adjoining its track. The owner agreed to give the company the land provided it would build a depot. Upon the building a mechanic's lien was filed. The owner had never

made a conveyance. Upon a foreclosure of the mortgage the mechanic's lien upon the building and the ground upon which it was constructed was held prior to the mortgage. The decision was based upon the ground that the full equitable title never passed to the railroad company until the completion of the building, and then it passed subject to the burden of the mechanic's lien. Hence, though after acquired property, and subject to the lien of the mortgage, it was when acquired already burdened with a lien.

But in the case at bar, as appears from the testimony and the decree, only the naked legal title remained in Ballou; the full equitable title was in the railroad company — and in that company before the contracts were entered into. The railroad company had the same title when it made the contracts that it had when the work was done and the decree rendered. Hamilton's contracts were with the railroad company, and of course gave a lien upon the lands only to the extent of the title that the railroad company had. The mortgage being one with words of general description, conveyed land held by a full equitable, as well as that held by a legal, title. Jones on Mortgages, section 138; *Massey* v. *Papin*, 24 How. 362; *Farmers' Loan and Trust Co.* v. *Fisher*, 17 Wisconsin, 114; *Lincoln Building Association* v. *Hass*, 10 Nebraska, 581; *Laughlin* v. *Braley*, 25 Kansas, 147. We conclude, therefore, that there is nothing in this fact to justify an award of priority to appellee.

It is further objected by the appellee that the ground upon which this dock was built was never acquired by the company which executed the mortgage, but by a new company into which the mortgagor company passed by consolidation. In view of the condition of the record we are compelled to accept the statement of the court in its decree, which is, that the property was covered by the mortgage in suit. Again, it is urged that a part of the work was done after the receiver was appointed, and by his authority. The report of the master does not sustain this claim; neither does the account filed by the intervenor for the purpose of securing his mechanic's lien. And while there is testimony tending to show that he did

some work after the appointment of a receiver, there is also contradictory testimony. And even in that part of the testimony which tends to show that work was done after the appointment of a receiver, there is nothing to indicate how much was done, or whether it was done by the authority and direction of the receiver, or simply in completion of a contract theretofore entered into with the company.

These are all the facts we deem it necessary to mention. The decree of the Circuit Court will be

Reversed, with instructions for further proceedings in accordance with the views herein expressed.

De WITT *v.* BERRY.

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

No. 173. Argued January 7, 8, 1890. — Decided March 17, 1890.

If a contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty.

If a contract of sale in writing contains a warranty, parol evidence is inadmissible to show a warranty inconsistent with it.

An express warranty of quality in a sale excludes any implied warranty that the articles sold were merchantable.

A warranty cannot be implied in a sale when there is an express warranty of quality, accompanied by the delivery and acceptance of a sample, as such.

The party who seeks to establish that words are used in a contract in a different acceptation from their ordinary sense must prove it by clear, distinct and irresistible evidence.

When parties have reduced their contract to writing, without any uncertainty as to the object or extent of the engagement, evidence of antecedent conversations between them in regard to it is inadmissible.

This action was commenced in the Marine Court of the city of New York, to recover $1687.51, alleged to be due plaintiffs, for a quantity of varnish, etc., sold and delivered to defendants between November 9, 1881, and May 15, 1882. It was duly removed into the Circuit Court of the United

Statement of the Case.

States for the Southern District of New York, on the petition of the defendants, the plaintiffs being citizens of Michigan, the defendants citizens of New York, and the amount sought to be recovered, exclusive of costs, exceeding $500.

The record appears to contain substantially all the evidence. It shows the material facts to be as follows:

On the 24th of June, 1881, a contract was made between the parties in these terms:

"BROOKLYN, N. Y., *June 24th*, 1881.

"We hereby agree to deliver to Messrs. H. J. De Witt & Son, at their factory in Brooklyn in N. Y., eighty (80) barrels of japan and twenty (20) barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered.

"Turpentine copal varnish, at 65c. per gallon.

"Turpentine japan dryer, at 55c. " "

"Each shipment to consist of eight (8) barrels japan and two (2) barrels varnish, to be made once a month, commencing September next.

"Terms on each shipment, six months, without interest.

"BERRY BROTHERS.

"per A. HOOPER, *Manager*."

"We hereby accept the above proposition.

"J. H. DE WITT & SON.

"Brooklyn, *June 24th*, '81."

At the time stipulated, the defendants in error, Berry Bros., delivered the proper number of barrels of varnish and of dryer, but the plaintiffs in error claim that the dryer did not conform to the contract, in quality. They not only resist the payment of a balance due of the purchase-money, but also present a cross-demand for $17,500 for alleged breach of contract. The precise point of controversy is as to the relative quantities of turpentine and of benzine in the dryer. It appears that plaintiffs in error were manufacturers of wire

gauze for screens, etc., and bought the dryer to use in their factory, and that the plaintiffs in error knew of these facts. The japan dryer and the copal varnish were used to mix with the paint that was put on wire goods. The process was that the wire cloth ran through a trough filled with the paint so mixed, and passed between felt rollers into a drying chamber heated by steam to 140 degrees. At the farther end of such chamber the cloth passed into the cold air. The rolls then stood four or five days, after which they were rolled into tight rolls, wrapped, and put into the storehouse. The plaintiffs in error allege that the paint and varnish, in this case, were adulterated by the excessive use of benzine in their manufacture; and that for that reason the paint did not adhere to the wire cloth, but scaled off.

Plaintiffs in error commenced using the dryer and varnish in question about their business in August, 1881; but the goods prepared with them did not, in the ordinary course of business, reach the consumers until May, 1882. It was then that plaintiffs in error first discovered the defect — the composition of the goods being unknown to them, and only discoverable either by a chemical analysis or by the results of use. In the fall of 1882 large quantities of the wire cloth were returned because the paint came off; and the balance that plaintiffs in error had on hand unsold proved to be unsalable for the same reason, and had to be cleaned off and repainted; there being some 3,500,000 square feet damaged one-half cent per square foot, or $17,500.

Plaintiffs in error further claimed, that, under the contract, the defendants in error were obliged to furnish articles of a grade that commercially answered to the description of "turpentine copal varnish," and "turpentine japan dryer;" and that such grades were commercially known. That the articles so known contain either very little or no benzine, and are made of turpentine; whereas, if made of benzine, without turpentine, they are called in trade a "benzine copal varnish" and a "benzine japan dryer;" and if they contain half benzine and half turpentine, they are called a "turpentine and benzine japan dryer," or a "turpentine and copal varnish."

Argument for Plaintiffs in Error.

They claimed further that the defendants in error had fraudulently substituted inferior goods for those sold; that whereas, by the description in the bill of sale, they were to have received goods with little or no benzine, they were furnished with goods which, on analysis, were shown to have 38 parts of benzine to 6⅓ of turpentine, and were known to the trade as "benzine goods." The defendants in error, on the other hand, maintained that the contract did not call for goods known to the trade as "commercial turpentine" goods, for two reasons: (1) By the very terms of the contract the quality was agreed to be tested by a different standard, which was, that the goods sold were to be "exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered;" and (2) because there was no such standard of uniform manufacture and terminology in the trade, as to these goods, as was claimed by the plaintiffs in error, they themselves having discovered that their process was bad, and afterwards changed it.

It appears further from the record that in a previous contract between the defendants in error and the De Witt Wire Cloth Company — not the plaintiffs in error — a stipulation had been inserted that the goods should be "the best of their kind, and equal to those formerly furnished." Plaintiffs in error maintained that this contract of quality is, by reference, a part of the contract. This view the court rejected.

In the course of the trial there were several exceptions taken to the introduction, or the refusal to permit the introduction, of evidence. The plaintiffs in error also made several exceptions to the charges as given, and to the refusals to charge as requested.

The trial resulted in a verdict and judgment for the defendants in error for the sum of $2177.57, being the full amount of the demand and costs; to review which judgment this writ of error was sued out. The plaintiffs in error claimed by their assignments that the court in the trial below committed sixteen different errors.

Mr. Mason W. Tyler (with whom was *Mr. Henry Edwin Tremain*) for plaintiffs in error.

Argument for Plaintiffs in Error.

I. Under the contract in this case defendants in error were bound to deliver articles that answered to the commercial description "turpentine copal varnish" and "turpentine japan dryer." *Nichol* v. *Godts*, 10 Exch. 191; *Josling* v. *Kingsford*, 13 C. B. (N. S.) 447; *White* v. *Miller*, 71 N. Y. 118; *Hawkins* v. *Pemberton*, 51 N. Y. 198; *Henshaw* v. *Robins*, 9 Met. 83; *S. C.* 43 Am. Dec. 367.

II. The whole controversy in the case at bar centred around the question whether the goods that defendants in error delivered to plaintiffs in error were or were not "turpentine" goods.

III. It was error in the court to refuse to charge the jury as asked for in the request recited in the first assignment of error, to wit, that the evidence showed without contradiction that goods compounded of an equal quantity of turpentine and benzine are commercially designated and known in trade as "turpentine and benzine," or "union" goods; and the court also erred in the same direction in stating that Mr. Wood testified that an article of which the liquid portion is half turpentine and half benzine is commercially known as "turpentine japan," as stated in the second assignment of error. See *Parks* v. *Ross*, 11 How. 362; *Toland* v. *Sprague*, 12 Pet. 300; *Schuchardt* v. *Allens*, 1 Wall. 359; *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 665; *Marion County* v. *Clark*, 94 U. S. 278.

IV. The court erred in refusing to allow plaintiffs in error to introduce evidence tending to show that the article which was the subject of the controversy in this case was not a merchantable article, as indicated in the fourth assignment of error, and also in refusing to charge, as requested by plaintiffs in their sixth, seventh and eighth requests, that in order to comply with their contract, defendants in error must have delivered to plaintiffs in error a fairly merchantable and salable article of turpentine japan and turpentine varnish, as indicated in the fifth, sixth and seventh assignments of error. *Mody* v. *Gregson*, L. R. 4 Ex. 49; *Hoe* v. *Sanborn*, 21 N. Y. 552; *S. C.* 78 Am. Dec. 163; *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, 116; *MacFarland* v. *Taylor*, L. R. 1 Scotch App. 245.

V. The court erred in refusing to allow plaintiffs in error

to prove the difference in value between their cloth as painted with the Berry Brothers' material and the same cloth painted with a fair article of turpentine japan and turpentine varnish, as indicated in the eighth, ninth, tenth and eleventh assignments of error. *Dushane* v. *Benedict*, 120 U. S. 630, 636; *Dart* v. *Laimbeer*, 107 N. Y. 664; *White* v. *Miller*, 71 N. Y. 118; *Passinger* v. *Thorburn*, 34 N. Y. 634; *S. C.* 90 Am. Dec. 753; *Milburn* v. *Belloni*, 39 N. Y. 53; *S. C.* 100 Am. Dec. 403; *Flich* v. *Wetherbee*, 20 Wisconsin, 392; *Masterton* v. *The Mayor*, 7 Hill, 61; *S. C.* 42 Am. Dec. 38; *Griffin* v. *Colver*, 16 N. Y. 489; *S. C.* 69 Am. Dec. 718; *Messmore* v. *New York Shot Co.*, 40 N. Y. 422; *Wakeman* v. *Wheeler & Wilson M'f'g Co.*, 101 N. Y. 205.

Mr. John E. Parsons, for defendants in error, cited: *Northwestern Ins. Co.* v. *Muskegon Bank*, 122 U. S. 501; *Sands* v. *Taylor*, 5 Johns. 395; *S. C.* 4 Am. Dec. 374; *Beck* v. *Sheldon*, 45 N. Y. 365; *Parkinson* v. *Lee*, 2 East, 314; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Chanter* v. *Hopkins*, 4 M. & W. 398; *Mumford* v. *McPherson*, 1 Johns. 414; *Fox* v. *Hazelton*, 10 Pick. 275; *Gale* v. *New York Central Railroad*, 13 Hun, 1.

MR. JUSTICE LAMAR delivered the opinion of the court.

It is not necessary to examine the sixteen assignments of error in detail. When analyzed they are resolved into one or other of these three propositions:

(1) That under a contract for the future delivery of goods, such as was made in this case, and by the terms of this agreement, it was still necessary that the goods delivered should conform to a common commercial standard, and should be adapted to the known uses of the vendee, notwithstanding the express terms of the written contract.

(2) That the court erred in refusing to treat the previous contract between Berry Brothers and the De Witt Wire Cloth Company as a part of the contract in controversy, by reference.

(3) That the court erred in excluding the antecedent parol *colloquium* offered as a part of the contract, or as competent to explain and interpret it.

We will consider these general propositions in the order

stated. *First.* The contract between the parties was in writing and contained an express warranty as to the quality. It says: "These goods [are] to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered." Now there is good authority for the proposition that if the contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty. *Van Ostrand* v. *Reed*, 1 Wend. 424; *Lamb* v. *Crafts*, 12 Met. 350, 353; *Dean* v. *Mason*, 4 Connecticut, 428, 432; *Reed* v. *Wood*, 9 Vermont, 285; 1 Parsons on Cont. (6th edition) 589.

If it be true that the failure of a vendee to exact a warranty when he takes a written contract precludes him from showing a warranty by parol, *a multo fortiori* when his written contract contains a warranty on the identical question, and one in its terms inconsistent with the one claimed.

In the case of *The Reeside*, 2 Sumner, 567, Mr. Justice Story said: "I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." The principle is, that, while parol evidence is sometimes admissible to explain such terms in the contract as are doubtful, it is not admissible to contradict what is plain, or to add new terms. Thus, where a certain written contract was for "prime singed bacon," evidence offered to prove that by the usage of the trade a certain latitude of deterioration called "average taint" was allowed to subsist before the bacon ceased to answer that description, was

held to be inadmissible. 1 Greenleaf on Evidence, § 292, note 3; *Yates* v. *Pym*, 6 Taunt. 446; *Barnard* v. *Kellogg*, 10 Wall. 383; *Bliven* v. *New England Screw Company*, 23 How. 420; *Oelricks* v. *Ford*, 23 How. 49.

There are numerous well considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use. *International Pavement Co.* v. *Smith*, 17 Missouri App. 264; *Johnson* v. *Latimer*, 71 Georgia, 470; *Cosgrove* v. *Bennett*, 32 Minnesota, 371; *Shepherd* v. *Gilroy*, 46 Iowa, 193; *McGraw* v. *Fletcher*, 35 Michigan, 104.

Nor is there any conflict between these authorities and others like them on the one hand, and those on the other, which hold that goods sold by a manufacturer, in the absence of an express contract, are impliedly warranted as merchantable, or as suited to the known purpose of the buyer. *Dushane* v. *Benedict*, 120 U. S. 630, 636, and cases there cited. It is the existence of the express warranty, or its absence, which determines the question. In the case at bar there was such an express warranty of quality in terms. Not only that, but there was a sample delivered and accepted, as such. The law is well settled, that, under such circumstances, implied warranties do not exist. *Mumford* v. *McPherson*, 1 Johns. 414; *Sands* v. *Taylor*, 5 Johns. 395; *Beck* v. *Sheldon*, 48 N. Y. 365; *Parkinson* v. *Lee*, 2 East, 314. In *Jones* v. *Just*, L. R. 3 Q. B. 197, 202, quoted by Mr. Benjamin in his work on Sales, § 657, Mellor, J., delivering the opinion of the court, laid down among others the following rule: "Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter* v. *Hopkins*, 4 M. & W. 399; *Ollivant* v. *Bayley*, 5 Q. B. 288."

Examining now the express terms of the contract, in order to see what they are, and whether they fairly import the warranty claimed by the plaintiffs in error, we find them to be as follows:

"These goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered. Turpentine copal varnish at 65 cts. per gallon; turpentine japan dryer at 55 cts. per gallon."

There are here three items of description *claimed* by the plaintiffs in error: (1) That they should be the same as those made for the De Witt Wire Cloth Company; and there is no evidence whatever that they were not the same, nor is a difference in this respect any part of their claim. (2) That they should conform to a sample delivered; and here again is an entire absence of testimony to show any difference, and a want of any such claim by the plaintiffs in error. The whole question, therefore, as to this branch of the case, turns upon the effect of the use of the expressions "Turpentine copal varnish, at 65 cts. per gallon, turpentine japan dryer, at 55 cts. per gallon." The plaintiffs in error maintain that the defendants in error thereby engaged to deliver articles known to the trade by those names, and of a certain standard of quality. We do not so construe the writing. All the terms descriptive of the quality are found in the sentence preceding. These sentences are nothing but stipulations in respect to the prices to be paid, and were not intended to fix quality.

There is this further to be said. We have carefully examined the record in this case, and are impressed with a conviction that, whatever the fact may be, the evidence adduced fails to show any such general usage of trade in respect to the standard of these preparations, or in respect to their designations, as is claimed by the plaintiffs in error. Their position is, that the words "turpentine copal varnish," etc., if considered at all as a stipulation as to quality, would mean a varnish in which the liquid elements were to be so composed that at least 50 per cent of them should be turpentine. In *Carter* v. *Crick*, 4 H. & N. 412, 417, Pollock, C. B., observed that "if a party seeks to make out that certain words used in a contract have a different acceptation from their ordinary sense, either for the purposes of trade, or within a certain market, or in a particular country, he must prove it; not by calling witnesses, some of whom will say it is one way and some the other, and then

leaving it to the jury to say which they believe; but by clear, distinct and irresistible evidence."

We pass now to the second proposition of the plaintiffs in error, that the court erred in refusing to charge the jury that if the goods delivered to them as turpentine were not the best of their kind, as guaranteed by reference to the contract with the De Witt Wire Cloth Company, they should find for them. The answer to the proposition seems obvious; it is but an effort, in a different shape, to vary the written contract made. The terms of that contract were not "these goods to be exactly the same quality as we have heretofore *contracted* to make for the De Witt Wire Cloth Company and as per sample bbls. delivered;" but were, "these goods to be exactly the same quality as we *make* for the De Witt Wire Cloth Company, etc." There is here no reference whatever, either express or implied, to the contract with the De Witt Wire Cloth Company; what goods *were in fact made*, not what were agreed to be made, was the standard. To fix that standard of goods produced, and not goods contracted for, yet more firmly as the measure of quality, a subsequent clause was written — "*and* as per sample bbls. delivered." It is clear that, under the contract, if the goods produced for the De Witt Wire Cloth Company varied from the samples delivered, the plaintiffs in error had the right to insist on the test by the sample. It is manifest that the terms of the other contract were not present to the minds of the parties of this contract. The plaintiffs in error fixed the terms of their warranty, and we cannot import other terms into the writing.

The third proposition, that the court erred in excluding evidence of an antecedent conversation between the salesman and one of the plaintiffs in error, is disposed of by the well-settled rule, that "when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, . . . as it would

tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." 1 Greenleaf Ev. § 275, and authorities cited; *White* v. *National Bank*, 102 U. S. 658; *Metcalf* v. *Williams*, 104 U. S. 93; *Martin* v. *Cole*, 104 U. S. 30.

On the whole case we find no material error, and the judgment of the court below is

Affirmed.

ARNDT *v.* GRIGGS.

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

No. 1150. Submitted January 10, 1890. — Decided March 17, 1890.

A State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication.

The well-settled rules, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone; do not apply when a State has provided by statute for the adjudication of titles to real estate within its limits as against non-residents, who are brought into court only by publication.

Hart v. *Sansom*, 110 U. S. 151, explained.

This was an action to recover possession of land and to quiet title. Judgment for the plaintiff. Defendant sued out this writ of error. The case is stated in the opinion.

Mr. Walter J. Lamb, *Mr. Arnott C. Ricketts* and *Mr. Henry H. Wilson*, for plaintiffs in error, cited: *Holland* v. *Challen*, 110 U. S. 15; *Watson* v. *Ulbrich*, 18 Nebraska, 186; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Burgess* v. *Seligman*, 107 U. S. 20; *Scudder* v. *Sargent*, 15 Nebraska, 102; *Keene* v. *Sallenbach*, 15 Nebraska, 200; *Langdon* v. *Sherwood*, 124 U. S. 74; *Boswell* v. *Otis*, 9 How. 336; *Parker* v. *Overman*, 18

How. 137; *Huling* v. *Kaw Valley Railway*, 130 U. S. 559; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; *Salisbury* v. *Sands*, 2 Dillon, 270; *Blair* v. *West Point M'f'g Co.*, 7 Nebraska, 146, 152; *Penn* v. *Hayward*, 14 Ohio St. 302, 304; *Williams* v. *Welton*, 28 Ohio St. 451; *Fisher* v. *Fredericks*, 33 Missouri, 612; *Weil* v. *Lowenthal*, 10 Iowa, 575; *Brooklyn Trust Co.* v. *Bulmer*, 49 N. Y. 84; *Beebe* v. *Dostor*, 36 Kansas, 666; *Gillespie* v. *Thomas*, 23 Kansas, 138; *Walkenhorst* v. *Lewis*, 24 Kansas, 420; *Rowe* v. *Palmer*, 29 Kansas, 337; *Entreken* v. *Howard*, 16 Kansas, 551; *Howard* v. *Entreken*, 24 Kansas, 428; *Cloyd* v. *Trotter*, 118 Illinois, 391.

Mr. Nathan K. Griggs, *Mr. Samuel Rinaker* and *Mr. Julius A. Smith*, for defendant in error, cited: *Hart* v. *Sansom*, 110 U. S. 151, and cases therein cited; *Pennoyer* v. *Neff*, 95 U. S. 714; *Stang* v. *Redden*, 28 Fed. Rep. 11, 12; *Clark* v. *Hammett*, 27 Fed. Rep. 339; *Pitts* v. *Clay*, 27 Fed. Rep. 635, 637; *Howard* v. *Entreken*, 24 Kansas, 428; *Watson* v. *Ulbrich*, 18 Nebraska, 186; *Grimes* v. *Hobson*, 46 Texas, 416; *Dangerfield* v. *Paschal*, 20 Texas, 537; *Titus* v. *Johnson*, 50 Texas, 224; *Johnson* v. *Bryan*, 62 Texas, 623; *Eaton* v. *Badger*, 33 N. H. 228; *Nebraska* v. *Sioux City & Pacific Railroad*, 7 Nebraska, 357; *Gregory* v. *Lancaster County Bank*, 16 Nebraska, 411; *Snowden* v. *Tyler*, 21 Nebraska, 199.

Mr. Justice Brewer delivered the opinion of the court.

The statutes of Nebraska contain these sections: Sec. 57, chap. 73, Compiled Statutes 1885, p. 483: "An action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Sec. 58: "All such pleadings and proofs and subsequent proceedings shall be had in such action now pending or hereafter brought, as may be necessary to fully settle or determine the question of title between the par-

ties to said real estate, and to decree the title to the same, or any part thereof, to the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect." Sec. 77, Code of Civil Procedure, Compiled Statutes 1885, p. 637: "Service may be made by publication in either of the following cases: . . . *Fourth.* In actions which relate to, or the subject of which is, real or personal property in this State, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the State or a foreign corporation." Sec. 78 of the Code: "Before service can be made by publication, an affidavit must be filed that service of a summons cannot be made within this State, on the defendant or defendants, to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Sec. 82 of the Code: "A party against whom a judgment or decree has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; . . . but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold before judgment under an attachment." Sec. 429, *b*, of the Code: "When any judgment or decree shall be rendered for a conveyance, release or acquittance, in any court of this State, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformable to such judgment or decree."

Under these sections, in March, 1882, Charles L. Flint filed his petition in the proper court against Michael Hurley and

another, alleging that he was the owner and in possession of the tracts of land in controversy in this suit; that he held title thereto by virtue of certain tax deeds, which were described; that the defendants claimed to have some title, estate, interest in, or claim upon the lands by patent from the United States, or deed from the patentee, but that whatever title, estate, or claim they had, or pretended to have, was divested by the said tax deeds, and was unjust, inequitable, and a cloud upon plaintiff's title; and that this suit was brought for the purpose of quieting his title. The defendants were brought in by publication, a decree was entered in favor of Flint quieting his title, and it is conceded that all the proceedings were in full conformity with the statutory provisions above quoted.

The present suit is one in ejectment, between grantees of the respective parties to the foregoing proceedings to quiet title; and the question before us, arising upon a certificate of division of opinion between the trial judges, is whether the decree in such proceedings to quiet title, rendered in accordance with the provisions of the Nebraska statute, upon service duly authorized by them, was valid and operated to quiet the title in the plaintiff therein. In other words, has a State the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court only by publication? The Supreme Court of Nebraska has answered this question in the affirmative. *Watson* v. *Ulbrich*, 18 Nebraska, 189 — in which the court says: "The principal question to be determined is whether or not the decree in favor of Gray, rendered upon constructive service, is valid until set aside. No objection is made to the service, or any proceedings connected with it. The real estate in controversy was within the jurisdiction of the District Court, and that court had authority, in a proper case, to render the decree confirming the title of Gray. In *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 429, Mr. Justice Blackburn says: 'We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the

sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world.' The court, therefore, in this case, having authority to render the decree, and jurisdiction of the subject matter, its decree is conclusive upon the property until vacated under the statutes or set aside."

Section 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the federal court. *Holland* v. *Challen*, 110 U. S. 15. But it is earnestly contended that no decree in such a case, rendered on service by publication only, is valid or can be recognized in the federal courts. And *Hart* v. *Sansom*, 110 U. S. 151, is relied on as authority for this proposition. The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be

stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the State, in this respect, is binding upon the federal courts. In *United States* v. *Fox*, 94 U. S. 315, 320, it was said: "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." See also *McCormick* v. *Sullivant*, 10 Wheat. 192, 202; *Beauregard* v. *New Orleans*, 18 How. 497; *Suydam* v. *Williamson*, 24 How. 427; *Christian Union* v. *Yount*, 101 U. S. 352; *Lathrop* v. *Bank*, 8 Dana, 114.

Passing to an examination of the decisions on the precise question it may safely be affirmed that the general, if not the uniform, ruling of state courts has been in favor of the power of the State to thus quiet the title to real estate within its limits. In addition to the case from Nebraska, heretofore

cited, and which only followed prior rulings in that State— *Scudder* v. *Sargent*, 15 Nebraska, 102; *Keene* v. *Sallenbach*, 15 Nebraska, 200 — reference may be had to a few cases. In *Cloyd* v. *Trotter*, 118 Illinois, 391, the Supreme Court of Illinois held that under the statutes of that State the court could acquire jurisdiction to quiet title by constructive service against non-resident defendants. A similar ruling as to jurisdiction acquired in a suit to set aside a conveyance as fraudulent as to creditors was affirmed in *Adams* v. *Cowles*, 95 Missouri, 501. In *Wunstel* v. *Landry*, 39 La. Ann. 312, it was held that a non-resident party could be brought into an action of partition by constructive service. In *Essig* v. *Lower*, 21 Northeastern Rep. 1090, the Supreme Court of Indiana thus expressed its views on the question: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, Rev. Stat. 1881, expressly authorizes the rendition of such a decree on publication." This was since the decision in *Hart* v. *Sansom*, as was also the case of *Dillen* v. *Heller*, 39 Kansas, 599, in which Mr. Justice Valentine, for the court, says: "For the present we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid. Or, in other words, we think the question is this: Has the State any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender

jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? Power of this kind has already been exercised, not only in Kansas, but in all the other States. Lands of non-resident owners, as well as of resident owners, are taxed and sold for taxes; and the owners thereby may totally be deprived of such lands, although no notice is ever given to such owners, except a notice by publication, or some other notice of no greater value, force or efficacy. *Beebe* v. *Doster*, 36 Kansas, 666, 675, 677; *S. C.* 14 Pac. Rep. 150. Mortgage liens, mechanic's liens, material men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and, indeed, almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. *Gillespie* v. *Thomas*, 23 Kansas, 138; *Walkenhorst* v. *Lewis*, 24 Kansas, 420; *Rowe* v. *Palmer*, 29 Kansas, 337; *Venable* v. *Dutch*, 37 Kansas, 515, 519. All the States by proper statutes authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and, in the nature of things, such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign State has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and, generally, within its own boundaries a sovereignty is supreme. Kansas is supreme, except so far as its power and authority are limited by the Constitution and laws of the United States; and within the Constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the State which the constitution and laws of Kansas may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclu-

sively by the statutes of Kansas. To obtain jurisdiction of everything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service."

Turning now to the decisions of this court: In *Boswell's Lessee* v. *Otis*, 9 How. 336, 348, was presented a case of a bill for a specific performance and an accounting, and in which was a decree for specific performance and accounting; and an adjudication that the amount due on such accounting should operate as a judgment at law. Service was had by publication, the defendants being non-residents. The validity of a sale under such judgment was in question; the court held that portion of the decree, and the sale made under it, void; but with reference to jurisdiction in a case for specific performance alone, made these observations: "Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding *in rem*, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service or process, it is substantially of that character."

In the case of *Parker* v. *Overman*, 18 How. 137, 140, the question was presented under an Arkansas statute, a statute authorizing service by publication. While the decision on the merits was adverse, the court thus states the statute, the case and the law applicable to the proceedings under it: "It had its origin in the state court of Dallas County, Arkansas, sitting in chancery. It is a proceeding under a statute of Arkansas, prescribing a special remedy for the confirmation of sales of land by a sheriff or other public officer. Its object is to quiet the title. The purchaser at such sales is authorized to

institute proceedings by a public notice in some newspaper, describing the land, stating the authority under which it was sold, and 'calling on all persons who can set up any right to the lands so purchased, in consequence of any informality, or any irregularity or illegality connected with the sale, to show cause why the sale so made should not be confirmed.' In case no one appears to contest the regularity of the sale, the court is required to confirm it, on finding certain facts to exist. But if opposition be made, and it should appear that the sale was made 'contrary to law,' it became the duty of the court to annul it. The judgment or decree, in favor of the grantee in the deed, operates 'as a complete bar against any and all persons who may thereafter claim such land, in consequence of any informality or illegality in the proceedings.' It is a very great evil in any community to have titles to land insecure and uncertain; and especially in new States, where its result is to retard the settlement and improvement of their vacant lands. Where such lands have been sold for taxes there is a cloud on the title of both claimants, which deters the settler from purchasing from either. A prudent man will not purchase a law suit, or risk the loss of his money and labor upon a litigious title. The act now under consideration was intended to remedy this evil. It is in substance a bill of peace. The jurisdiction of the court over the controversy is founded on the presence of the property; and, like a proceeding *in rem*, it becomes conclusive against the absent claimant, as well as the present contestant. As was said by the court in *Clark* v. *Smith*, 13 Pet. 195, 203, with regard to a similar law of Kentucky: 'A State has an undoubted power to regulate and protect individual rights to her soil, and declare what shall form a cloud over titles; and, having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The state legislatures have no authority to prescribe forms and modes of proceeding to the courts of the United States; yet having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed be substantially consistent with the ordinary modes

of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state court.' In the case before us the proceeding, though special in its form, is in its nature but the application of a well-known chancery remedy; it acts upon the land, and may be conclusive as to the title of a citizen of another State."

In the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 727, 734, in which the question of jurisdiction in cases of service by publication was considered at length, the court, by Mr. Justice Field, thus stated the law: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. . . . It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." These cases were all before the decision of *Hart* v. *Sansom*.

Passing to a case later than that, *Huling* v. *Kaw Valley Railway*, 130 U. S. 559, 563, it was held that, in proceedings commenced under a statute for the condemnation of lands for railroad purposes, publication was sufficient notice to a non-resident. In the opinion, Mr. Justice Miller, speaking for the court, says: "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed

to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters. The owner of real estate, who is a non-resident of the State within which the property lies, cannot evade the duties and obligations, which the law imposes upon him in regard to such property, by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, have no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; and in such cases, some substituted form of notice has always been held to be a sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. Otherwise the burdens of taxation and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every State of the Union." In this connection, it is well to bear in mind, that by the statutes of the United States, in proceedings to enforce any legal or equitable lien, or to remove a cloud upon the title of real estate, non-resident holders of real estate may be brought in by publication, 18 Stat. 472; and the validity of this statute, and the jurisdiction conferred by publication, has been sustained by this court. *Mellen* v. *Moline Iron Works*, 131 U. S. 352.

These various decisions of this court establish that, in its judgment, a State has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication; and that is all that is necessary to sustain the validity of the decree in question in this case.

Nothing inconsistent with this doctrine was decided in *Hart* v. *Sansom*, *supra*. The question there was as to the effect of a judgment. That judgment was rendered upon a petition in ejectment against one Wilkerson. Besides the allegations in the petition to sustain the ejectment against Wilkerson, were allegations that other defendants named had executed deeds, which were described, which were clouds upon plaintiffs' title; and in addition an allegation that the defendant Hart set up some pretended claim of title to the land. This was the only averment connecting him with the controversy. Publication was made against some of the defendants, Hart being among the number. There was no appearance, but judgment upon default. That judgment was, that the plaintiffs recover of the defendants the premises described; "that the several deeds in plaintiffs' petition mentioned be, and the same are hereby, annulled and cancelled, and for naught held, and that the cloud be thereby removed;" and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. There was no general language in the decree quieting the title as against all the defendants; so there was nothing which could be construed as working any adjudication against Hart as to his claim and title to the land. He might apparently be affected by the judgment for costs, but they had no effect upon the title. So the court held, for it said: "It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

Opinion of the Court.

An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment *in rem*, establishing against him a title in the land. But the power of the State, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words "unless otherwise expressly provided by statute," and by adding: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." And of course, it follows that if a State has power to bring in a non-resident by publication for the purpose of appointing a trustee, it can, in like manner, bring him in and subject him to a direct decree. There was presented no statute of the State of Texas providing directly for quieting the title of lands within the State, as against non-residents, brought in only by service by publication, such as we have in the case at bar, and the only statute cited by counsel or referred to in the opinion was a mere general provision for bringing in non-resident defendants in any case by publication; and it was not the intention of the court to overthrow that series of earlier authorities heretofore referred to, which affirm the power of the State, by suitable statutory proceedings, to determine the titles to real estate within its limits, as against a non-resident defendant, notified only by publication.

It follows, from these considerations, that the first question presented in the certificate of division, the one heretofore stated, and which is decisive of this case, must be answered in the affirmative.

The judgment of the Circuit Court is reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

EVANS *v.* STATE BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 655. Submitted March 3, 1890.— Decided March 17, 1890.

When the term at which an appeal is returnable goes by without the filing of the record, a second appeal may be taken, if the time for appeal has not expired.

If an appellee does not avail himself of his right, under the ninth rule, to docket and dismiss an appeal for neglect of the appellant to docket the case and file the record as required by the rules, the appellant may file the record at any time during the return term.

The failure to obtain a citation or give a bond within two years from the rendition of a decree does not deprive this court of jurisdiction over an appeal, when the transcript of the record is filed here during the term succeeding its allowance.

MOTION TO DISMISS. The case is stated in the opinion.

Mr. J. McConnell and *Mr. W. Hallett Phillips* for the motion.

Mr. A. H. Garland, *Mr. J. J. Johnson* and *Mr. H. J. May* opposing.

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

The decree in this case was rendered on the 19th of June and a rehearing refused on the 6th of July, 1885. On the 8th of July of that year an order was entered allowing Mrs. Evans and her husband, who were complainants below, an appeal to this court upon giving bond with security as directed; and upon the same day the bond was filed and approved. Nothing further was done, and the record not having been filed in this court during the succeeding term the appeal became of no avail, because not duly prosecuted. *Credit Company* v. *Arkansas Central Railway Co.*, 128 U. S. 258. On the 21st of May, 1887, Mr. and Mrs. Evans petitioned the Circuit Court to

allow an appeal from said decree, which was on that day allowed and entered of record, on the petitioners furnishing bond conditioned according to law. This bond was accordingly given and approved on the 3d of October, 1887, and citation issued and served, returnable at October term, 1887. The record was filed here on the 31st of March, 1888, one of the days of that term.

A motion is now made to dismiss the appeal, upon the grounds that it could not be granted, because the court had exhausted its power by the allowance of the first appeal, and because, if this were not so, the second appeal was not taken within two years from the entry of the decree. As to the first of these grounds, it may be remarked, that when the term elapsed at which the first appeal was returnable, without the filing of the record, that appeal had spent its force, and the matter was open to the taking of a second appeal, as it would have been if the appellee had docketed the cause and had it dismissed. As to the second appeal, this was taken within the two years, by its allowance by the Circuit Court and not lost, as he did not fail to file the record during the succeeding term. Neither the signing of the citation, nor the approval of the bond, was necessary to our jurisdiction, but it was essential that the record should be filed during the term at which the appeal was returnable.

Under the ninth rule, it is the duty of an appellant to docket his case and file the record with the clerk of this court within the first six days of the term, where the decree was rendered thirty days before the commencement of the term, and if this is not done, the appellee may have the case docketed and dismissed as therein provided; though even then the court may by order permit the appellant to docket the case and file the record after such dismissal. And it has always been held that if the case is not so docketed and dismissed by the appellee, the appellant is in time if the record be filed during the return term.

The filing of the transcript of record in this case under the second appeal, during the term succeeding its allowance, sufficed for the purposes of jurisdiction, which was not defeated

by the failure to obtain a citation or give the bond within two years from the rendition of the decree. *Edmonson* v. *Bloomshire*, 7 Wall. 306; *Richardson* v. *Green*, 130 U. S. 104, and cases cited.

The motion to dismiss is therefore

Denied.

MACON COUNTY *v.* HUIDEKOPER.

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

No. 615. Argued January 17, 20, 1890. — Decided March 17, 1890.

The power, conferred by the statutes of Missouri upon counties within the State, to levy and collect annually a tax of one-half of one per cent upon all the taxable wealth of the county for county revenue, is not exhausted by a levy of thirty cents on every one hundred dollars of taxable property for county purposes, and the levy of twenty cents on the same by the board of townships for township and bridge purposes; and a judgment creditor of such a county has a right to require it to impose further taxation, within the limit of the unexhausted power, for his benefit.

On the 19th of November, 1879, the relator, Alfred Huidekoper, recovered in the Circuit Court of the United States for the Eastern Division of the Western District of Missouri, a judgment against Macon County, in that State, for $28,033.00, and costs, upon interest coupons detached from certain bonds issued May 2, 1870, by that county to the Missouri and Mississippi Railroad Company, under the authority of the 13th section of the act incorporating the company, approved February 20, 1865. The judgment not having been paid, and pursuant to a mandate of the court, a warrant was issued, dated April 29, 1884, upon the treasurer of the county, directing him to pay to the relator $35,677.47 out of the general funds of the county in payment of that judgment. This warrant represented the judgment with interest and costs. It was on the same day presented for payment to the treasurer

of the county, and its payment was refused for alleged want of funds.

The 13th section of the act incorporating the Missouri and Mississippi Railroad Company provided that "it shall be lawful for the corporate authorities of any city or town, or the county court of any county, desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor and levy a tax to pay the same not to exceed one-twentieth of one per cent upon the assessed value of taxable property for each year." It was under the authority thus conferred that the county court of Macon County subscribed for stock in that company and issued the bonds in payment of its subscription, upon coupons of which the judgment of the relator was recovered.

The laws of the State of Missouri existing at the time of the issue of the bonds and coupons, namely, May 2, 1870, authorized the county court of Macon County to levy and collect annually a tax of one-half of one per cent upon all the taxable wealth of the county for county revenue, in addition to the one-twentieth of one per cent tax authorized by the charter of the railroad company.

In *United States* v. *County of Clark*, 96 U. S. 211, it was held that bonds similar to those upon which the coupons were issued for which the judgment here was recovered, were debts of the county as fully as any other of its liabilities, and that if any balance remained due on them for principal or interest, after application of the proceeds of the specific tax of one-twentieth of one per cent, the holders were entitled to its payment out of the general funds of the county. And in the decision of five cases arising upon similar bonds before the court at the October term of 1883, *Knox County Court* v. *Harshman*, 109 U. S. 229, it was held that the payment of any such balance was demandable out of funds raised by taxation for ordinary county uses.

It appeared that for the year 1885 the county court of Macon County ordered that the levy upon every one hundred dollars of valuation of taxable property in that county for county revenue should be thirty cents, instead of fifty cents

authorized by law, and that the revenue should be apportioned as follows: to the salary fund, one-third; to the contingent fund one-fifth; to the poor-house fund, one-fifth; to the road and bridge fund, one-sixth; and to the jury and election fund the balance; and that its clerks certify that order to the treasurer. The relator thereupon made a demand upon the county to annul and rescind this order of apportionment, and to increase the tax levy for the current year of 1885 from thirty cents to the fifty cents authorized by law upon every one hundred dollars valuation of taxable property in the county, and to apply the proceeds of such tax to the payment of the relator's judgment and warrant. This demand being refused, he prayed for a further writ of mandamus directing the county court and the justices thereof to make the order and take the proceedings demanded.

Subsequently, on motion of the relator the court entered an order requiring the county court of Macon County and its treasurer to make and file in court on the first Monday in March, 1886, full returns and statements under oath relative to the administration of the county revenue after the first of January, 1884, to the date of filing their returns, stating the value of the property assessed for the years 1884 and 1885, what taxes were levied thereon for county revenue and when, what amounts were collected on said levies, what dispositions were made of the amounts so collected, what subdivisions into special funds had been made of the county revenue, what payments had been made to each fund, and what balance remained on hand to the credit of each of the funds, and to the credit of the general fund, and what warrants had been theretofore issued and registered drawn on the general fund, and what, if any, payments had been made thereon.

In November, 1885, the county court filed an amended return to the mandamus issued, its original return having been lost, admitting that the county is a municipal corporation whose financial affairs are administered by a county court, that the relator recovered the judgment stated, and procured the warrant on its treasurer in the manner alleged, that the warrant was unpaid, and that by the law of Missouri, at the time of

the issue of the bonds, the county court was authorized to levy and collect a tax of one-half of one per cent upon all the taxable wealth of the county for county revenue, in addition to the one-twentieth of one per cent authorized by the charter of the company. But it set up that the county had levied for the year 1885 upon all the taxable wealth of the county of every kind and description the full sum of fifty cents on the one hundred dollars' valuation thereof as would appear by the exhibits which it presented, and made a part of its return, and stated that it had apportioned the revenue as above mentioned. It appeared also that the township boards for the several townships in that county had levied for township and road purposes for the year 1885 twenty cents on the one hundred dollars' valuation of taxable property, and that the county court had directed the clerk of the county to extend on the several tax books of the respective townships the rates which had been thus levied for township purposes. It was only in this way that the county court had levied fifty cents on the hundred dollars of valuation of taxable property, that is, by treating as a part of such sum the amount which the township boards had levied for township and road purposes, namely, twenty cents on the one hundred dollars of valuation of taxable property.

It also appeared from that return that the amount of money remaining in the treasury of Macon County was $14,394.44, and that there were outstanding and unpaid warrants largely in excess of that sum, issued on the general fund of the county for the years of 1884 and 1885, and that before the issue of the relator's warrant and its registration, a school fund warrant for the sum of $7848.90 had been issued by the county and registered.

The relator demurred to the return, and the Circuit Court sustained the demurrer, and ordered a peremptory mandamus to issue, compelling the county court to annul the order apportioning the revenue for 1885 into separate and distinct funds, to increase the tax levy for that year from thirty cents to fifty cents by a further levy of twenty cents on every one hundred dollars of valuation of taxable property in the county, such levy to be made and collected with the regular annual levies

required by law, and to apply the proceeds of such levy *pro rata* towards the payment of all registered warrants of even date and registration with relator's warrant, and to divide the surplus in the treasury of $14,394.44, after deducting therefrom the amount of the warrant in favor of the school fund, between the relator's warrant and other warrants of even date of registration with that warrant, issued under and by virtue of mandamus proceedings in said Circuit Court.

A motion for a rehearing was denied. To review this judgment the case was brought to this court on writ of error.

Mr. James Carr (with whom was *Mr. Robert G. Mitchell* on the brief) for plaintiff in error.

Mr. Joseph Shippen for defendant in error.

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

According to the law of Missouri under which the bonds of Macon County were issued to the Missouri and Mississippi Railroad Company, in payment of its subscription of stock to that company, as stated above, the balance due upon the judgment of the relator, after application of the moneys raised by the special tax of one-twentieth of one per cent upon the assessed value of taxable property, stood on the same footing as any other liability of the county to be paid out of its general funds. To raise revenue to meet its expenses, which included that liability, the county was authorized to levy a tax of fifty cents on every one hundred dollars of valuation of taxable property in the county. *United States* v. *County of Clark*, 96 U. S. 211; *Knox County Court* v. *United States*, 109 U. S. 229.

In this case it appears that for the year 1885 the county had levied only thirty cents on every one hundred dollars of property, but it set up in its answer that it had levied fifty cents, treating the twenty cents which had been levied by the boards of townships for township and bridge purposes as part of the

fifty cents. The township is a separate organization from that of the county, with authority to purchase and hold real estate and make contracts and control its corporate property, and its taxes levied for those purposes over which it has control can in no just sense be termed taxes for county purposes. There can be, therefore, no valid objection to the county's levy of an additional twenty cents on the one hundred dollars to make up the fifty cents which it is authorized to levy to meet its expenses and liabilities.

The apportioning of the funds collected to distinct and separate purposes does not affect the question presented. The proceeding is to obtain a further levy and the appropriation of its proceeds upon the judgment of the relator among other debts of the county.

That the surplus remaining in the treasury over the payment of the warrant for the school fund, which is of prior registration, should be appropriated, *pro rata*, upon all the warrants of even date and registration, is a simple measure of justice. All the warrants were issued and registered on the same day, and if they could only be paid in the order of their registration, and a payment could not be made on any one without its surrender, as contended, the treasurer would be obliged to retain the funds in his possession until he had a sufficient amount to pay them all before applying any portion thereof. As the Circuit Court said, this is an absurd position, and it held that whenever any reasonable amount has accumulated it should be distributed, and added that the order of the court would be a full protection to the officer. In that respect as well as in other particulars, concurring with the court, we affirm its judgment.

Affirmed.

GORMLEY *v.* CLARK.

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

No. 192. Submitted January 27, 1890. — Decided March 17, 1890.

Upon the construction of the constitution and laws of a State this court, as a general rule, follows the decisions of the highest court of the State, unless they conflict with, or impair the efficacy of some provision of the Federal Constitution, or of a Federal statute, or a rule of general commercial law; and this is especially the case when a line of such decisions have become a rule of property, affecting title to real estate within the State.

When a Circuit Court of the United States in Illinois obtains jurisdiction in equity of a proceeding to establish title to real estate under the act of the legislature of that State of April 9, 1872, known as the "Burnt Records Act," in a case within the provisions of the act, it may, following the decisions of the courts of the State, proceed to adjudicate and determine in equity all the issues between the parties relating to the property, as well those at law as those in equity; and it is entirely within its discretion whether it will or will not send the issues at law to be determined by a jury.

It is no error in a court of equity to order buildings removed from a tract of land over which a party to the record has a right of way for ingress to and egress from his own property.

Michael Gormley, the appellant, on the 5th day of March, 1874, made a subdivision, into blocks and lots, of certain property within the limits of the village of Glencoe, Cook County, Illinois, entitled "Gormley's Addition to Glencoe"; acknowledged the plat before a justice of the peace; and had it certified to by the county surveyor, and duly recorded in the recorder's office of said county. He derived title to so much of the property as is involved in this case under a warranty deed from his father, Marcus Gormley, the patentee, dated May 4, 1861, and recorded in the office of said recorder June 5th of that year. On the 15th of May, 1877, Gormley and his wife executed a trust deed, which was duly recorded, to one Loeb as trustee, conveying certain blocks and lots in Gormley's addition to Glencoe, to secure a promissory note

described therein, which trust deed was duly acknowledged, and released in due form of law all homestead rights of the grantors in the property conveyed. The premises were subsequently sold under the powers of sale in the trust deed for default in payment, and conveyed by deeds dated September 10, 1878, some of the blocks to Edward Clark, a block and some of the lots to Sarah J. Condon, and some to others. Edward Clark died October 14, 1882, and Alfred Corning Clark acquired title to the portion conveyed to him, as his sole heir at law. On the 29th day of March, 1884, Sarah J. Condon conveyed the premises deeded to her to Alfred Corning Clark, who, by that conveyance, and as heir to Edward, became the owner of blocks 3, 4, 5, 8 to 24 inclusive, and lots 3, 4, 5, 6, 11 and 12 in block 6, in Gormley's addition to Glencoe, in the county of Cook and State of Illinois.

By the charter of the village of Glencoe, it was provided that printed or written copies of all ordinances passed by the council of the village should be posted up in at least three of the most public places therein, within thirty days after their passage, and should take effect at the expiration of ten days after such posting. On the 4th day of October, 1881, on a petition signed by Michael Gormley, the council of Glencoe vacated Adams Street, between Grove Street and Bluff Street, in Gormley's addition, which ran between blocks 8 and 9 of that addition, and upon which Gormley's house, barn and outbuildings then stood. This portion of the street formed the means of ingress and egress to some twenty-four lots in these two blocks. The ordinance was posted and a certified copy filed in the recorder's office by Gormley on October 17, 1881. On the 3d of January, 1882, the council of Glencoe passed an ordinance, which was in Gormley's own handwriting, vacating some ten streets and parts of streets in Gormley's addition, which surrounded the property in controversy, and the evidence tended to show that this was done upon representations made by Gormley that he owned the property through which the streets passed, and that, at all events, such was the belief of the members of the council in taking the action in question. On the 12th day of January, 1882, the vote

on the passage of the ordinance was reconsidered, and again reconsidered on January 24, 1882; and on the 7th of February, 1882, the council passed an ordinance providing "that any and all ordinances heretofore passed by this council, vacating any streets or parts of streets in Gormley's addition to Glencoe, or purporting so to do, are hereby repealed, and all the streets and parts of streets shown in the first and originally recorded plat of said addition are hereby declared to be public streets." The ordinance of January 3, 1882, was never posted by the clerk, and although the charter required ordinances to be entered at length in an ordinance book, neither the ordinance of October 4, 1881, nor that of January 3, 1882, nor any of the repealing or rescinding resolutions or ordinances, were entered at length in such book. Shortly after the passage of the ordinance of January 3, 1882, Gormley applied to the clerk of the village to post the ordinance, and the clerk replied that he should take the full time allowed him by law to do so, namely, thirty days. He also applied for a certified copy of the ordinance, but the clerk did not give it to him. He then copied the minutes of the meeting of January 3, 1882, and posted such copy and made oath thereto, January 24, 1882, and filed the same on that day in the recorder's office of Cook County. On the 17th of January, 1882, Gormley filed in the Superior Court of Cook County, Illinois, a petition for a mandamus upon the clerk of the village to immediately post certified copies of the ordinance passed on January 3, 1882, as required by law, and to file for record, in the recorder's office of Cook County, a duly certified copy of the ordinance, or to furnish to him (Gormley) a duly certified copy upon tender of his legal fees. This petition was answered by the clerk, and a replication filed, and the cause tried, a jury being waived, by Gary, J., who rendered judgment dismissing the petition at Gormley's costs. The case was taken to the Appellate Court for the First District of Illinois, by which court the judgment of the Superior Court was affirmed. After the commencement of this action, Gormley sued out from the Supreme Court of Illinois a writ of error to review the judgment of the Appellate Court, and the judg-

ment of that court was thereupon affirmed. *Gormley* v. *Day*, 114 Illinois, 185.

Gormley sold several lots and blocks of his subdivision to different parties; put down sidewalks, and threw up various streets with a plough; street and sidewalk work in the addition was done by the village; and portions of various streets were graded and ditched. After the foreclosure the taxes upon the premises in dispute were paid by Alfred Corning Clark.

On the 31st of March, 1884, Clark filed his petition under the "Burnt Records Act," so called, Session Laws 1871–2, 652, being chapter 116 of the Revised Statutes of Illinois, setting up his title to the property in controversy; alleging the destruction of the records of Cook County and of his record title on October 8 and 9, 1871, by fire; the proceedings of the council of the village of Glencoe, of the clerk, and of Michael Gormley; and the suits in the Superior and Appellate Courts; and charging fraud on Gormley's part and threatened irreparable injury; averring that Gormley was in possession of petitioner's land and about to destroy its market value by procuring a vacation of the streets around it; and asking that council and clerk be enjoined. Petitioner made the village of Glencoe, its council and clerk, Michael Gormley and wife and others, who had claimed some interest in the property, parties, "and all whom it may concern," and prayed that the ordinances of October 4, 1881, and January 3, 1882, be declared null and void and of no effect whatsoever, and for a decree confirming and establishing his title in fee simple to the lots and blocks mentioned as aforesaid, and that he be put in possession; and that the village, its council and clerk, be restrained from passing or posting any ordinance or ordinances vacating streets or parts of streets adjoining petitioner's lots and blocks. Many of the defendants defaulted, and some answered, including Gormley and wife, upon whose answer the only questions in issue here arose. Upon hearing, the court entered a final decree in favor of Clark, adjudging that he was, at the date of filing the petition, vested with title in fee simple absolute to the premises in dispute, and confirming and establishing the same; that Gormley was estopped from claim-

ing any informality or defect in the plat of his addition to Glencoe; that he and his wife had no homestead rights in any of the lots and blocks decreed to Clark, or in any streets or parts thereof on which any of the said lots or blocks abutted, as against said Clark, his representatives, heirs and assigns; that the ordinance of January 3, 1882, was null and void; that title to that portion of Adams Street, between Grove Street and Bluff Street, was vested in Gormley, but subject to an easement in the use of it by said Clark, his heirs, legal representatives and assigns, as the owner of lots or parts of lots abutting thereon; that said Gormley and wife remove from that portion of Adams Avenue on or before a date named; and in default of such removal the marshal remove the buildings thereon located; and that possession of the property in dispute be surrendered to petitioner. The decree dissolved a preliminary injunction which had been granted against the village and its authorities, and awarded no relief in respect to them.

From this decree Gormley appealed to this court, and assigned as errors (1) that the court erred in not dismissing the bill for want of equity; (2) that petitioner had a complete and adequate remedy at law, and a court of chancery had no jurisdiction; (3) that the court erred in decreeing void the ordinance vacating said streets in said Gormley's addition to Glencoe; (4) that the court erred in decreeing that said Michael and Eliza Gormley remove their house, barn and shop from said portion of Adams Avenue, between Grove and Bluff streets; (5) that the court erred in decreeing to the petitioner an easement in the right of use of Adams Avenue, between Grove and Bluff streets, as a street, by said petitioner; (6) that the court erred in decreeing the petitioner entitled to the possession of said lots and blocks in said petition described; (7) that the court erred in decreeing that the appellant surrender up possession of said streets, lots and blocks to the petitioner.

Mr. Morton Culver and *Mr. Millard F. Riggle* for appellant.

The Burnt Records Act was passed for the purpose of establishing and confirming titles to property — the title of which

had become insecure by the great Chicago fire. It was not intended to take the place of ejectment proceedings, and deprive a man of his right of trial by jury, except in cases where the remedy at law was inadequate, or when the prime purpose of the petition was to establish the title to real estate rendered thus insecure.

When the prime purpose of the petition is to evict a man from premises he is in the adverse occupancy of, a court of chancery will, by right, refuse its aid when the remedy is adequate in a court of law.

The trust deed from Gormley, its foreclosure, and the subdivision and ordinance complained of, are all acts which have occurred since the fire, and so far as the rights of the petitioner were concerned he could have obtained them without any evidence relating back to the fire. The right to possession being purely a question for a jury, a court of chancery should have refused to take jurisdiction. *Lewis* v. *Cocks*, 23 Wall. 466; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Fussell* v. *Gregg*, 113 U. S. 550.

The Supreme Court of Illinois has decided that under the Burnt Records Act, a complainant out of possession may file a petition against a defendant in possession; but these cases can be regarded in no other light than in special instances when the remedy at law is inadequate.

This doctrine is in conflict with the entire principle of equity practice, for under the general principles of chancery jurisdiction to remove a cloud or to confirm or establish titles, a complainant out of possession could not file a petition against a defendant in possession; and if the act in question can be sustained only on the ground that it applies to all cases, regardless of the question, "Is there an adequate remedy at law?" then the act is unconstitutional because it would deprive the defendant of his right to trial by jury. The constitutionality of the act can be sustained on the principle that it is only intended to supply a loss when courts of law have not the remedy to grant the relief sought. See *Holland* v. *Challen*, 110 U. S. 15.

There was no relinquishment or waiver of the homestead of said Michael Gormley, it being that part of Adams Avenue

Counsel for Appellee.

between Grove and Bluff streets, upon which this house and barn stand, and where he has resided for over forty years, and the court clearly erred when it decreed said Gormley to surrender up possession and remove his buildings therefrom, or be evicted by the United States marshal. The homestead, unless expressly waived, would be paramount to any easement that appellee could have ever acquired. The Circuit Court expressly decrees the legal title to said slip of ground in Michael Gormley. Under what process of reasoning, can it decree away the homestead which he has never relinquished or abandoned?

The petitioner out of possession and the appellant in possession, it cannot be said that appellant obstructed the street. To have acquired an easement it was necessary for appellant to be in possession of the property, to which, and from which, he claimed the right of easement of the appellant's premises.

In *Cooper* v. *Detroit*, 42 Michigan, 584, it is held that where a highway has been extinguished, it can only be renewed in the same way that would turn other lands into public highways. After the passage of the ordinance vacating the streets the fee reverted immediately to the appellant. The acts of the village in this respect were either legal or illegal. If legal, no court has the power to set them aside. If illegal they are void, and would be so held by a court of law; and consequently there is no necessity for resorting to a court of equity.

The decree goes further than the petition or bill will warrant. There is no prayer or allegation contained in the bill warranting the court to decree the appellant to surrender the possession of the strip of land occupied by him as a homestead. The bill or petition seeks the possession of certain lots and blocks, and not the intervening space between any such lots or blocks, and I submit to this honorable court, without further argument, that under the prayer for general relief, a court cannot legally decree one party to surrender to another the possession of land not specifically asked in the bill.

Mr. Charles E. Pope, *Mr. Alexander McCoy* and *Mr. Charles B. McCoy* for appellee.

Opinion of the Court.

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

Upon the 8th and 9th of October, 1871, a memorable conflagration destroyed a large part of the city of Chicago, including the court-house and the entire records of the county of Cook, in the State of Illinois, in which the city of Chicago was situated. An act was thereupon passed by the general assembly of that State, approved April 9, 1872, to remedy the evils consequent upon the destruction of public records. Laws Illinois 1871–2, p. 652, which act is now chapter 116 of the Revised Statutes of Illinois. 2 Starr and Curtis, 1993. That act provided that in case of such destruction, the courts of the county wherein it occurred, having chancery jurisdiction, should have power to inquire into the condition of any title to or interest in any land in such county, and to make all such orders, judgments and decrees as might be necessary to determine and establish said title or interest, legal or equitable, against all persons known or unknown, and all liens existing on such lands, whether by statute, mortgage, deed of trust or otherwise; that it should be lawful for any person claiming title to any lands in the county at the time of the destruction of its records, and for all claiming under such person, to file a petition in any court in the county having chancery jurisdiction, praying for a decree establishing and confirming his said title, which petition should set out the character and extent of the estate in the land in question claimed by the complainant or petitioner, and from whom and when and by what mode he derived his title thereto; the names of all persons owning or claiming any estate in fee in, or who should be in possession of, said lands or any part thereof, and also all persons to whom any such lands had been conveyed, and the deed or deeds of such conveyance recorded in the office of recorder of deeds since the time of destruction of the records and prior to the filing of the petition; and their residences, so far as the same were known; that all persons so named in the petition should be made defendants and notified of the suit by summons or publication in the same manner as required in chancery pro-

ceedings in the State, unknown owners or claimants to be brought in under the designation of "to whom it may concern;" that any person interested might oppose the petition, demur to or answer it, or file a cross-petition if he desired to do so; and that the decree entered in the proceeding should be, as to the title found, forever binding and conclusive, except against minors and insane persons, and persons in possession or to whom the lands had been conveyed and the deeds recorded since the destruction of the records and prior to the filing of the petition, and not made parties defendant by name. The act also contained various provisions in protection of married women, insane persons and minors, and all defendants not served with summons were given one year after entry of decree to ask its vacation on petition; and the rules and regulations governing courts of chancery in Illinois were declared to apply to proceedings under the act, so far as not inconsistent therewith.

By numerous decisions of the Supreme Court of the State of Illinois it has been determined that a petition to establish title under what is known as the "Burnt Records Act," need not show that the petitioner was in possession of the land or that it was vacant and unoccupied, as required in a bill to quiet title, the act authorizing the petitioner to make all parties in possession or claiming an interest in the land parties defendant to the petition, creating a clear and marked distinction between a case of this character and such a bill; that the court is authorized and required to investigate the interest of all the parties in the premises in question, and to decree in favor of the better title; that all that is required in respect to adverse claimants or their titles is, that such claimant shall be named in the petition and made defendant; that nothing more is required to give the court jurisdiction under the statute to investigate the claims of title to the premises, and by its decree establish and confirm the title in the person in whom it is found to be vested, and to make all such orders, judgments and decrees as shall be necessary to that end; that decrees so entered are, as to the title so found, forever binding and conclusive between the parties; that the statute was in effect a

statute of limitations, and under the circumstances was not unreasonable, but demanded as a matter of safety in a great emergency; that it was not open to the objection of unconstitutionality, because not providing for trial by jury or otherwise; and that the question whether a jury should be allowed could not arise unless a jury was demanded. *Gage* v. *Caraher*, 125 Illinois, 447; *Heacock* v. *Hosmer*, 109 Illinois, 245; *Heacock* v. *Lubuke*, 107 Illinois, 396; *Robinson* v. *Ferguson*, 78 Illinois, 538; *Bradish* v. *Grant*, 119 Illinois, 606; *Bertrand* v. *Taylor*, 87 Illinois, 235.

The subject received much consideration from Judge Blodgett, holding the Circuit Court for the Northern District of Illinois, in *Smith* v. *Gage*, 11 Bissell, 217, 220, in which he announced substantially the same conclusions. And he remarks "that the court, on the final hearing of such a case, may, in its discretion as a court of equity, where two conflicting titles are presented, the validity of which can be determined in a court of law, by the express terms of its decree, remit the parties holding such titles to a court of law for the trial of their rights; but this would be purely a matter of equitable discretion, and does not limit the power of the court in this proceeding to settle the entire title by its decree." In *Gage* v. *Caraher*, *ubi supra*, the Supreme Court of Illinois says: "Whatever may be the power of the court of chancery, where there are controverted titles, to restore, by its decree, the evidences of title in the respective parties as they were before the destruction of the record, and then, in its discretion, remit the parties to a court of law to there try their titles, it is manifest no such course was contemplated by the statute, or necessary in cases under it." p. 452. In *Ward* v. *Farwell*, 97 Illinois, 593, 613, in passing upon the right to demand a trial by jury in the particular instance there in hand, it is justly observed: "Where a new class of cases are, by legislative action, directed to be tried as chancery causes, it must appear that, when tested by the general principles of equity, they are of an equitable character, and can be more appropriately tried in a court of equity than in a court of law. And if of this character, when brought in a court of equity they stand

upon the same footing with other causes, and the court will have the right, as in other cases, to determine all questions of fact without submitting them to a jury."

Upon the construction of the constitution and laws of a State, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the Federal Constitution, or of a Federal statute, or a rule of general commercial law. *Norton* v. *Shelby County*, 118 U. S. 425, 439. And this is so 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. *Burgess* v. *Seligman*, 107 U. S. 20; *Bucher* v. *Cheshire Railroad Company*, 125 U. S. 555. Substantially conclusive effect is given to such decisions upon the construction of state statutes, as affecting title to real estate within the State. *Ridings* v. *Johnson*, 128 U. S. 212; *Bacon* v. *Northwestern Insurance Co.*, 131 U. S. 258; *Hanrick* v. *Patrick*, 119 U. S. 156, 169.

And while the rule is thoroughly settled that remedies in the courts of the United States are at common law or in equity, according to the essential character of the case, uncontrolled in that particular by the practice of the state courts. *New Orleans* v. *Louisiana Construction Co.*, 129 U. S. 45, 46. yet an enlargement of equitable rights by state statute may be administered by the Circuit Courts of the United States as well as by the courts of the State; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction. *Broderick Will Case*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15, 25; *Frost* v. *Spitley*, 121 U. S. 552, 557.

Tested by the conclusions of the Supreme Court of Illinois, the principal contention on appellant's behalf cannot be sustained. The record of the patent and the deed from the patentee to Michael Gormley had been destroyed, and the deed, which it turned out on this hearing was in Gormley's posses-

sion, had never been re-recorded. The petitioner was entitled to the establishment of the record by the proceeding authorized under the statute, and, when the court had once acquired jurisdiction, it could go on and adjudicate upon all claims to the property in controversy, as therein provided. The character of the litigation sufficiently indicates that the petitioner legitimately invoked the aid of the statute.

It is strenuously insisted that the remedy at law was adequate, and that as the right of possession was purely a legal question and for a jury, the court of chancery should have declined jurisdiction; but, inasmuch as the case came within the provisions of the statute, and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances, *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514; and it is quite clear that under this statute the restoration of the record title is a matter essentially of equitable cognizance, while the declaration of the invalidity of the ordinance of January 3, 1882, the removal of the cloud caused by recording a copy thereof, and the abatement of the obstruction to the streets, were matters in respect to which, under the averments of the petition and the evidence adduced at the hearing, the petitioner could properly resort to a court of equity. Undoubtedly the rule that a bill may be retained for the purpose of granting full relief when jurisdiction exists, should not be abused by being employed as a mere pretext for bringing into chancery causes proper for a court of law; but under the local law, this could not be predicated of a petition which the petitioner was entitled to file under the "Burnt Records Act," and, as already stated, we administer, where adverse citizenship gives us jurisdiction of a case, the equitable relief which state legislation accords.

It is objected that there was error in the direction for the removal of the buildings from the portion of Adams Street between blocks eight and nine, in disregard of the homestead

rights of appellant and his wife; but we do not think so. Whether the plat was a statutory plat or not, as to which some issue is made by the answer, the proofs establish such a dedication as created an easement in the petitioner, the existence of which Gormley was estopped to deny, and which the court was justified in protecting. *Maywood Co.* v. *Village of Maywood*, 118 Illinois, 61; *Zinc Company* v. *City of La Salle*, 117 Illinois, 411; *Littler* v. *City of Lincoln*, 106 Illinois, 353; *Hamilton* v. *Chicago, Burlington &c. Railroad*, 124 Illinois, 235.

The right of way, as appurtenant to these blocks and lots, passed to the purchasers under the sale upon the trust deed, which was executed by Gormley and his wife, and by which both had released the homestead claim, and the decree recognized the fee as still in Gormley subject to the burden thus imposed. *Trickey* v. *Schlader*, 52 Illinois, 78; *Kittle* v. *Pfeiffer*, 22 California, 485.

As to the remaining errors assigned, we are of opinion that the court correctly held the second ordinance duly annulled, and the easement as existing in the petitioner, so far as respected the property described in the first of the two ordinances referred to, and properly granted the writ of assistance to put the petitioner into possession of his blocks and lots as prayed; and while the bill did not specifically pray for similar relief in respect to the streets in question, such relief was agreeable to the case made by the bill, and could be awarded as within the prayer for general relief. The writ of assistance was simply in effectuation of the decree, and was in accordance with the recognized practice in equity and the ninth equity rule. We are satisfied upon the whole case that the Circuit Court committed no error, and the decree will therefore be

Affirmed.

Citations for Plaintiff in Error.

PENFIELD *v.* CHESAPEAKE, OHIO AND SOUTH-WESTERN RAILROAD COMPANY.

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

No. 187. Argued January 30, 1890. — Decided March 17, 1890.

In section 90 of the New York Code of Civil Procedure it is provided that "where a cause of action . . . accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases: . . . 2. Where before the expiration of the time so limited, the person, in whose favor it originally accrued, was, or became, a resident of the State, etc.;" *Held*, following the decisions of the courts of the State of New York in parallel cases, that this statute contemplates that the plaintiff shall be an actual resident in the State, and that he does not become such by sending his family to the State of New York from another State, in which he and they were residing, with the intent that they should reside there, but remaining himself in the other State.

THE case is stated in the opinion.

Mr. Rufus M. Williams, for plaintiff in error, cited, among other cases: *Putnam* v. *Johnson*, 10 Mass. 488; *Blanchard* v. *Stearns*, 5 Met. 298; *Holmes* v. *Greene*, 7 Gray, 299; *Crawford* v. *Wilson*, 4 Barb. 504; *Fry's Election Case*, 71 Penn. St. 302; *State* v. *Hallett*, 8 Alabama, 159; *Dale* v. *Irwin*, 78 Illinois, 170; *Vanderpoel* v. *O'Hanlon*, 53 Iowa, 246; *Moorehouse* v. *Lord*, 10 H. L. Cas. 272; *Whicker* v. *Hume*, 7 H. L. Cas. 124; *Lord* v. *Colvin*, 4 Drew. 366; *Mitchell* v. *United States*, 21 Wall. 350; *Exeter* v. *Brighton*, 15 Maine, 58; *Shaw* v. *Shaw*, 98 Mass. 158; *State* v. *Aldrich*, 14 R. I. 171; *Shattuck* v. *Maynard*, 3 N. H. 123; *Long* v. *Ryan*, 30 Gratt. 718; *Cohen* v. *Daniels*, 25 Iowa, 88; *Fitzgerald* v. *Arel*, 63 Iowa, 104; *Boucicault* v. *Wood*, 2 Bissell, 34; *Doyle* v. *Clark*, 1 Flipp. 536; *Abington* v. *North Bridgewater*, 23 Pick. 170; *Thorndike* v. *Boston*, 1 Met. 242; *Collester* v. *Hailey*, 6 Gray, 517; *Langdon* v. *Doud*, 6 Allen, 423; *S. C.* 83 Am. Dec. 641; *Hallett* v. *Bassett*, 100 Mass. 167; *Kennedy* v. *Ryal*, 67 N. Y.

379; *Reed's Appeal*, 71 Penn. St. 378; *Tyler* v. *Murray*, 57 Maryland, 418; *Talmadge* v. *Talmadge*, 66 Alabama, 199; *Campbell* v. *White*, 22 Michigan, 178; *Chariton County* v. *Moberly*, 59 Missouri, 238; *Desmare* v. *United States*, 93 U. S. 605; *White* v. *Brown*, 1 Wall. Jr. C. C. 217; *Church* v. *Rowell*, 49 Maine, 367; *Gilman* v. *Gilman*, 52 Maine, 165; *S. C.* 83 Am. Dec. 502; *Report of the Judges*, 5 Met. 587; *McDaniel* v. *King*, 5 Cush. 469; *Otis* v. *Boston*, 12 Cush. 44; *Briggs* v. *Rochester*, 16 Gray, 337; *Wilson* v. *Terry*, 11 Allen, 206; *Hindman's Appeal*, 85 Penn. St. 466; *State* v. *Grizzard*, 89 N. C. 115; *Kellogg* v. *Oshkosh*, 14 Wisconsin, 623; *Hall* v. *Hall*, 25 Wisconsin, 600; *Kellogg* v. *Supervisors*, 42 Wisconsin, 97; *Morgan* v. *Nunes*, 54 Mississippi, 308; *Shepherd* v. *Cassiday*, 20 Texas, 24; *Cross* v. *Everts*, 28 Texas, 523; *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Harris* v. *Firth*, 4 Cranch C. C. 710; *Hayes* v. *Hayes*, 74 Illinois, 312; *Littlefield* v. *Brooks*, 50 Maine, 475; *Mills* v. *Alexander*, 21 Texas, 154; *Jennison* v. *Hapgood*, 10 Pick. 77; *Bassett* v. *Wheeler*, 84 N. Y. 468; *Frost* v. *Brisbin*, 19 Wend. 11; *S. C.* 32 Am. Dec. 423; *Boardman* v. *House*, 18 Wend. 512; *Burrows* v. *Miller*, 4 How. Pr. (N. Y.) 349; *Isham* v. *Gibbons*, 1 Bradf. (N. Y.) 69; *Matter of Thompson*, 1 Wend. 43.

Mr. B. F. Tracy, (with whom was *Mr. W. W. MacFarland* on the brief,) for defendant in error, cited: *St. Clair* v. *Cox*, 106 U. S. 350; *Burnham* v. *Rangley*, 1 Woodb. & Min. 7, 11; *Frost* v. *Brisbin*, 19 Wend. 11; *S. C.* 32 Am. Dec. 423; *Matter of Thompson*, 1 Wend. 43; *Haggart* v. *Morgan*, 5 N. Y. 422; *S. C.* 55 Am. Dec. 350; *Bell* v. *Pierce*, 51 N. Y. 12; *Union Hotel Co.* v. *Hersee*, 79 N. Y. 454; *Queen* v. *Vice-Chancellor &c.*, L. R. 7 Q. B. 471; *Attorney General* v. *McLean*, 1 H. & C. 750; *Blackwell* v. *England*, 8 Ell. & Bl. 541; *Hewer* v. *Cox*, 3 El. & El. 428; *Board of Supervisors* v. *Davenport*, 40 Illinois, 197; *Storm* v. *Smith*, 43 Mississippi, 497.

Mr. Justice Harlan delivered the opinion of the court.

This action was brought in March, 1884, in the Supreme Court of New York, Kings County, by the plaintiff in error against the Chesapeake, Ohio and Southwestern Railroad

Company, a corporation created under the laws of Kentucky and Tennessee. Its object was to recover damages alleged to have been sustained by the plaintiff on the 30th of November, 1882, in the State of Tennessee, in consequence of the careless, negligent and wrongful conduct of the defendant and its servants, while he was a passenger upon one of its trains. Upon the petition of the company the action was removed into the Circuit Court of the United States for the Eastern District of New York, where, after the evidence was concluded, the jury, under the direction of the court, returned a verdict for the defendant. This direction was given because, in the opinion of that court, the plaintiff's cause of action was barred by the statutes of limitation of New York.

The statutes here referred to are in these words:

"The following actions must be commenced within the following periods, after the cause of action has accrued. . . . Within three years: . . . An action to recover damages for a personal injury, resulting from negligence." N. Y. Code of Civil Procedure, §§ 380, 383.

"Where a cause of action which does not involve the title to, or possession of, real property within the State, accrues against a person who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time limited by the laws of his residence for bringing a like action, except by a resident of the State, and in one of the following cases:

"1. Where the cause of action originally accrued in favor of a resident of the State.

"2. Where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was, or became, a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State." *Ib.* § 390.

A motion for new trial having been overruled, a judgment was rendered for the company. That judgment is here for review, the only error assigned being the court's instruction to find for the defendant.

It was agreed that at the trial the plaintiff gave testimony tending to show the following facts: He lived in Harlem, New York, when a boy of fourteen years of age, married in Brooklyn, removed from that city to Michigan, from the latter State to Illinois, and from Illinois to St. Louis, Missouri, where he had resided for about one year prior to the accident. At the time of the accident he was a travelling salesman for an agent of the Michigan Salt Association located in St. Louis, and when the trial took place, was engaged in that capacity. When injured, he resided in St. Louis, with his wife and children. In August, 1883, he "sent his wife and children to Brooklyn, New York, where they took up their residence and commenced to keep house, and where they have resided ever since August, 1883, and do now reside." The plaintiff himself did not go to Brooklyn with his family in August, 1883, nor did he join them there until December 31, 1883, or January 1, 1884. "He remained with his family in Brooklyn for about three months, when he again went to St. Louis, and from there went travelling for said agency as said salesman." He "again joined his wife and children the next December, 1884, and remained with them some three months, when he again went out on the road." He joined his family in October, 1885, and was with them at the time of the trial. He lived with them when at home, and always lived with his wife since their marriage, except when absent on business. The attorney for the defendant addressed the plaintiff at his place of business in St. Louis, up to December 28, 1883, on which day the latter notified him by letter of his change of address to Brooklyn, for which place he was in the act of starting to join his family.

Upon the issue as to the residence of her husband, Mrs. Penfield's evidence was, that they had lived together constantly for about twenty-two years, and she was always with him except when he was travelling. Having stated that at the time of the accident, and during the sickness of her husband, resulting from the injuries received by him, they resided at St. Louis, her examination continued: "Q. How long did you continue to live there yourself after this sickness? A. Until the next August. Q. What year was that? A. 1883. Q. In

August, 1883, what did you do? A. Came here to Brooklyn; hired a house and went to house-keeping; moved all my things I wished to retain, and have lived here ever since with my children. Q. What about your furniture? A. Part I sold in St. Louis and part I brought here. Q. And have you been residing here ever since? A. Yes, sir. Q. Your husband's place of abode is here with you in your house? A. Yes, sir. Q. At the time you removed from St. Louis to Brooklyn will you state, if you know, the reason why your husband did not come on with you at that time?" This question was objected to as immaterial and irrelevant, and was not answered.

As the railroad company is a corporation of Tennessee, where the injury occurred, and as the plaintiff was not a resident of New York when the cause of action originally accrued to him, the suit was barred by section 390 unless he became a resident of the latter State before the expiration of the period limited by the laws of Tennessee for the commencement of actions like this, that is, before the expiration of one year from November 30, 1882. The contention of the plaintiff is that, although he was not in the State of New York for some years prior to December, 1883, he became, within the meaning of the statute, a resident of that State, when, in August, 1883, he sent his family to the city of Brooklyn. We are not aware of any determination of this precise question by the highest court of New York. But there are decisions of that court construing statutes, other than statutes of limitation, which contain the words "resident" and "residence." Those decisions may throw some light upon the present case.

The earliest of those cases, to which our attention has been called, is *In re Thompson*, 1 Wend. 43, 45. It arose under a statute, 1 Rev. Laws N. Y. (1813) c. 49, p. 157, the 23d section of which provided "that the estate, real and personal, of every debtor who resides out of this State, and is indebted within it, shall be liable to be attached and sold for the payment of his debts, in like manner, in all respects, as nearly as may be, as the estates of debtors residing within this State." Chief Justice Savage, delivering the opinion of the court, said that the object of the statute was to authorize creditors to prosecute

for their debts when their debtors were abroad; and whether their absence from the State was permanent or temporary, whether voluntary or involuntary, the reason for giving this remedy to the creditor was the same. He said the question was "where was his actual *residence*, not his *domicil*. . . . The act is intended to give a remedy to creditors, whose debtors cannot be served with process. If the debtor absconds or secretes himself, then an attachment issues. If he notoriously resides abroad, then the attachment issues. But if he goes openly to another State or country, and remains there doing business, but intending to return when his convenience will permit, he is not, as his counsel contends, an absent debtor, and his property cannot be touched. He may become a bankrupt abroad, as has Alexander Thompson; his property may be taken by his partners, and used by them, or transferred to his foreign creditors, as is attempted in this case; and the creditor may stand by and acknowledge and regret the insufficiency of our laws, but the property cannot be touched. Surely the legislature never intended such a state of things. . . . The reason why this remedy is given against the property of debtors resident abroad is equally applicable whether the debtor is absent permanently or temporarily. No length of residence, without the intention of remaining, constitutes *domicil*. A debtor, therefore, by residing abroad, without declaring an intention to remain, might prevent his creditors from ever collecting their debts. In my judgment, the present case comes not only within the spirit of the act, but also within its terms."

In *Frost* v. *Brisbin*, 19 Wend. 11, 14, the court was required to determine the meaning of the word "resident," in the act of 1831, Statutes 1831, p. 396, providing that no person should be arrested on civil process in suits brought upon contracts, express or implied, except in cases where the defendant "shall not have been a resident of this State for at least one month previous to the commencement of a suit against him."

In that case it appeared that Brisbin, a citizen and resident of New York, purchased a stock of goods, took them to Milwaukee, and established himself in business in the latter city,

leaving his wife and child to board at his former residence in New York. There was evidence tending to show that he went to Milwaukee with intent to make it his permanent residence. But there was, also, evidence tending to show that he had no fixed purpose, when he went to that city, of making it his permanent abode, unless he was successful in business, and that when arrested he had the purpose — not having been thus successful — to close up his business and return to his former residence, though without any certain plans as to his future course.

The court, speaking by Chief Justice Nelson, said that if the case turned upon the defendant's formed intention and purpose of mind, and not upon the fact of actual residence, the law was for him. But upon a review of former decisions, construing statutes regulating the rights and remedies of creditor and debtor, he said: "The cases cited above establish that the transient visit of a person for a time at a place, does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for a time, for business or other purposes, to constitute *a residence* within the legal meaning of that term. . . . One of these cases expressly, and all of them virtually, decide that *actual residence*, without regard to the *domicil* of the defendant, was within the contemplation of the statutes. Whether, therefore, the defendant had so established himself at Milwaukee as to work a change of his domicil or not, is immaterial; for if we concede he has not, he may still be a *resident* there. The domicil of a citizen may be in one State or Territory, and his actual residence in another." After observing that upon the facts it must be assumed that the defendant commenced an actual and permanent residence in Milwaukee in the spring of 1836, but that since that date he had resolved to close his business there as soon as it could be conveniently done, and return to his former residence, the court said: "Has this change of intention worked a change of residence? for this is the most that can be pretended. If our exposition of the meaning of the term in the statute is correct, it clearly

did not. His actual residence is still at Milwaukee. He is still carrying on his business there, and may continue it for such time as he pleases. Change of mind may lead to change of residence, but cannot with any propriety be deemed such of itself."

In *Haggart* v. *Morgan*, 1 Selden, (5 N. Y.) 422, 428, which was the case of an attachment against the defendant as a non-resident debtor, it was held that although the defendant was *domiciled* in New York, he was, by reason of a continuous, though temporary, absence in New Orleans, for about three years, to be deemed a non-resident within the meaning of the statute regulating attachments.

In *Weitkamp* v. *Loehr*, 53 N. Y. Superior Ct. 79, 82, the court said: "Residence, in attachment laws, generally implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return to the true domicil."

These cases show that, within the meaning of the statutes regulating attachments against the property of debtors, as well as those regulating arrests on civil process for debts, it was the actual residence of the defendant, and not his domicil, that determined the rights of the parties.

A like construction appears to have been given, or assumed, by the courts of New York in regard to similar words in that clause of its statute of limitations, which provides that if, after the cause of action shall have accrued, the defendant shall "depart from and reside out of the State, the time of his absence" shall not be included in the period of limitation. The Supreme Court of the State, discussing that provision, said: "The expressions 'and reside out of the State' and 'the time of his absence' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of, he was absent from, the State, and accordingly, until he again became a resident of the State, the suspension of the operation of the statute continued." *Burroughs* v. *Bloomer*, 5 Denio, 532, 535. It was held in that case, as well as in two later and well considered opinions, the one of the Superior Court of the city of New York, delivered by Mr.

Justice Duer, and the other of the Court of Appeals, delivered by Judge Selden, that where a defendant, after the cause of action accrued against him, departed from and resided out of the State several times, returning to the State in the intervening periods, all the times of absence or non-residence were to be added together and deducted from the term of limitation. *Ford* v. *Babcock*, 2 Sandf. (N. Y.) 518, 527, 531; *Cole* v. *Jessup*, 10 N. Y. 96, 104, 107. In each of those three cases it was not alleged or contended, and could not be inferred from any language in the pleadings, or in the opinion, that the defendant changed his domicil upon each departure and return. To the same effect is *Satterthwaite* v. *Abercrombie*, 23 Blatchford, 308. And, in a very recent case, the Court of Appeals said: "The law gives a creditor six years' continued presence of his debtor within the State after the cause of action has accrued." *Engel* v. *Fischer*, 102 N. Y. 400, 404.

To give a different meaning to the word "residence," or "resident," or "reside" in that clause of the New York statute of limitations which relates to plaintiffs, from that which the courts of the State have given it in that clause of the same statute which relates to defendants, as well as in various statutes of the State on other subjects, would produce much confusion.

Assuming, without deciding, that the testimony introduced for the plaintiff in the present case would warrant the impression that he had obtained a domicil in the State of New York by virtue of his wife and family, with his consent, having made their home in that State, there is nothing in the evidence which had the slightest tendency to show that his own actual residence was in the State of New York for many years prior to his going there from St. Louis in December, 1883.

To illustrate by referring to other statutes, let us suppose that the plaintiff, while engaged in business in St. Louis, had brought this action in the Supreme Court of New York, immediately after his family took up their residence in Brooklyn. Could he not have been compelled to give security for costs, under section 3268, of the Code of Civil Procedure, which declares that "the defendant, in an action brought in

a court of record, may require security for costs to be given . . . where the plaintiff was, when the action was commenced, . . . a person residing without the State." Or if the defendant in this action had, within the same period, brought, in one of the courts of New York, a suit against the present plaintiff, upon a cause of action for an "injury to personal property, in consequence of negligence," it could not be doubted, in view of the decisions heretofore cited, that an attachment could have been sued out, and sustained, under sections 635 and 636 of the code, which provide that a warrant of attachment against the property of one or more defendants in such an action may be granted upon the application of the plaintiff, where it appears by affidavit "that the defendant is . . . not a resident of the State." Could Penfield, in the last case supposed, have been deemed a non-resident of New York when sued for "an injury to personal property in consequence of negligence," and under the same facts be regarded as a resident of New York if he sued the same party "for a personal injury resulting from negligence?" Could he be deemed a resident of the State for the purpose of bringing this action, immediately after his family reached Brooklyn, and a non-resident if the railroad company had, at the same time, sued him in New York, and taken out an attachment against his property? The answer to these questions suggests that, in view of the course of decisions in New York, the plaintiff, by retaining his residence for purposes of business in St. Louis, did not become a resident of New York, within the meaning of section 390, until he changed his actual residence to that State. If he had, before the expiration of the period limited by the law of Tennessee, quitted his residence in Missouri and joined his family in New York for the purpose of making the latter State his residence in fact, he would have been entitled to bring his action within the period fixed by the laws of New York for the commencement of actions like this by one who is a resident of that State when the cause of action accrues.

As under the evidence the jury could not, by any reasonable inference from the proof, have found that the plaintiff became

himself a resident of New York, within a year after the cause of action accrued, the instruction to find for the defendant was right.

Judgment affirmed.

CLOUGH *v.* CURTIS.

BURKHART *v.* REED.

APPEALS FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

Nos. 1133, 1134. Argued January 27, 28, 1890. — Decided March 17, 1890.

The jurisdiction of the several courts of the Territory of Idaho is a rightful subject of legislation by the territorial legislature.

An act of the territorial legislature conferring upon the Supreme Court of the Territory original jurisdiction to issue writs of mandate, review, prohibition, *habeas corpus* and all writs necessary to its appellate jurisdiction is not inconsistent with the Constitution of the United States, or with any act of Congress.

Section 1910 of the Revised Statutes does not forbid a territorial legislature from conferring original jurisdiction upon the Supreme Court of the Territory in such cases.

This court has jurisdiction over judgments of a territorial court: (1) denying an application for a writ of mandamus to compel the secretary of the Territory to record certain proceedings as part of the proceedings of a session of the legislature of the Territory; and (2) denying an application for a like writ to compel the chief clerk of the House of Representatives of the Territory to bring his minutes and journals into the court in order that they may be there corrected in the presence of the court; and it is *held* that there was no error in denying applications for such writs of mandamus, when they were not asked for by one claiming to have a beneficial interest in sustaining or defeating the measures which it was sought to have incorporated into the official records.

The courts of the United States cannot be required, in a case involving no private interest, to determine whether particular bodies, assuming to exercise legislative functions, constitute a lawful legislative assembly.

THE case, as stated by the court, was as follows:

These cases depend upon the same principles of law, and will be considered together.

It appears from the record of the first one (No. 1133) that upon the petition of the appellant to the Supreme Court of

the Territory of Idaho, an alternative writ of mandamus was issued, stating substantially the following facts: The appellant was and is the president of the Council of the 15th session of the legislature of Idaho, and the appellee is the secretary of that Territory. On the 60th day of that session, February 7, 1889, the Council continued in session until midnight, and thereafter until about one o'clock of the succeeding morning. About the latter hour in the morning of the 8th day of February, 1889, a communication was received from the chief clerk of the House of Representatives, announcing that that body had elected one George P. Wheeler as speaker *pro tem.* The petitioner declined to receive that message as a message from the House, for the reason that the latter body had no authority to elect a speaker after the expiration of the sixty days prescribed for the session by the act of Congress; and the petitioner, as president of the Council, announced to that body and declared "that, because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said legislature was permitted to transact business, therefore the said Council was adjourned without day." He then inquired of the chief clerk if the adjournment was recorded in the minutes of the proceedings of the session, and received from him the reply that it was. The Council then dispersed, and the petitioner and some of the members left the room, after which other members pretended to reorganize the Council, and to elect one S. F. Taylor president *pro tem.* thereof, and to elect other officers of the Council, and, also, assumed to transact legislative business, passing enactments which the persons, so pretending to be a legislature, claimed were acts of the legislature of the 15th session of the Territory. Seventeen acts were so passed after the time had expired for holding the session of the legislature.

The writ also stated that in making up a record of the sixtieth day of the legislative session the clerk did not thereafter show him the same; and petitioner never saw, until after the clerk had filed with E. J. Curtis, the secretary of the Territory, certain papers which he claimed were the proceedings of the sixtieth day of the session of the Council, but which, in

fact, were a false and fictitious account of those proceedings, signed by S. F. Taylor, and not signed by petitioner, president of the Council, as required by its rules and practice. The petitioner found that a part of the minutes or records had been cut out, and that there were three stubs of leaves which had been a part of the former proceedings of the records or minutes of said session. The part of the minutes reciting that the president of the Council declared the session adjourned, and his reasons therefor, had been cut out and were omitted from the minutes as filed with the secretary of the Territory.

On the 14th of February, 1889, the petitioner, as the president of the Council, called the attention of the secretary of the Territory to said cut leaves, stating to him the proceedings that should have appeared therein, and handed to him a report thereof as they actually occurred, demanding that the same be incorporated with the proceedings of the legislature, and recorded as a part of the proceedings of the Council. The defendant, Edward J. Curtis, declined to record the adjournment proceedings as a part of the proceedings of the legislature. The petitioner then and there demanded that the report as furnished by him be certified to Congress as part of the proceedings of the legislature of Idaho for the fifteenth session. But defendant refused to report the said adjournment as a part of the proceedings. The petitioner, after having stated and certified to him, as secretary of the Territory, that all of the alleged proceedings, wherein it was stated that S. F. Taylor was president *pro tem.*, were had after the hour of 12 o'clock, and after the adjournment of the Council by the president thereof, demanded that the subsequent proceedings and pretended legislation be not recorded as a part of the proceedings of the legislature; and, if already recorded, that the same be expunged from the record of the proceedings of the fifteenth session of the legislature; all of which the secretary declined to do, and he still declines to treat the proceedings and acts signed by S. F. Taylor, president *pro tem.*, as null and void, and threatens to certify them to Congress as a part of the proceedings of the Council.

Statement of the Case.

The record in the second case (No. 1134) shows that upon the petition of H. Z. Burkhart, speaker of the House of Representatives of Idaho Territory, 15th session, an alternative writ of mandamus was issued against Charles H. Reed, chief clerk of that body, and Edward J. Curtis, secretary of the Territory, alleging the following facts:

The defendant Reed, as such chief clerk, has in his possession the minutes of the proceedings of the last day of the session of the House of Representatives, which minutes have been read and approved by that body, and so declared to it then and there by the speaker on the last day of such session. Thereafter the speaker asked the clerk if there was any further business before the House, and the latter replied there was none. After the hour of 12 o'clock midnight of the 7th day of February, 1889, being the 60th and last day of the session, the plaintiff, as speaker and acting as such, announced that the time had arrived when by the act of Congress the session closed by limitation of time, and declared the House adjourned *sine die*. To that announcement there was no dissent by the House or by any member thereof, but all acquiesced therein, and the speaker, acting as such, actually adjourned the House after the hour of 12 o'clock at night of the 60th day of the session. Upon such adjournment he and a portion of the Representatives left the assembly room, and thereafter several members of the legislature elected a speaker and assumed to pass acts and to perform the duties of the House.

The writ in this case also states that it was and is the duty of the defendant Reed, as chief clerk, to make and keep correct and true minutes of the doings and proceedings of the House, and upon their approval by the speaker it is his custom and duty to sign the same as speaker. But Reed wrongfully and fraudulently falsified said record of the minutes of the House on its last day's session, and took from and kept out of the minutes the fact that the speaker had them read and approved, and declared the same duly approved, and that the speaker asked the clerk if there was any further business, to which the latter replied that there was none, and that the

speaker declared the House adjourned without day, according to the laws of the United States, the time for the limit of the session having expired. He wrongly and falsely put into the minutes of the last day's session the statement that, pending the reading of the journal, the speaker left the chair and went out of the House, when, in fact, he did not leave the House until after its final adjournment. The defendant Reed also neglected and refused to allow the speaker to inspect, revise, approve or sign the minutes, and obtained the signature thereto of one George P. Wheeler, a member of the legislature, who was neither the speaker nor the actual speaker *pro tem.* of the House. He filed with the defendant Curtis, secretary of the Territory, said falsified minutes as the true minutes of the last day's session, although the same, as the defendant Curtis knows, were not signed by the speaker as the law and custom require. On the 7th day of February, 1889, demand was made by Lyttleton Price, in behalf of the speaker, the plaintiff herein, that Curtis do not record or treat the proceedings after said adjournment as the proceedings of the House. Yet Curtis, as secretary, is wrongfully claiming and pretending that said false and incorrect minutes are the real, true and correct journals and minutes of the House, and is threatening to continue so to do, and to record and preserve those minutes as a record of the proceedings of the House on the last day of its 15th session.

These are the essential facts disclosed by the alternative writs of mandamus.

By the writ in the first case the defendant Curtis was commanded "to record the said report of the said proceedings of the said Council as a part of the proceedings of the fifteenth session of the legislature of Idaho Territory," and "to expunge from the records of the said sixtieth day of the session all the proceedings assumed to have been done while S. F. Taylor is alleged to be president of the Council, and to strike from the files and records of the laws of Idaho those pretended acts of legislation signed by S. F. Taylor as President of the Council, or show cause," etc.

The writ in the other case commanded the defendants "to

bring such minutes and pretended minutes and journal of said House of Representatives into court, that the same may be corrected so as to state the facts, and that said Charles H. Reed correct the same in accordance with the facts, so that it may appear in the proper place in the minutes that said speaker asked the clerk if there was any further business before the House, and that the clerk said there was not, and that thereupon the minutes were read and approved, and that thereupon, it then being 12 o'clock midnight, the said speaker announced to the House that, the time having arrived when the session must close according to the law of Congress, he therefore now declared the House adjourned *sine die*, and that to the said announcement of the expiration of the time of the session there was no dissent, and that to the said order of final adjournment there was no objection; and that in every way and manner and particular said Reed make said minutes correspond with the facts, and be a full, true and complete record of said last day's session of said House of Representatives, and be nothing otherwise; and that after being so corrected, the said speaker, H. Z. Burkhart, may have an opportunity to sign said minutes as corrected; that the same be returned to the defendant Edward J. Curtis, as such secretary, or that, failing so to do," cause be shown, etc.

In each case there was a demurrer upon these grounds: 1, The court has no jurisdiction of the person of the defendant or of the subject of the proceeding; 2, The plaintiff has no legal capacity to sue; 3, The petition and writ do not state facts sufficient to constitute a cause of action or proceedings of this kind; 4, The writ is ambiguous and uncertain. In the second case an additional ground was assigned to the effect that several causes of action were improperly united. The demurrers were all sustained, and the applications for writs of mandamus denied.

Mr. Arthur Brown and *Mr. Littleton Price*, for appellants, cited: *Burnham* v. *Morrissey*, 14 Gray, 226; *S. C.* 74 Am. Dec. 676; *Hill* v. *Goodwin*, 56 N. H. 441; *Hendee* v. *Cleaveland*, 54 Vermont, 142; *Wise* v. *Bigger*, 79 Virginia, 269;

Smith v. *Moore*, 38 Connecticut, 105; *Farrell* v. *King*, 41 Connecticut, 448; *Road Company* v. *Douglas County*, 5 Oregon, 373; *State* v. *Whittit*, 61 Wisconsin, 351; *Bell* v. *Pike*, 53 N. H. 473; *Hall* v. *Somersworth*, 39 N. H. 511; *Justices' Answer*, 70 Maine, 560; *Prince* v. *Skillin*, 71 Maine, 361; *Lamb* v. *Lynd*, 44 Penn. St. 336; *Union Pacific Railroad* v. *Hall*, 91 U. S. 343; *United States* v. *Kendall*, 12 Pet. 524, 608; *United States* v. *Schurtz*, 102 U. S. 378; *People* v. *Schiellein*, 95 N. Y. 124; *Harrington* v. *Holler*, 111 U. S. 796; *United States* v. *Gomez*, 3 Wall. 752; *People* v. *Delaware County*, 45 N. Y. 196; *People* v. *Nostrand*, 46 N. Y. 375; *Hamilton* v. *Pittsburgh*, 34 Penn. St. 496.

Mr. George Augustus Jenks, for appellees, cited: *Gardner* v. *Collector*, 6 Wall. 499; *Watkins* v. *Holman*, 16 Pet. 25; *People* v. *Commissioners*, 54 N. Y. 276, 279; *People* v. *Devlin*, 33 N. Y. 269; *S. C.* 88 Am. Dec. 377; *Sherman* v. *Story*, 30 California, 253; *S. C.* 89 Am. Dec. 93; *Post* v. *Supervisors*, 105 U. S. 667; *Ryan* v. *Lynch*, 68 Illinois, 160; *Spangler* v. *Jacoby*, 14 Illinois, 297; *S. C.* 58 Am. Dec. 571; *Division of Howard County*, 15 Kansas, 194; *South Ottawa* v. *Perkins*, 94 U. S. 260; *United States* v. *Clark County*, 95 U. S. 769; *Supervisors* v. *United States*, 18 Wall. 71; *United States* v. *Macon County*, 99 U. S. 582; *Ex parte Rowland*, 104 U. S. 612; *Secretary* v. *MacGarrahan*, 9 Wall. 298, 313; *United States* v. *Boutwell*, 17 Wall. 604; *Commonwealth* v. *Supervisors*, 29 Penn. St. 121; *Ex parte Burtis*, 103 U. S. 238; *Maxwell* v. *Burton*, 2 Utah, 595; *People* v. *Olds*, 3 California, 167; *S. C.* 58 Am. Dec. 398; *People* v. *Thompson*, 25 Barb. 73; *State* v. *Smith*, 44 Ohio St. 348; *State* v. *Moffitt*, 5 Ohio, 358; *Koehler* v. *Hill*, 60 Iowa, 543; *In re Robert*, 5 Colorado, 525, 528; *Turley* v. *Logan Co.*, 17 Illinois, 151; *Ex parte McCarthy*, 29 California, 395; *Flint* v. *Woodhull*, 25 Michigan, 99.

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

Certain questions of jurisdiction raised by the appellees must be first examined. It is contended by them that the

Supreme Court of Idaho has no original jurisdiction, and that, if it had, no appeal lies from its judgment in this case. Neither of these propositions is sound. The Revised Statutes of the United States expressly declare that the jurisdiction, both appellate and original, of the courts of Idaho "shall be limited by law." § 1866. And by section 3816 of the Revised Statutes of Idaho it is provided that the jurisdiction of the Supreme Court of that Territory shall be original and appellate, and that "its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction." Of the power of the legislature of Idaho to confer original jurisdiction upon the Supreme Court of the Territory in such cases, there can be no doubt. Its power extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Rev. Stat. § 1851. The jurisdiction of the several courts of the Territory is a rightful subject of legislation, and the above provision is not inconsistent with the Constitution or any act of Congress.

It is contended, however, that the provision that each of the District Courts in certain Territories, including Idaho, "shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States," Rev. Stat. § 1910, confers original jurisdiction, in cases of that character, only upon the territorial District Courts. But that section is not to be so interpreted. It does not forbid the legislature from giving original jurisdiction to the District Courts of the Territory in cases other than those therein named. Accordingly, by the Revised Statutes of Idaho the jurisdiction of the District Courts of the Territory is extended to all civil actions for relief formerly given in courts of equity; in which the subject of litigation is not capable of pecuniary estimation; in which the subject of litigation is capable of such estimation, and which involves the title or possession of real estate, or the legality of any tax, unjust assessment, toll, or municipal fine; to all special proceedings; to the issuing of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to

the exercise of its powers, and to the trial of indictments. Rev. Stats. Idaho, § 3830. Nor does section 1910 of the Revised Statutes of the United States forbid the territorial legislature from conferring original jurisdiction upon the Supreme Court of the Territory in cases named in section 3816 of the Revised Statutes of Idaho, although such cases may depend upon questions arising under the Constitution or laws of the United States. If Congress had intended to confer upon the District Courts of the Territories named exclusive jurisdiction in the class of cases named in section 1910, it would have so declared in express terms.

This question has been adverted to because the jurisdiction of this court to review the judgment below depends upon the inquiry whether the present case is embraced by section 2 of the act of March 3, 1885, authorizing this court, without regard to the sum or value in dispute, to review the judgment or decree of the Supreme Court of a Territory, in any case in which is drawn in question the validity of an authority exercised under the United States. 23 Stat. 443, c. 355. Do the cases now before us raise any question as to the validity of an authority exercised under the United States? We are of opinion that they do. By the Revised Statutes of the United States, the legislative power in each Territory is vested in the governor and a legislative assembly, the latter to consist of a Council and House of Representatives. § 1846. The alternative writ of mandamus proceeds upon the ground that a body of persons claimed, but without right, to be respectively, the lawful Council and House of Representatives of the Territory, usurped the legislative power conferred by Congress upon the legislative assembly of the Territory and passed enactments purporting to be laws of such Territory. In each case is directly drawn in question the lawful existence of those bodies as the Council and House of Representatives of the Territory, and consequently, the authority which they have assumed, as the legislative assembly of the Territory, to exercise under the United States. In this respect the present case differs from *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 225, upon writ of error to the Supreme Court

of the District of Columbia. In that case it was held that the words in the Act of March 3, 1885, 23 Stat. 443, c. 355, the validity of a "statute of or an authority exercised under the United States" do not embrace a case, which depends only on a judicial construction of an act of Congress, there being no denial of the power of Congress to pass the act, or of the right to enjoy whatever privileges are granted by it. The case now before us is within the very letter of the act of 1885 because there is drawn in question the validity of an authority exercised under the United States. *Clayton* v. *Utah Territory*, 132 U. S. 632, 637. It is, consequently, our duty to inquire whether the court below erred in withholding the relief asked by the petitioners.

It is clear that such relief cannot be granted without deciding that the body over which George P. Wheeler presided was not the lawful House of Representatives; that the one over which S. F. Taylor presided was not the lawful Council; and that the minutes filed with the secretary of the Territory, purporting to be the record of the proceedings of the last day of the fifteenth session of the legislature, were not true minutes of that day's session prior to its legal termination, but were, in part, minutes of the proceedings of persons who did not constitute the Council and House of Representatives of the Territory. Those facts being determined in favor of the petitioners the court is, in effect, asked to take these minutes into its own custody or under its control; to cause them to be corrected in accordance with the facts as alleged by the petitioners to exist; to order them, after being thus corrected, to be filed in the office of the secretary of the Territory as the only true records of the legislative proceedings in question; and to require that officer to expunge from the files and records of the laws of the Territory the acts passed while Taylor and Wheeler assumed to be the presiding officers, respectively, of the Council and House of Representatives of the Territory. And this relief, it is to be observed, is not asked by any one claiming to have a beneficial interest in defeating or in sustaining the enactments passed by the two bodies alleged to have usurped the functions of a legislative assembly. Rev. Stats. Idaho, § 4978.

Opinion of the Court.

We are all of opinion that there was no error in denying these applications for writs of mandamus. We have not been referred to any adjudged case that would justify a court in giving the relief asked by the petitioners. And we do not suppose that such a case can be found in any State whose powers of government are distributed — as is the case in the Territory of Idaho — among separate, independent and co-ordinate departments, the legislative, the executive and the judicial. 12 Stat. 808, c. 97; Rev. Stat. §§ 1841, 1846, 1907. "One branch of the government," this court said in the *Sinking Fund Cases*, 99 U. S. 700, 718, "cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." It is not one of the functions of a court to make up the records of the proceedings of legislative bodies. Nor can it be required, in a case not involving the private interests of parties, to determine whether particular bodies, assuming to exercise legislative functions, constitute a lawful legislative assembly. Such a question might indeed arise in a suit depending upon an enactment passed by such an assembly. And it might be that, in a case of that character, and under some circumstances, the court would be compelled to decide whether such an enactment was passed by a legislature having legal authority to enact laws. How far in the decision of such a question the judiciary would be concluded by the record of the proceedings of those bodies, deposited by the person whose duty it was to keep it with the officer designated by law as its custodian, are questions we have no occasion at this time to consider. It is sufficient for the disposition of the present case to say that the court below properly refused to lay its hands upon what purported to be the record of the proceedings of the legislative assembly of Idaho, in the custody of the secretary of that Territory, and to cause changes or alterations to be therein made.

The cases cited by the appellants do not assert any different doctrines in respect to the power of the courts over the record of the proceedings of a co-ordinate department of government. They go no further than to assert the rule that a

writ of mandamus, where there is no other adequate remedy, may be granted to compel inferior tribunals, corporations and public officers or agents to perform purely ministerial duties, in respect to which there is no discretion to be exercised. Rev. Stat. Idaho, § 4977. Such cases do not sustain the proposition that the judiciary, by means of writs of mandamus operating upon the officers of legislative bodies, may supervise the making up of the records of the proceedings of those bodies, or cause alterations to be made in such records as prepared by the officer whose duty it was to prepare them. Much less do they justify the court, in a case that does not involve the private rights of litigants, to determine whether particular bodies of persons constituted a lawful legislative assembly.

The judgment in each case is affirmed.

IN RE LONEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 1118. Submitted January 21, 1890. — Decided March 24, 1890.

The courts of a State have no jurisdiction of a complaint for perjury in testifying before a notary public of the State upon a contested election of a member of the House of Representatives of the United States; and a person arrested by order of a magistrate of the State on such a complaint will be discharged by writ of *habeas corpus*.

THIS was a writ of *habeas corpus*, granted upon the petition of Wilson Loney, by the Circuit Court of the United States, to the police sergeant of the city of Richmond, in the State of Virginia, who justified his detention of the prisoner under a warrant of arrest from a justice of the peace for that city upon a complaint charging him with wilful perjury committed on February 2, 1889, in giving his deposition as a witness before a notary public of the city in the case of a contested election of a member of the House of Representatives of the United States.

The Circuit Court discharged the prisoner, upon the ground that the offence charged against him was punishable only under § 5392 of the Revised Statutes, and was within the exclusive cognizance of the courts of the United States. 38 Fed. Rep. 101. The respondent appealed to this court.

Mr. J. Randolph Tucker and *Mr. R. A. Ayers*, Attorney General of the State of Virginia, for appellant.

No appearance for appellee.

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

By the Constitution, the judicial power of the United States is vested in the courts of the United States. Art. 3, sect. 1. By the statutes of the United States, those courts have jurisdiction, exclusive of the courts of the several States, of "all crimes and offences cognizable under the authority of the United States;" Rev. Stat. § 711, cl. 1; and the Circuit Courts of the United States have exclusive cognizance of all such crimes and offences, except where otherwise provided by law, the principal exception being where concurrent jurisdiction is given to the District Courts of the United States; Rev. Stat. § 629, cl. 20; Act of August 13, 1888, c. 866, § 1, 25 Stat. 434; and it is declared, by way of greater caution, that nothing contained in the Crimes Act of the United States "shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Rev. Stat. § 5328.

The House of Representatives of the United States is made by the Constitution the judge of the elections, returns and qualifications of its own members. Art. 1, sect. 5.

Congress has regulated by law the form in which notice of a contested election may be given and answered, and the time and manner in which depositions on oath of witnesses in such cases may be taken and returned to the House of Representatives by a judge of any court of the United States, or of a court of record of any State, or by any mayor or recorder of a city, or by any register in bankruptcy or notary public, or, if

the parties so agree, by any officer authorized to take depositions by the laws of the State or of the United States; and has provided for the punishment of such witnesses failing to attend and testify after being duly summoned. Rev. Stat. §§ 105–130; Act of March 2, 1887, c. 318, 24 Stat. 445.

Congress has also enacted that every person, having taken an oath to testify truly, "before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered," who wilfully and contrary to such oaths states any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine and imprisonment. Rev. Stat. § 5392.

The laws of Virginia indeed provide that notaries public shall be appointed by the Governor of the State; and may take "any oath or affidavit required by law, which is not of such nature that it must be made in court." Virginia Code of 1887, §§ 923, 173. But the oath of a witness in the case of a contested election of a member of the House of Representatives of the United States is not required by any law of Virginia, but is an oath authorized to be administered by the laws of the United States, and by those laws only; and the witness gives his testimony in obedience to those laws, and not in the performance of any duty which he owes to the State in which his testimony is taken.

Any one of the officers designated by Congress to take the depositions of such witnesses, (whether he is appointed by the United States, such as a judge of a Federal court or a register in bankruptcy, or by the State, such as a judge of one of its courts of record, a mayor or recorder of a city, or a notary public,) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States.

Testimony taken with the single object of being returned to and considered by the House of Representatives of the United States exercising the judicial power, vested in it by the Constitution, of judging of the elections of its members, and taken before an officer designated by Congress as compe-

tent for this purpose and deriving his authority to do this from no other source, stands upon the same ground as testimony taken before any judge or officer of the United States, and perjury in giving such testimony is punishable in the courts of the United States. *United States* v. *Bailey*, 9 Pet. 238.

There are cases (the most familiar of which are those of making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as of the laws of the United States, and be punishable by the judiciary of either. *Fox* v. *Ohio*, 5 How. 410; *United States* v. *Marigold*, 9 How. 560; *Moore* v. *Illinois*, 14 How. 13; *Ex parte Siebold*, 100 U. S. 371, 390; *Cross* v. *North Carolina*, 132 U. S. 131.

But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation, that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States, or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of the State upon a charge of perjury, preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice.

A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the State) designated by act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offence against the public justice of the United States and within the exclusive jurisdiction of the courts of the United States; and cannot, therefore, be punished in the courts of Virginia under the general provision of her statutes that "if any person, to whom

an oath is lawfully administered on any occasion, wilfully swears falsely on such occasion touching any material matter or thing," he shall be guilty of perjury. Virginia Code of 1887, § 3741.

It has accordingly been held by the Supreme Court of New Hampshire, in an able opinion of Chief Justice Parker, that the courts of a State have no jurisdiction of the crime of perjury committed in an examination before a commissioner under the United States Bankrupt Act; *State* v. *Pike*, 15 N. H. 83; by Mr. Justice Bradley, affirming a decision of Judge Erskine, as well as by the Supreme Courts of Tennessee and of Georgia, that the state courts have no jurisdiction of perjury in testifying before a commissioner of the Circuit Court of the United States; *Ex parte Bridges*, 2 Woods, 428; *S. C. nom. Brown* v. *United States*, 14 Amer. Law Reg. (N. S.) 566; *State* v. *Shelley*, 11 Lea (Tenn.) 594; *Ross* v. *State*, 55 Georgia, 192; and by the courts of other States, that they have no jurisdiction of perjury in making an affidavit under the acts of Congress relating to the sale of public lands. *State* v. *Adams*, 4 Blackford, 146; *People* v. *Kelly*, 38 California, 145; *State* v. *Kirkpatrick*, 32 Arkansas, 117.

The decisions in the Supreme Courts of Pennsylvania and of New Hampshire, cited for the appellant, holding that the judiciary of a State has jurisdiction of perjury committed in a proceeding for naturalization before a court of the State, under authority of Congress, tend rather to support than to oppose our conclusion; for they were put upon the ground that the proceeding for naturalization was a judicial proceeding in a court of the State, as it doubtless was. *Rump* v. *Commonwealth*, 30 Penn. St. 475; *State* v. *Whittemore*, 50 N. H. 245; *Spratt* v. *Spratt*, 4 Pet. 393, 408.

The courts of Virginia having no jurisdiction of the matter of the charge on which the prisoner was arrested, and he being in custody, in violation of the Constitution and laws of the United States, for an act done in pursuance of those laws by testifying in the case of a contested election of a member of Congress, law and justice required that he should be discharged from such custody, and he was rightly so discharged by the

Statement of the Case.

Circuit Court on writ of *habeas corpus*. Rev. Stat. §§ 751, 761; *Ex parte Royall*, 117 U. S. 241.

Judgment affirmed.

IN RE GREEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 1117. Submitted January 21, 1890. — Decided March 24, 1890.

The courts of a State have jurisdiction of an indictment for illegal voting for electors of President and Vice President of the United States; and a person sentenced by a state court to imprisonment upon such an indictment cannot be discharged by writ of *habeas corpus*, although the indictment and sentence include illegal voting for a representative in Congress.

This was a writ of *habeas corpus*, granted upon the petition of Charles Green, by the Circuit Court of the United States, to the sergeant and jailer of the city of Manchester in the State of Virginia, who justified his detention of the prisoner under a judgment of the hustings or corporation court of the city, sentencing him to be imprisoned in the city jail for five weeks and to pay a fine of five dollars, upon his conviction by a jury on an indictment charging him with unlawfully, knowingly, corruptly, and with unlawful intent, voting at an election held in that city for a representative in Congress and for electors of President and Vice President of the United States on November 6, 1888, being disqualified by a previous conviction for petty larceny.

By the Code of Virginia of 1887, general elections are held throughout the State on the fourth Tuesday in May, and on the first Tuesday after the first Monday in November, in each year, for all officers required by law to be chosen at such elections respectively; § 109; persons convicted of bribery at an election, embezzlement of public funds, treason, felony or petty larceny, are disqualified to vote; § 62; elections are by ballot containing the names of all persons intended to be

voted for and designating the office of each; § 122; members of the House of Representatives of the United States are chosen by the qualified voters of the respective congressional districts at the general election in November, 1888, and in every second year thereafter; § 52; electors for President and Vice President of the United States are chosen by the qualified voters of the State at the election held on the first Tuesday after the first Monday in November, 1888, and on the corresponding day in each fourth year thereafter, or at such other time as may be appointed by Congress; §§ 54, 55; and any person, who shall knowingly vote in any election district in which he does not reside and is registered, or vote more than once at the same election, "or, not being a qualified elector, vote at any election with an unlawful intent," shall be punished by imprisonment in jail not exceeding one year, and by fine not exceeding $1000. § 3851.

The Circuit Court was of opinion "that the United States courts for this district have sole and exclusive jurisdiction to hear and determine the matters and things alleged in the bill of indictment found in the said hustings court of Manchester, upon the ground that the acts of Congress in such case made and provided (Rev. Stat. §§ 5511, 5514,) have defined the offence charged in the said indictment and prescribed the penalty therefor, and that the United States courts have sole and exclusive jurisdiction thereof, and that the said hustings or corporation court of Manchester had no jurisdiction of the matters and things charged in the said indictment against the said Charles Green;" and therefore adjudged that the prisoner be discharged. The respondent appealed to this court.

Mr. J. Randolph Tucker and *Mr. R. A. Ayers*, Attorney General of the State of Virginia, for appellant.

No appearance for appellee.

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

In this case, as in *Loney's case*, just decided, (*ante*, 372,) the question presented is whether the courts of the State of Virginia

had jurisdiction of the charge against the prisoner. But that is the only respect in which the two cases have any resemblance.

By the Constitution of the United States, the electors for President and Vice President in each State are appointed by the State in such manner as its legislature may direct; their number is equal to the whole number of senators and representatives to which the State is entitled in Congress; no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the electors meet and vote within the State, and thence certify and transmit their votes to the seat of government of the United States. The only rights and duties, expressly vested by the Constitution in the national government, with regard to the appointment or the votes of presidential electors, are by those provisions which authorize Congress to determine the time of choosing the electors and the day on which they shall give their votes, and which direct that the certificates of their votes shall be opened by the president of the Senate in the presence of the two houses of Congress, and the votes shall then be counted. Constitution, art. 2, sect. 1; Amendments, art. 12.

The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. Constitution, art. 1, sects. 2, 3.

In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to

the seat of the national government, and the course of proceeding in their opening and counting them. Rev. Stat. §§ 131–143; Acts of February 3, 1887, c. 90, 24 Stat. 373; October 19, 1888, c. 1216, 25 Stat. 613.

Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States.

Sections 5511 and 5514 of the Revised Statutes, referred to in the order of the Circuit Court, were, as observed by this Court in *Coy's Case*, 127 U. S. 731, 751, made for the security and protection of elections held for representatives or delegates in Congress; and do not impair or restrict the power of the State to punish fraudulent voting in the choice of its electors.

The question whether the State has concurrent power with the United States to punish fraudulent voting for representatives in Congress is not presented by the record before us. It may be that it has. *Ex parte Siebold*, 100 U. S. 371. But even if the State has no such power in regard to votes for representatives in Congress, it clearly has such power in regard to votes for presidential electors, unaffected by anything in the Constitution and laws of the United States; and the including, in one indictment and sentence, of illegal voting both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of *habeas corpus*. *Ex parte Crouch*, 112 U. S. 178; *In re Coy*, 127 U. S. 756–759.

Judgment reversed, and case remanded for further proceedings in conformity with this opinion.

POHL v. ANCHOR BREWING CO.

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

No. 1269. Submitted January 10, 1890. — Decided March 24, 1890.

Under § 4887 of the Revised Statutes, which provides that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years," a United States patent runs for the term for which the prior foreign patent was granted, without reference to whether the latter patent became lapsed or forfeited in consequence of the failure of the patentee to comply with the requirements of the foreign patent law.
The case of *Bate Refrigerating Co.* v. *Hammond*, 129 U. S. 151, explained.

IN EQUITY. The case is stated in the opinion.

Mr. Grosvenor Lowrey, *Mr. B. F. Thurston*, *Mr. Clarence A. Seward* and *Mr. J. M. Deuel* for appellants.

Mr. Noah Davis for Edison Electric Light Company.

Mr. William J. Townsend for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought on the 16th of April, 1889, in the Circuit Court of the United States for the Southern District of New York, by Carl Pohl and Charles Zoller against the Anchor Brewing Company, a corporation, for the infringement of letters patent, No. 213,447, granted March 18, 1879, on an application filed January 3, 1879, to Carl Pohl, for an "improvement in barrel and cask-scrubbing machines."

The patent is granted on its face for the term of seventeen years from March 18, 1879, "subject to the limitation prescribed by sec. 4887, Rev. Stats., by reason of German patent dated September 6, 1877, and French patent dated September

3, 1877." It appears, by translations into English of the German and French patents, annexed to the bill, that the German patent began to run September 6, 1877, and its longest duration was until December 12, 1891, and that the French patent began to run from September 3, 1877, and ran for fifteen years.

The defendant put in a plea to the bill, setting forth that, at the time when Pohl applied for the United States patent, and at the time it was issued, he was a citizen of the empire of Germany; that, on the 6th of September, 1877, a German patent was issued to him for the same invention, for the term of fifteen years; that, under the German patent law of May 25, 1877, he was required to pay certain annuities on the German patent, and to work the invention in the empire of Germany in the manner and for the term specified by that law; that in default thereof, the term of the German patent would expire, and the rights and privileges of the patentee under it would become forfeited and cease; that Pohl neglected and failed to pay the annuities, and to work the invention in the empire of Germany in the manner and time required by that law, whereby and under the provisions of that law the German patent became forfeited in 1880, and the term thereof expired; that, by reason thereof, and under the provisions of section 4887 of the Revised Statutes, the United States patent expired and the term thereof ended in 1880, and prior to the commencement of this suit, and, at the time it was brought, the plaintiff had no title to the patent and no rights under it; that, on the 3d of September, 1877, a patent was issued to Pohl for the same invention by the proper authorities of the government of France, for the term of fifteen years, and subject to the provisions of the French patent law of July 5, 1844; that, under those provisions, a patentee who failed to pay his annuity as required by that law, before the beginning of each year of the duration of his patent, or who failed to put his invention in working order in France within two years from the signature of the patent, or who ceased such working during two consecutive years, would forfeit all right under the patent; that Pohl neglected and failed to pay his annuity as required by such law, and failed to put his alleged invention in working

order in France within two years from the signature of the patent, and ceased such working during two consecutive years, whereby, under the provisions of the French patent law, the French patent was forfeited and the time and term thereof expired, and the rights of Pohl thereunder ceased; and that, under the provisions of section 4887 of the Revised Statutes, the United States patent expired and the term thereof ended prior to the commencement of this suit, and at that time the plaintiffs had no title to the patent and no exclusive rights thereunder.

The plea was set down for argument, and the Circuit Court, held by Judge Wallace, sustained the plea and dismissed the bill. To review that decree the plaintiffs have appealed.

Section 4887 of the Revised Statutes, on which the question involved in this case arises, reads as follows: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years." The particular question involved is as to the meaning of the language of the second paragraph of the section.

The United States patent in the present case, granted March 18, 1879, was granted for an invention which had been patented previously, in September, 1877, in Germany and in France. It must be, therefore, by the terms of section 4887, so limited as to expire at the same time with that one of the two patents, German and French, "having the shortest term." The German patent on its face appears to have been granted for a term extending from September 6, 1877, to December 12, 1891; and the French patent for a term extending for fifteen years from September 3, 1877, that is, until September 3,

1892. If the United States patent does not expire until the end of the term expressed on the face of that one of the two patents, German and French, which has the shortest term so expressed on its face, it does not expire until the end of the term so expressed on the face of the German patent, namely, December 12, 1891; and so it had not expired when this suit was commenced, and has not yet expired. On the other hand, if it expired when the German patent became forfeited by reason of the facts alleged in the plea in regard to it, or when the French patent became forfeited by reason of the facts alleged in the plea in regard to it, the United States patent expired prior to the commencement of this suit.

The opinion of the Circuit Court in the present case, 39 Fed. Rep. 782, proceeded upon the view that the "term" of the foreign patent, referred to in section 4887 was not the original term expressed in it, but its period of actual existence; and that the United States patent expired when the foreign patent having the shortest term was terminated by its lapsing or becoming forfeited in consequence of the failure of the patentee to comply with the requirements of the foreign patent law. The Circuit Court regarded the decision of this court in *Bate Refrigerating Co.* v. *Hammond*, 129 U. S. 151, made in January, 1889, as requiring such decision.

The question involved in the present case has been decided by several of the Circuit Courts.

In *Holmes Electrical Protective Co.* v. *Metropolitan Burglar Alarm Co.*, 21 Fed. Rep. 458, in the Circuit Court for the Southern District of New York, in August, 1884, it was held by Judge Wheeler, that section 4887 meant that the term of the United States patent should be as long as the remainder of the term for which the foreign patent was granted, without reference to incidents occurring after the grant of the foreign patent; that that section referred to the fixing of the term of the foreign patent, and not to the keeping of it in force; and that the term of the United States patent was not affected by the fact that a prior English patent had been suffered to lapse by the non-payment of a tax.

In *Paillard* v. *Bruno*, 29 Fed. Rep. 864, in the Circuit

Court for the Southern District of New York, in December, 1886, it was held by Judge Wallace that, under section 4887, a United States patent, for an invention which had been patented previously in England for the term of fourteen years, did not expire until fourteen years from the date of the English patent, notwithstanding the grant of the latter patent had terminated by the failure of the patentee to pay a stamp duty required to be paid as a condition of the continuance of the grant beyond the term of three years.

In *Bate Refrigerating Co.* v. *Gillett*, 31 Fed. Rep. 809, in the Circuit Court for the District of New Jersey, in August, 1887, before Mr. Justice Bradley, it was held that where an English patent was granted for a term certain, provided that if the patentee should not pay a stamp duty within a certain time, the patent should cease and determine, a United States patent afterwards granted for the same invention was not affected by a forfeiture of the foreign patent subsequently incurred by a failure to perform such condition; that the term of the English patent fixed the term of the United States patent; that the subsequent fate of the English patent had no effect upon the United States patent; and that the life of each, after its inception, proceeded independently of the life of the other. As authority for this view, Mr. Justice Bradley cited the cases above referred to, of *Holmes Electrical Protective Co.* v. *Metropolitan Burglar Alarm Co.* and *Paillard* v. *Bruno.*

Prior to the decision of the Circuit Court in the present case, and in May, 1889, in *Huber* v. *Nelson M'f'g Co.*, 38 Fed. Rep. 830, in the Circuit Court for the Eastern District of Missouri, before Judge Thayer, it was held that a United States patent, granted after an English patent for the same invention had lapsed and become void by reason of the non-payment of a stamp duty, was granted without authority of law. This decision was made on the interpretation which the court gave to the case of *Bate Refrigerating Co.* v. *Hammond.*

But we think that the question involved in the present case is not the same as that decided in *Bate Refrigerating Co.* v.

Hammond, and is not controlled by the decision in that case. There, a United States patent was granted in November, 1877, for seventeen years. A patent for the same invention had been granted in Canada to the same patentee for five years from January, 1877. The Canadian patent was, in December, 1881, extended for five years from January, 1882, and also for five years from January, 1887, under a Canadian statute passed in 1872. The question involved was whether, under section 4887, the United States patent expired in January, 1882, or in January, 1892. This court, limiting itself to the precise question involved, said that it was "of opinion that, in the present case, where the Canadian statute under which the extensions of the Canadian patent were granted, was in force when the United States patent was issued, and also when that patent was applied for, and where, by the Canadian statute, the extension of the patent for Canada was a matter entirely of right, at the option of the patentee, on his payment of a required fee, and where the fifteen years' term of the Canadian patent has been continuous and without interruption, the United States patent does not expire before the end of the fifteen years' duration of the Canadian patent." This was said on the view, expressed elsewhere in the opinion, that the Canadian patent did not expire, and it never could have been said properly that it would expire, before January, 1892. The ground of this conclusion was that the "term" of the Canadian patent granted in January, 1877, was by the Canadian statute at all times a term of fifteen years' duration, made continuous and uninterrupted by the action of the patentee, as a matter entirely of right, at his own option.

By parity of reasoning, as applied to the present case, section 4887 requires that the United States patent shall be so limited as to expire at the same time with the term limited by the foreign patent issued prior to the issuing of the United States patent, having then the shortest time to run. There is nothing in the statute which admits of the view that the duration of the United States patent is to be limited by anything but the duration of the legal term of the foreign patent in force at the time of the issuing of the United States patent, or

that it is to be limited by any lapsing or forfeiture of any portion of the term of such foreign patent, by means of the operation of a condition subsequent, according to the foreign statute. In saying that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is, that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent. Such term was held, in *Bate Refrigerating Co.* v. *Hammond*, to be fifteen years and not five years.

This view is made conclusive by the requirement of section 4887, that if there be more than one prior foreign patent, the United States patent shall be so limited as to expire at the same time with that one of such foreign patents "having the shortest term." This means the foreign patent which, at the time the United States patent is granted, has then the shortest term to run, irrespective of the fact that the foreign patent may afterwards lapse or become forfeited by the non-observance of a condition subsequent prescribed by the foreign statute.

In the view that section 4887 is to be read as if it said that the United States patent is to be so limited as to expire at the same time with the expiration of the term of the foreign patent, or if there be more than one, at the same time with the expiration of the term of the one having the shortest term, the interpretation we have given to it is in harmony with the interpretation of the words "expiration of term" in analogous cases. *Oakley* v. *Schoonmaker*, 15 Wend. 226; *Beach* v. *Nixon*, 9 N. Y. 35; *Farnum* v. *Platt*, 8 Pick. 338. In those cases it was held that the words "expiration of term" do not mean expiration of term through a forfeiture by breach of a condition, but mean expiration by lapse of time.

The decree of the Circuit Court is reversed, and the case is remanded to that court with a direction to overrule, with costs, the plea of the defendant, to assign it to answer the bill, and to take such further proceedings as shall not be inconsistent with the opinion of this court.

HOWE MACHINE COMPANY *v.* NATIONAL NEEDLE COMPANY.

HOWE MACHINE COMPANY *v.* WHITTEN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Nos. 201, 202. Argued March 7, 10, 1890. — Decided March 24, 1890.

There was no novelty or invention in "the combination of a griping chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth," which was patented to Charles Spring and Andrew Spring by letters patent, dated May 10, 1859, and extended for seven years from May 10, 1873; and the letters patent therefor are therefore invalid.
Pennsylvania Railroad v. *Locomotive Truck Co.*, 110 U. S. 490, again affirmed.

THESE were appeals from decrees of the Circuit Court of the United States for the District of Massachusetts, dismissing bills in equity brought on account of alleged infringement of letters patent granted May 10, 1859, to Charles and Andrew Spring, for an "Improvement in Lathes for turning Irregular Forms." The patent was extended for seven years from May 10, 1873. The bills were filed May 27, 1879.

The opinion of the Circuit Court was announced September 30, 1884; but by reason of the interposition of petitions for rehearing, the final decree was not entered until April 17, 1886.

The specification was as follows:

"To all whom it may concern:

"Be it known that we, Charles and Andrew Spring, both of Boston, in the county of Suffolk and State of Massachusetts, have invented a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be

held to be operated upon otherwise than by the opposite end; and we do hereby declare that the following, taken in connection with the accompanying drawings which form part of this specification, is a clear, full and exact description of our invention and sufficient to enable those skilled in the art to practice it. Fig. 2 is a perspective view embodying our invention, and Fig. 1 is a plan exhibiting more in detail some of its parts. *c* represents the head stock and *b* the tail stock of a lathe fixed upon a bed, *d*. The spindle *a* is supported and rotated in the manner usual in lathes, and carries a chuck which seizes and holds by one end the article *o* to be operated upon. The spindle *l* in the tail stock *k* is capable of traversing backwards and forwards in the axial line of the lathe's rotation, but does not itself rotate. This movement may be accomplished by the means usual for this purpose in lathes. The carriage *m* is raised from the lathe bed *d* in the support *n*, on which it is guided in movements towards and from *o* by means of the usual 'ways.' Rotation of the screw *p* causes the movements of the carriage *m*, and the set-screw *s* is used to gauge the diameter of the article operated upon, which it does by striking on *n*, which is fixed to the lathe bed and arrests further onward movement of *m*. Fixed upon *m* and partaking of its movements is the arrangement which modifies the movement of the tool-carrier. This arrangement consists of two principal parts, *q* and *r*; *q* is pivoted to *n* by screw *t*, and is held in any desired position by the screws *u*, *q* being slotted where these screws pass through it into *m*. It may here be mentioned that this provision for the adjustment of *q* is for the purpose of giving any required taper to *o*, and that the screws *v* aid in the adjustment of *q*. The piece *r* is connected with *q* by the guide rods *w* passing through the latter and fixed in the former. Compressed spiral springs around *w* act to draw *r* and the roll shown in dotted lines, Fig. 1, towards *q*. The carriage *x* rests upon and slides over *q* and *r*, and bears with it the tool-holder *y*, which is of angular form and can slide within *x* towards and from *o*. It is to *y* that the roll before mentioned, as shown in dotted lines, Fig. 1, is fixed, *x* being slotted where it passes through

to admit of movement of y. A portion of x extends upwards, and is made to fit in a hole bored for that purpose in the spindle l. To admit of nice adjustment of the tool c the piece z is pivoted to y, and raised and lowered by operating at the end opposite the pivot, the set-screw a', and holding screw b'; z is extended above and over the tool c', so that by the action of the set-screw d' the tool is confined to or released from y. On that side of x preceding the tool in its cutting movement toward the chuck, and forming a part of or fixed to x, is a yoke arranged to contain a die, s'. This die is made in two parts, having a hole through them, half in each part, of just the diameter of the material from which the finished article is to be formed. This hole in the die is made and kept concentric with the axis of the lathe's rotation by set-screws, one of which acts on opposite sides of each half, and also one from the top and another from beneath. The sides of q and r, with which the roll fixed in y comes into contact, should conform nearly to the general outline of the article to be turned. A slot is made in q from that side touching the roll, and in about the centre of its thickness. Within this slot may be placed any desirable pattern projecting beyond the acting face of q, and this pattern may be adjustable. In the particular instance illustrated q and r are formed for turning awls or machine needles. The pattern e', which is adjustable by means of the set-screw n', is pivoted in q and serves to shape the shank of the awl or needle, while the pattern o', which is adjustable along the length of q, as well as outward from it, serves to form and shape the point. A groove is formed in q, as shown in dotted lines, Fig. 1, in which the pivot of o' is permitted to slide, and the pattern is held in position by the pinch produced by the action of the screws u u. The material from which any article is to be turned by the use of our invention must be cylindrical and straight, and the hole in the die must be of its diameter. The carriage x is forced forward and drawn back by the spindle l, and the direction of its movement is at all times parallel with the axis of the lathe's rotation. The tool-holder y partakes of the movement x, and is at the same time moved toward and from the piece to be

turned by the action of the shaping mechanism described as existing in *q*, *r*, *e'* and *o'* upon the roll or pin fixed in *y* and passing through *x*. The arrangement of the shaping mechanism illustrated by the drawing is that designed and adapted to the formation of awls or machine needles. The action of the springs upon the guide rods *w* draws *r* against the roll fixed in *y* and keeps it constantly pressed against *q* and the projecting parts of the adjustable formers *e'* and *o'* therein arranged. The form and adjustment of *e'* govern the shape of that part of the awl between its haft and shaft, and the form and adjustment *o'*, the shape of the point, and, as *o'* is adjustable along the length of *q*, any length of awl or needle within the limits of the machine can be brought to a point. Provision is made for giving any desired amount of taper to the shape of the needle or awl by the inclination of *q*, obtainable by pivoting on *t*, and adjustable by the screws *v*. The tool is adjusted and held in the best position for cutting by the screws *d' a' b'*, and the diameter of the article to be turned is varied by the action of screw *p* and gauged by the screws *s*. The chuck used to hold the material to be operated on may be any of the well-known forms of griping or holding chucks that hold fast by one end the article which is to be turned. We prefer to use such a chuck as we have fully described in an application for letters patent bearing even date herewith. Prior to our invention, awls and needles have been brought to a point by grinding by hand, a process which evidently is apt to leave the point out of the centre of the needle, and the part near the haft has either been left with a square shoulder or else curved by the action of a separate tool from that which formed the shaft, sometimes used as a hand tool. Amongst the advantages derived from the use of our invention may be mentioned that the article is turned perfectly true at one operation, and no time is lost by rechucking, hand-tooling or grinding.

"Having described our invention, what we claim therein as new and desire to secure by letters patent of the United States is —

"The combination of a griping chuck, by which an article

can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth."

The causes were heard before Mr. Justice Gray and the District Judge, and the opinion of the court was delivered by the latter as follows, 21 Fed. Rep. 630:

"NELSON J.: These suits are bills in equity for the infringement of patent No. 23,957, granted to Charles and Andrew Spring May 10, 1859, for an improvement in lathes for turning irregular forms. The invention, as described in the specification, is a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end. It consists (1) of a griping chuck, by which the article is held by one end so as to present the other end free to be operated upon; (2) a rest preceding the cutting tool, to afford support to the article in the operation of turning; (3) a cutting tool; and (4) a guide cam, or its equivalent, which modifies the movement of the cutting tool. The chuck may be of any of the well-known forms of griping or holding chucks, which hold the article to be turned fast by one end. The material to be turned must be cylindrical and straight. In the drawings annexed, the guide cam is of a form suitable for turning awls or machine needles, and the plaintiffs contend that their machine, as patented, was intended to be and is a lathe for turning sewing-machine needles or awls. The claim is for 'the combination of a griping chuck, by which an article can be so held by one end as to present the other free to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth.'

"The defendants have proved, by testimony which we cannot doubt, that as long ago as the year 1845, and perhaps still earlier, a machine was in use in the shop of William Murdock,

Counsel for Parties.

in Winchendon, Massachusetts, which contained all the elements and the precise combination of the Spring patent. It had the griping chuck, the rest preceding the cutting tool, the cutting tool, and, instead of the guide cam, its equivalent, a pattern — all the parts arranged, combined and operating in the same manner as in the Spring machine. It had, in addition, a fixed cutting tool, preceding the rest, which served to reduce the material to the cylindrical form in which it is first received in the Spring lathe. But this extra tool formed no part and was wholly independent of the other combination. The machine still had all the elements of the Spring lathe in the same combination. The Murdock lathe was used for turning tapering wooden skewers or spindles for use in spinning yarn. It was not constructed so as to be capable of turning awls or machine needles from metal.

"It has been decided by the Supreme Court that 'the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no results substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.' *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490.

"Applying this rule to the present case, we are of opinion that the application to the turning of machine awls and needles from metal, of mechanism old and familiar in the art of wood turning, is not invention, and is not patentable. We therefore decide that the Murdock lathe was an anticipation of the Spring invention, and that the complainants' patent is void for want of novelty. This view of the case renders it unnecessary for us to consider the other matters urged in defence of the complainants' suit at the argument.

"The entry in each case will be: bill dismissed, with costs."

Mr. Harvey D. Hadlock for appellants.

Mr. Grosvenor Lowrey and *Mr. John E. Abbott* for appellees.

Opinion of the Court.

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

Doubtless a claim is to be construed in connection with the explanation contained in the specification and it may be so drawn as in effect to make the specification an essential part of it; but since the inventor must particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is. As remarked by Mr. Justice Bradley, in *White* v. *Dunbar*, 119 U. S. 47, 52: "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

The patentees state that they "have invented a new combination designed for turning such articles as are to be brought to a point or are to be finished or turned at one end, and therefore cannot conveniently be held to be operated upon otherwise than by the opposite end." In the drawings attached to the patent, *q* and *r* are the guide cam or pattern specially referred to in the specification, and it is said that "in the particular instance illustrated *q* and *r* are formed for turning awls or machine needles," and that "the arrangement of the shaping mechanism illustrated by the drawing is that designed and adapted to the formation of awls or machine needles." They also say that "the material from which any article is to be turned by the use of our invention must be cylindrical and straight;" and that "the chuck used to hold the material to be operated on may be any of the well-known forms of griping or holding chucks that hold fast by one end the article which is to be turned."

The claim is couched in plain and unambiguous language, and is "The combination of a griping chuck, by which an article can be so held by one end as to present the other free

to be operated upon, with a rest preceding the cutting tool, when it is combined with a guide cam, or its equivalent, which modifies the movement of the cutting tool, all operating together for the purpose set forth." The alleged improvement is in the mode of producing turned articles of "irregular forms," and the purpose set forth is the turning of such articles as are to be brought to a point or to be turned or finished at one end, and which ought, therefore, to be held by the opposite end in order to be operated upon. The material is not specified, but it must be cylindrical and straight.

The complainant's expert testifies on cross-examination: "The patent is for a combination. The new part consists of elements, each and all of them old and familiar in preëxisting combinations. They are, therefore, the griping chuck; the supporting rest preceding the cutting tool; a cutting tool having the reciprocating motion towards and from the axis of the piece to be operated upon, under the control of a guide cam or former, so organized as to be also under the constant control of delicate adjusting apparatus, by which the required diameter of a piece to be operated upon may be constantly preserved without disturbing the functional performance of former and cutting tool, substantially as set forth and described, all operating together for the purpose set forth. It is, then, the combination of these several elements, as organized, which constitutes the new part." But the combination claimed is the combination of a griping chuck, a rest preceding the cutting tool, a cutting tool, and a guide cam or its equivalent; and complainants cannot now be permitted to read into it any delicate adjusting apparatus not originally included in the claim, and then insist, in the words of the witness, that there is "a margin of patentable novelty."

The Springs completed their first machine in September or October, 1857. Their patent was issued May 10, 1859.

As found by the Circuit Court, the testimony leaves no doubt that as early as 1845, William Murdock used a lathe at Winchendon, Massachusetts, for turning pointed skewers of wood. This had a chuck, a cutting tool, a rest preceding the cutting tool, and a pattern governing the movement of the

cutting tool to shape the skewer to the desired form; or, in other words, all the elements of the Spring combination, as claimed.

Defendants' expert, Brevoort, correctly says: "This Murdock device shows the combination of a holding chuck which holds the material at one end while the other end is left free, a rest preceding a cutting tool, which latter is controlled in its movements by guide or former, so that the parts operating together will produce irregular forms. Now this is the invention referred to in the claim of the Spring patent, and this Murdock lathe undoubtedly contains the invention recited in the Spring patent, with the exception that in the Murdock lathe the parts are adapted for turning wood, while in the Spring device they are more especially adapted for turning metal." And he continues: "I understand that this Murdock lathe was used for turning large numbers of yarn skewers, such as were used at one time in mills where cotton goods were manufactured. 'Defendants' Exhibit Murdock Skewer, W. G. H., Sp. Ex'r,' shows one of these skewers, and when I compare this skewer with a sewing-machine needle, as the question requested me to do, I find that both the needle and the skewer are brought to a point. The Murdock lathe, the Spring device, and the Pernot lathe all being adapted for producing points upon the articles subjected to their action, the only difference being that the Pernot and Spring lathes were adapted for making points on metal, while the Murdock lathe is adapted for making points on wooden blanks, all of the three lathes referred to, as well as the Wright lathe and the Waymoth lathe, being so constructed as to produce the desired configuration upon the surface of the turned blank by using a pattern or former of the desired shape. In all the lathes referred to by me in this testimony the irregular form of the article turned is reached by the former, guide, or pattern causing the cutting tool, as it was slid toward the holding or griping chuck, to approach or recede from the axial line of the work, and in all these lathes the cutting tool is preceded by a rest through a hole in which the work revolves, leaving one end of the work free, while the other is held and turned by the chuck."

There is nothing in the specification about the nature of the material to be used, nor is the device limited to the production of awls and needles, although the drawings show that mode of applying the invention, and "the particular instance illustrated" is that "designed and adapted to the formation of awls or machine needles." But the invention claimed is not restricted to lathes for turning sewing-machine needles, nor did the patentees by disclaimer place any such limit upon the construction of the patent.

The rule laid down in *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated, has been applied in very many cases by this court. *Thompson* v. *Boisselier*, 114 U. S. 1; *Peters* v. *Active M'f'g Co.*, 129 U. S. 530; *Peters* v. *Hanson*, 129 U. S. 542; *Aron* v. *Manhattan Railway Co.*, 132 U. S. 84; *Watson* v. *Cincinnati &c. Railway Co.*, 132 U. S. 161.

In the employment of the chuck, the rest, the cutting tool and the guide cam in the making of awls and needles, the patentees displayed the skill of their calling, which involved "only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice." *Hollister* v. *Benedict M'f'g Co.*, 113 U. S. 59, 73. The purpose of Murdock, in reference to the wooden skewer, was the same as the purpose of the Springs in reference to articles of any material which could be worked up on their machines. The claim was certainly broad enough to include Murdock's invention, and no disclaimer was ever filed; and even with a limitation as to the article, patentable novelty was not present, within the rule upon that subject. The art of turning is the art of turning, whether applied to wood or metal; and it would seem that there was here nothing more than the substitution of one material for another, without involving an essentially new mode of construction. And be that

as it may, there was no restriction as to material. Operation in metal would, of course, demand variations in organization, but not necessarily anything more than would result from the experience of the intelligent mechanic.

The Springs did not claim a combination of a slotted guide cam, an adjusting screw, a spring, guiding rods, etc., with a former, a cutting tool, a rest, and a griping chuck, and as it stands the claim was, in the existing state of the art, for an analogous or double use, and not patentable.

The Circuit Court was clearly right, and its decree is

Affirmed.

GLENN *v.* FANT.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 357. Argued March 11, 1890. — Decided March 24, 1890.

A stipulation was filed in this cause to the effect that the court should consider the cause as if the general issue and other named pleas had been pleaded and issue joined; that the cause should be heard upon "an agreed statement of facts annexed with leave to refer to exhibits filed therewith;" and that the cause might be submitted to the court to decide on such statement, exhibits and pleadings. No bill of exceptions was taken, there was no finding of facts by the court below, nor was any case stated by the parties, analogous to a special verdict, stating the ultimate facts, and presenting questions of law only; *Held*, that this stipulation could not be regarded as taking the place of a special verdict, or a special finding of facts, and that this court had no jurisdiction to determine the questions of law thereon arising.

This was an action at law commenced in the Supreme Court of the District of Columbia by the plaintiff in error against the defendant in error on the 11th day of December, 1883, to recover certain amounts, for the payment of which the defendant was alleged to be liable upon an assessment levied on shares of stock in the National Express and Transportation Company of Virginia, held by him.

The defendant demurred to the declaration, but subsequently it was agreed that the demurrer should be overruled,

and a stipulation was filed to the effect that the court should consider the cause as if there had been pleaded the general issue and certain other pleas in the stipulation named, and as if issue had been joined thereon; that the cause should be heard upon an "agreed statement of facts," annexed as part of the stipulation, with leave to any party to refer to Exhibits X and Y, therewith filed; that a jury was thereby waived; that the cause might be submitted to the court to hear and decide upon said agreed statement of facts, exhibits and pleadings; and that either party might "rely upon any and all grounds of action or defence arising from said agreed statement of facts, exhibits and pleadings." The statement referred to was to the effect that the defendant was a subscriber for and assignee of the number of shares of the capital stock of the National Express and Transportation Company of Virginia in respect of which he was sued; that a certain deed of trust was as set forth in the record, therewith filed, marked Exhibit X; that Exhibit X was the record of a certain cause between W. W. Glenn and the National Express and Transportation Company of Virginia, in the Chancery Court of the city of Richmond, in the State of Virginia, afterwards removed into the Circuit Court of Henrico County, Virginia; and that on the 8th day of August, 1866, one Reynolds, claiming to be a stockholder of said company, filed his bill against said company in the Circuit Court of the United States for the Eastern District of Virginia, and certain proceedings were therein had, as would appear from the record in that cause, filed and marked Exhibit Y. It was agreed that the laws of the State of Virginia might be referred to as a part of the statement of facts, and certain other matters of fact were set forth, not material to be repeated here.

The cause came on at special term, the demurrer was overruled, and the stipulation filed "with an agreed statement of facts thereto annexed, and with exhibits, marked 'X' and 'Y,'" and thereupon the cause was certified to the general term of the court to be heard there in the first instance, "upon said stipulation and agreed statement of facts thereto annexed and exhibits therewith filed and the pleadings, in accordance

with the provisions of the stipulation aforesaid." A hearing was accordingly had at general term, and judgment rendered in favor of the defendant with costs, and the plaintiff sued out a writ of error from this court.

Mr. Charles Marshall and *Mr. John Howard* for plaintiff in error. *Mr. Henry Wise Garnett* and *Mr. Conway Robinson, Jr.*, also filed a brief for plaintiff in error.

Mr. Walter D. Davidge and *Mr. Martin F. Morris* for defendant in error. *Mr. Eugene Carusi* and *Mr. Reginald Fendale* were also on the brief for defendant in error.

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

No bill of exceptions was taken in this case, nor was there any finding of facts by the Supreme Court of the District of Columbia, nor any case stated by the parties analogous to a special verdict and stating the ultimate facts of the case, presenting questions of law only. What is styled here an "agreed statement of facts" is an agreement as to certain matters, and that the parties might refer to and rely upon any and all grounds of action or defence to be found in two voluminous exhibits, marked X and Y, being the records of two equity causes in other courts, including all the pleadings and evidence, as well as the orders and decrees therein. The effect of some of that evidence and of the conclusions of fact to be drawn from it is controverted. It is impossible for us to regard this stipulation as taking the place of a special verdict of a jury, or a special finding of facts by the court, upon which our jurisdiction could properly be invoked to determine the questions of law thereon arising. And while the case is governed by the rule laid down in *Campbell* v. *Boyreau*, 21 How. 223, yet, even if the statutory provisions in relation to the trial of causes without the intervention of a jury by the Circuit Courts of the United States were applicable, the result upon this record would be the same. *Raimond* v. *Terrebonne Par-*

ish, 132 U. S. 192; *Andes* v. *Slauson*, 130 U. S. 435; *Bond* v. *Dustin*, 112 U. S. 604; *Lyons* v. *Lyons Bank*, 19 Blatchford, 279.

The judgment must be

Affirmed.

HAMMOND *v.* HASTINGS.

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

No. 200. Argued March 7, 1890. — Decided March 24, 1890.

When, by general law, a lien is given to a corporation upon the stock of a stockholder in the corporation for any indebtedness owing by him to it, that lien is valid and enforceable against all the world; and a sale of the stockholder's stock to a person ignorant of the lien will not discharge it and thus authorize the purchaser to demand and receive a transfer of it so discharged.

THE case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error. *Mr. Don M. Dickinson*, *Mr. William H. Swift* and *Mr. Elisha H. Flinn* filed a brief for plaintiff in error.

Mr. Thomas McDougall for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On July 22, 1884, George O. Sweet was the owner of twelve hundred shares of the capital stock of a corporation organized under the laws of the State of Michigan, known as George H. Hammond & Company, as evidenced by two certificates of stock (which were alike in everything, except numbers of shares and dates); and of one of which, with endorsements, the following is a copy:

"George H. Hammond & Company.

"Capital stock, $1,500,000. Shares, $25 each.
Number 5. Shares, 800.

"This is to certify that George O. Sweet is entitled to eight hundred shares of $25 each of the capital stock of George H. Hammond & Company. Transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

"Detroit, Mich., Jan'y 18, 1882.

"Geo. H. Hammond, *Pres't.*

"[seal.] James D. Standish, *Sec'y.*"

Endorsed.

"For value received, — hereby sell, assign, and transfer unto —— —— shares of the within stock, and do hereby constitute and appoint —— —— attorney to transfer the same on the books of the company.

"Witness my hand and seal this — day of ——, A. D. 18—

"———— ————. [L. S.]"

These certificates had theretofore been pledged to the National Bank of Illinois, a bank located in the city of Chicago. On that day, in pursuance of the pledge, the stock was sold, and purchased by the defendant in error, Thomas D. Hastings. During all the time that Sweet owned the stock he was indebted to the corporation George H. Hammond & Company. After his purchase Mr. Hastings presented the certificates to the officers of the corporation, and demanded a transfer. This was refused, on the ground that the corporation had a lien upon the stock for the amount of Sweet's indebtedness to it. Thereupon this action was brought.

George H. Hammond & Company was a manufacturing corporation, created in October, 1881, under the laws of the State of Michigan, with its principal office in the city of Detroit, Michigan, and Sweet was, during the time of these transactions, a resident of and doing business in the city of

Chicago, selling the property of the corporation on commission.

The law of Michigan under which manufacturing companies may be organized, and under which George H. Hammond & Company was created and exists, has, since 1875, contained this provision: Section 4143, 1 Howell's Annotated Statutes, section 17 of act 187, laws 1875: "The stock of every such corporation shall be deemed personal property, and be transferred only on the books of such corporation, in such form and manner as their by-laws shall prescribe; and such corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation." The general act, 1 Howell, sec. 4866, provides, as to all corporations, that a transfer of stock shall not be valid except as between the parties, unless entered on the books of the company, showing the names of the parties, by and to whom transferred, the number and designation of shares, and the date of the transfer. The bank was ignorant of Sweet's indebtedness to the corporation when it lent its money on the security of the stock, and of course Hastings, though notified thereof at the time of the sale, succeeded to all the rights of the bank. On these facts the circuit judge held that the purchaser took the stock discharged of any lien, and submitted to the jury only the question of the value of the stock; this having been found by its verdict, judgment was entered therefor, and the corporation now alleges error. The single question is, whether the corporation had a lien upon the stock for Sweet's indebtedness, as against the claims of the bank and the purchaser. This question must be answered in the affirmative; for the rule is clear and unquestioned, that where by general law a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world. *Union Bank* v. *Laird*, 2 Wheat. 390; *Brent* v. *Bank of Washington*, 10 Pet. 596; *National Bank* v. *Watsontown Bank*, 105 U. S. 217, 221; *Rogers* v. *Huntingdon Bank*, 12 S. & R. 77; *Sewall* v. *Lancaster Bank*, 17 S. & R. 285; *Presbyterian Congregation* v. *Carlisle Bank*, 5 Penn. St. 345,

348; *Farmers' Bank* v. *Iglehart*, 6 Gill, 50; *Reese* v. *Bank of Commerce*, 14 Maryland, 271; *Hartford Bank* v. *Hartford Ins. Co.*, 45 Connecticut, 22; *Bishop* v. *Globe Company*, 135 Mass. 132; *Bohmer* v. *City Bank*, 77 Virginia, 445.

The law under which this corporation was organized was a general law. So it has been decided by the Supreme Court of Michigan, *Newberry* v. *Detroit Co.*, 17 Michigan, 141, 151, where it is said: "The law in question is a public act, and all are charged with knowledge of its provisions." This construction by the Supreme Court of the State which enacted the law is conclusive in this court, as well as everywhere, as to its character. The law in terms provides for a lien, and that being a public law all are charged with knowledge of its provisions. Generally, wherever paper of a nature similar to this is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute. And this is true whether the party lives in or out of the State by which the law was enacted. See authorities cited, *supra*. It was unnecessary to enter upon the certificate any statement of the limitations and burdens which the law casts upon all such paper; and the omission to state such limitations upon the face of the paper is not a waiver by the corporation of the benefits thereof.

In the case in 2 Wheat. *supra*, where the act of incorporation gave a lien, this court, by Mr. Justice Story, said: "The certificate, issued to Patton for the fifty shares held by him, (which is in the usual form,) declares the shares to be 'transferable at the said bank, by the said Patton, or his attorney, on surrendering this certificate.' No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment, it must be subject to the rights of the bank, under the act of incorporation, of which he is bound to take notice."

Repeated efforts have been made to have certificates of stock declared negotiable paper, but they have been unsuccessful. Such a certificate is not negotiable in either form or

character; and like every non-negotiable paper, whoever takes it does so subject to its equities and burdens; and though ignorant of such equities and burdens his ignorance does not relieve the paper therefrom, or enable him to hold it discharged therefrom. It is objected that upon the face of this certificate it is nowhere stated that "George H. Hammond & Company" is a corporation. While this is not expressly stated, it clearly appears; and even if it were not so, the certificate is non-negotiable paper, and the party had no right to deal with it as though it were otherwise. He takes it subject to the burdens that in fact rested upon it.

Technical matters are suggested by counsel, but we deem it unnecessary to notice them. The circuit judge unquestionably, as appears from the record, ruled upon the substantial question considered by us. We think his ruling erroneous, and the case must therefore be reversed. That this lien of a corporation may be waived cannot be doubted. *National Bank* v. *Watsontown Bank*, 105 U. S. 217, 221. Perhaps when all the facts are developed, as they can be on the new trial, matters may be disclosed sufficient to establish a waiver; but mere ignorance on the part of the purchaser of the fact of the existence of the lien does not destroy it. It constitutes no waiver on the part of the corporation.

Judgment reversed, and the case remanded for a new trial.

SCHREYER *v.* SCOTT.

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

No. 197. Argued January 31, 1890. — Decided March 24, 1890.

In determining the rules applicable to conveyances of real estate from a husband to his wife, reference should be had not only to the decisions of this court, but also to those of the state where the parties lived, and where the transactions took place.

The rule obtains in New York, and is recognized by this court, that even a

Citations for Appellant.

voluntary conveyance from husband to wife is good as against subsequent creditors, unless it was made with the intent to defraud such subsequent creditors; or, unless there was secrecy in the transaction, by which knowledge of it was withheld from such creditors who dealt with the grantor, upon the faith of his owning the property transferred; or, unless the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business.

When real estate is acquired by a husband in his own name by the use of the separate property of his wife, a subsequent conveyance of it by him to her is not a voluntary conveyance, but the transfer of the legal title to the equitable owner.

In equity. The case is stated in the opinion.

Mr. Frederic R. Coudert for appellant. *Mr. A. O. Salter* filed a brief for same, citing: *Allen* v. *Massey*, 17 Wall. 351; *Carr* v. *Breese*, 81 N. Y. 584; *Phœnix Bank* v. *Stafford*, 89 N. Y. 405; *Cole* v. *Tyler*, 65 N. Y. 73; *Dunlap* v. *Hawkins*, 59 N. Y. 342; *Wickes* v. *Clarke*, 8 Paige, 161; *Van Wyck* v. *Seward*, 1 Edw. Ch. 327; *Wallace* v. *Penfield*, 106 U. S. 260; *Hinde* v. *Longworth*, 11 Wheat. 199; *Clark* v. *Killian*, 103 U. S. 766; *Smith* v. *Vodges*, 92 U. S. 183; *Graham* v. *Railroad Co.*, 102 U. S. 148; *Horback* v. *Hill*, 112 U. S. 144; *Pepper* v. *Carter*, 11 Missouri, 540; *Payne* v. *Stanton*, 59 Missouri, 158; *Lerow* v. *Witmarth*, 9 Allen, 382; *S. C.* 83 Am. Dec. 701; *Pratt* v. *Curtis*, 2 Lowell, 87; *Herring* v. *Richards*, 1 McCrary, 570; *Dygert* v. *Remerschnider*, 32 N. Y. 629; *Todd* v. *Nelson*, 109 N. Y. 316; *Matthai* v. *Heather*, 57 Maryland, 483; *Kimble* v. *Smith*, 95 Penn. St. 69; *Harlan* v. *Maglaughlin*, 90 Penn. St. 293; *Curtis* v. *Fox*, 47 N. Y. 301; *Phillips* v. *Wooster*, 36 N. Y. 412; *Walter* v. *Lane*, 1 MacArthur, 275; *Claflin* v. *Mess*, 30 N. J. Eq. (3 Stewart) 11; *Babcock* v. *Eckler*, 24 N. Y. 623; *Medsker* v. *Bonebrake*, 108 U. S. 66; *Baker* v. *Gilman*, 52 Barb. 26; *Reed* v. *Woodman*, 4 Maine, 400; *Lehmberg* v. *Biberstein*, 51 Texas, 457; *Monroe* v. *Smith*, 79 Penn. St. 459; *Herring* v. *Richards*, 3 Fed. Rep. 439; *Pell* v. *Tredwell*, 5 Wend. 661; *Nippe's Appeal*, 75 Penn. St. 472; *Kempner* v. *Churchill*, 8 Wall. 362; *Fuller* v. *Brewster*, 53 Maryland, 361; *Washband* v. *Washband*, 27 Connecticut, 431; *Seward* v. *Jackson*, 8 Cowen, 430.

Mr. T. M. Tyng, for appellee, cited: *Dudley* v. *Easton*, 104 U. S. 99; *Warren* v. *Moody*, 122 U. S. 132; *Adams* v. *Collier*, 122 U. S. 382; *Young* v. *Hermans*, 66 N. Y. 374; *Carpenter* v. *Roe*, 10 N. Y. 227; *King* v. *Wilcox*, 11 Paige, 589; *Savage* v. *Murphy*, 34 N. Y. 508; *S. C.* 90 Am. Dec. 733; *Smith* v. *Vodges*, 92 U. S. 183; *Case* v. *Phelps*, 39 N. Y. 164; *Dunn* v. *Hornbeck*, 72 N. Y. 80; *Wallace* v. *Penfield*, 106 U. S. 260; *Horback* v. *Hill*, 112 U. S. 144; *Blennerhasset* v. *Sherman*, 105 U. S. 100; *Schmidt* v. *Schmidt*, 48 N. Y. Superior Ct. 520; *Lent* v. *Howard*, 89 N. Y. 169; *Adair* v. *Lott*, 3 Hill, 182; *Coleman* v. *Burr*, 93 N. Y. 17; *Reynolds* v. *Robinson*, 64 N. Y. 589; *Chew* v. *Hyman*, 10 Bissell, 240; *Kerrison* v. *Stewart*, 93 U. S. 155; *Whelan* v. *Whelan*, 3 Cowen, 537; *Western Railroad* v. *Nolan*, 48 N. Y. 513; *Vetterlein* v. *Barnes*, 124 U. S. 169.

Mr. Justice Brewer delivered the opinion of the court.

The question in this case is whether certain transfers of property made by John Schreyer to his wife, Anna Maria Schreyer, were fraudulent and void as against Peter J. Vanderbilt, a creditor of John Schreyer. The case is here on appeal from a decree of the Circuit Court for the Southern District of New York, brought by the assignee in bankruptcy of Schreyer against Schreyer individually, and as executor, etc., of his wife, now deceased. The Circuit Court, 25 Fed. Rep. 83, found that the transfers were fraudulent, and decreed that the bankrupt, as executor and trustee, convey the real estate and bonds and mortgages hereafter described to the assignee in bankruptcy. From such decree this appeal has been taken. The facts are these: On January 21, 1871, Schreyer conveyed to his wife the following real estate situated in the city of New York: Nos. 348 and 350 West 39th Street and Nos. 351, 353 and 355 West 42d Street. The title was passed from Schreyer to his wife, by conveyance to Edward Sharkey, and from him to Mrs. Schreyer. On October 15, 1870, Schreyer and his wife conveyed No. 420 West 40th Street to George Gebhart and No. 422 West 40th Street to Matthew L. Ritchie, who each thereupon executed mortgages for $5000 to Mrs. Schreyer.

These conveyances and mortgages were all recorded in 1871. Notice was thus given, by public record, of title in Mrs. Schreyer to both the real estate and the mortgages. Thereafter, and in 1874, buildings were erected on the two lots last mentioned, the mortgages for $5000 surrendered and two new mortgages taken — one from Gebhart to Mrs. Schreyer for $7750 on premises No. 420 West 40th Street, and one from Ritchie to Mrs. Schreyer for $8850 on premises No. 422 West 40th Street. The claim of Vanderbilt arose in this way: On February 2, 1874, a building contract was entered into between George Gebhart and Matthew L. Ritchie, as owners of premises Nos. 420 and 422 West 40th Street, with Vanderbilt, whereby he covenanted to erect two buildings on said premises for the sum of $8175, to be paid in the following manner: "When the said houses are topped out the payment of five thousand ($5000) dollars, by assignment of mortgage held by John Schreyer on the property of Anna Maria Schreyer, No. 350 West 42d Street, in the city of New York; three thousand one hundred and seventy-five ($3175) dollars when the houses are fully completed as above." On May 5, 1874, Vanderbilt had so far completed his contract that he was entitled to an assignment of the bond and mortgage. He then demanded and received from Schreyer not only an assignment, but a guaranty of the bond and mortgage. There was no new consideration for this guaranty. In 1876 a prior mortgage on the premises covered by the bond and mortgage assigned as above set forth was foreclosed, and swept away the entire property, so that this bond and mortgage became worthless; whereupon Schreyer was sued on his guaranty, and judgment recovered thereon. On September 17, 1878, John Schreyer was adjudged a bankrupt upon a creditor's petition, filed August 23, 1878. Several claims were proved against his estate in bankruptcy, but all have been satisfied except that of Vanderbilt; so that, while this action was brought by an assignee in bankruptcy, it was really for the sole benefit of Vanderbilt. On September 6, 1876, Mrs. Schreyer died, leaving a will by which her property was devised and bequeathed to her children; her husband was named as executor; and he, individually and as executor,

was the defendant in this suit. And now the contention of the plaintiff below is, that the conveyances of January 21, 1871, and the two mortgages from Gebhart and Ritchie to Mrs. Schreyer in 1874 were fraudulent and void as against the claim of Vanderbilt. The conveyances were made and recorded more than three years prior to the building contract, out of which Vanderbilt's claim arose; and, while the mortgages to Mrs. Schreyer were executed and recorded during the same year with the building contract, yet the obligation assumed by Schreyer was a voluntary one, without consideration, and after a contract expressly providing for payment in another way, was conditional, and only became a fixed indebtedness two years thereafter, when by the foreclosure proceedings the worthlessness of the guaranteed bond and mortgage was developed. Obviously, very clear and direct testimony is essential to support an adjudication that these various transfers were fraudulent and void as against this subsequent creditor. In determining the rules applicable to such transactions reference should be had not only to the decisions of this court, but also to those of the courts of New York, where the parties lived and the transactions took place. *Allen* v. *Massey*, 17 Wall. 351; *Graham* v. *Railroad Company*, 102 U. S. 148; *Wallace* v. *Penfield*, 106 U. S. 260, 263, 264.

In a recent case in the Court of Appeals of New York, *Todd* v. *Nelson*, 109 N. Y. 316, 327, that court thus stated the law: "The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit, or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive. Such are the cases cited by the learned counsel for the appellants." See also *Phillips*

v. *Wooster*, 36 N. Y. 412; *Curtis* v. *Fox*, 47 N. Y. 299; *Dunlap* v. *Hawkins*, 59 N. Y. 342; *Carr* v. *Breese*, 81 N. Y. 584; and *Phœnix Bank* v. *Stafford*, 89 N. Y. 405.

Turning now to the cases in this court: It was said in *Smith* v. *Vodges*, 92 U. S. 183: "The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mullen* v. *Wilson*, 44 Penn. St. 413; *Stileman* v. *Ashdown*, 2 Atk. 478, 481." In *Graham* v. *Railroad Company*, 102 U. S. 148, 154, it was said: "It seems clear that subsequent creditors have no better right than subsequent purchasers, to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right." In *Wallace* v. *Penfield*, 106 U. S. 260, 262, in which it appeared that the husband transferring property to his wife was indebted at the time of the transfer, though not to the party complaining of the transaction, the court observed: "His indebtedness existing at the time of the settlement upon the wife, as well as that which arose during the period of the improvements, was subsequently, and without unreasonable delay, fully discharged by him. Commenced in 1868, they were all, with trifling exceptions, completed and paid for before the close of the summer of 1869. So far as the record discloses, no creditor, who was such when the settlement was made or the improvements were going on, was materially hindered by the withdrawal by Williams, from his means or business, of the sums necessary to pay for the land and improvements. Those who seek, in this suit, to impeach the original settlement, or to reach the means he invested in improving his wife's land, became his creditors some

time after the improvements (with slight exceptions not worth mentioning) had been made and paid for. If they trusted him in the belief that he owned the land, it was negligent in them so to do, for the conveyance of February 11, 1868, duly acknowledged, was filed for record within a few days after its execution." And in *Horbach* v. *Hill*, 112 U. S. 144, 149, this language was used: "The complainant, not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against subsequent creditors, unless executed as a cover for future schemes of fraud." From these authorities, it is evident that the rule obtaining in New York, as well as recognized by this court, is, that even a voluntary conveyance from husband to wife is good as against subsequent creditors; unless it was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business. Tested by these rules, it is impossible to sustain an adjudication, upon the testimony in this case, that the transfer of either the real estate or the bonds and mortgages was fraudulent as against the creditor Vanderbilt.

Assuming, in the first instance, that both transfers were purely voluntary, the deeds to Mrs. Schreyer were made and recorded three years before the building contract was signed, or the work done, out of which Vanderbilt's claim arose. There was thus that constructive notice referred to in *Wallace* v. *Penfield*, *supra*, as sufficient. Further, on May 21st, 1872, Vanderbilt entered into a written contract with Mrs. Schreyer to do the mason work in the construction of a building on the lots conveyed, the contract price being $10,500. He thus had actual as well as constructive notice, more than two years before he entered into this last contract, that Mrs. Schreyer was the owner of these lots. With such knowledge he entered into the last contract, and thereafter accepted Schreyer's

guaranty. How can he then say, with such knowledge, that he was defrauded by those conveyances? Is it possible to suppose that the Schreyers, when they made those conveyances, looked forward three years, and anticipated that Gebhart and Ritchie would seek to improve their real estate, and obtain pecuniary assistance from them, and, with that prevision, planned to defraud any one who might rely upon Mr. Schreyer's guaranty? Further than that, Schreyer did not at the time purpose to, and did not in fact, change his regular business, or enter upon any new business. From 1854 his business was that of a stair-builder, which business he prosecuted steadily until he sold out, in 1876, six years after the conveyances. Notwithstanding these conveyances, he retained all the property used in his stair-building business, was in debt only from five hundred to one thousand dollars, and had money in bank, accounts due him, and personal property used in his business, aggregating from ten to twenty thousand dollars. It is true that some $12,000 of mechanic's liens had been filed against buildings which he owned, and which had been recently constructed; but these liens were by sub-contractors, with possibly one or two minor exceptions. Money for their payment was deposited with certain trust companies; and, as the amounts due were adjudicated, they were paid out of moneys thus deposited. Could anything be clearer than that these conveyances were free from all imputation of fraud, as against anybody, and especially as against such a remotely subsequent creditor?

While the transaction as to the bonds and mortgages is nearer in point of time to the creation of the indebtedness to Vanderbilt, it is so remote in fact as also to be free from imputation of fraud. The circumstances surrounding the creation of this debt must be stated a little more in detail: Gebhart and Ritchie owned the lots; they were each subject to two mortgages; one was a mortgage of $3750, given to Ellen E. Ward, from whom the Schreyers had originally purchased the lots; and one to Mrs. Schreyer, originally $5000, but reduced by payments to about $2200. Desiring to build, in the belief that the rents from new buildings on the front of

the lots could be used to pay off their indebtedness, they arranged with the Schreyers for an advance of the amount that should be needed in addition to the sums they could borrow on mortgages from the Ward estate. The Ward estate agreed to loan $10,000 on each lot and contemplated building. In pursuance of this arrangement, Mrs. Schreyer released her mortgages, new ones were executed to the Ward estate for $10,000 on each lot, and the difference in money, $6000 and over, was paid to Gebhart and Ritchie, respectively, and by them handed to the Schreyers; and, when the buildings were completed, new mortgages were executed to Mrs. Schreyer for the $2200 of her original mortgage, and the excess of the cost above the amount furnished by the Ward estate. Schreyer, who was a practical builder, superintended the construction of the buildings. Vanderbilt made a contract with Gebhart and Ritchie for the mason work, as heretofore stated. He entered into this contract with knowledge that the $5000 bond and mortgage which Schreyer proposed to transfer in part payment was second and subordinate to a prior mortgage of $16,000. He must have assumed, when he made the contract, that the property mortgaged was good for both mortgages; and, according to the testimony, it was then considered worth from thirty to thirty-five thousand dollars. When he had so far completed his contract as to be entitled to the assignment of his bond and mortgage, he demanded its guaranty from Schreyer; and he, in order that there might be no delay in the work, gave the required guaranty. Two years thereafter, owing to depreciation in value of real estate, the property covered by this $5000 bond and mortgage was sold under foreclosure of the $16,000 mortgage, and realized only enough to pay that. Hence, Schreyer became liable on his guaranty. Is there anything in these facts to show fraud in intent or fraud in result? Obviously not. Vanderbilt entered into his contract with full knowledge of all the circumstances, unquestionably considering the $5000 bond and mortgage well secured, and willing to take his chances of its payment on foreclosure, if not otherwise. Schreyer, making no representations or concealments, doubtless acted in the same belief;

and when, after partial completion of the contract, he, to prevent delay in the future work, guaranteed payment of the bond and mortgage, he did so in the belief that it was amply secured, and that he was assuming little or no risk in his guaranty. If fraud or wrong was intended on his part, obviously he would have refused to guarantee, and left Vanderbilt to take that which his contract entitled him to. The very fact of his voluntarily assuming a risk which he was under no obligations to assume, and which in no manner inured to his benefit, is satisfactory evidence that he had no thought of fraud. The subsequent depreciation of the value of real estate, and the failure to realize on the sale thereafter more than the first $16,000 mortgage, was something anticipated by neither party. It was one of those vicissitudes unexpected and unlooked for — not planned for — and doubtless an astonishment to all the parties. All the arrangements for the execution of these second mortgages to Mrs. Schreyer were made before any guaranty or personal liability on the part of Schreyer was demanded or thought of, and it does not appear that he was in debt to any one at the time the arrangements were so made. Surely this unnecessary and voluntary assumption on his part in no manner indicates fraud in the arrangements already entered into and subsequently carried out, for the execution of these bonds and mortgages to Mrs. Schreyer. In the case of *Carr* v. *Breese*, 81 N. Y. 584, which was like this in presenting an unexpected depreciation in the value of property, the court justly observed: "Reverses came unexpectedly, while in the pursuit of his ordinary business, without any intention on his part to defraud his creditors, and it may be said that, without any fault on his part, except a want of human foresight, he became embarrassed and insolvent. It is not apparent that Breese had in view, at the time of the execution of the deed to his wife, any such result, or that he in any way contributed to produce the result which followed, for the purpose of defrauding his creditors and enjoying the advantages to be derived from the provisions made for his wife. Under such circumstances, the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more

than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so." Further, as negativing any fraud in intent, a year after this guaranty, and when undoubtedly there must have been developing some probability of liability therefrom, Schreyer purchased other real estate and took the title in his own name. Still, again, not only did he continue in his regular business of stair-building after these transactions, but it is evident from his bank-books, produced in evidence, that his business was of considerable magnitude, for between August 26, 1869, and September 6, 1876, a period of about seven years, and including the time of these transactions, his deposits amounted to $391,296.44.

We have thus far considered the case as to these transfers from Schreyer to his wife, as if they were purely voluntary; but according to his testimony, and there is none contradicting it, they were far from voluntary, but rather the passing of the legal title to his wife, of property of which she was, prior thereto, the equitable owner, or in which she had at least a large equitable interest. She had between twenty-five hundred and three thousand dollars in money when they were married, in April, 1854. She purchased the leasehold interest in the lots on 39th Street, paying therefor out of her own moneys, $500 each. They lived on one of the lots, and the building on the other was rented. Unquestionably, therefore, the rents belonged to her. She also kept boarders for a number of years, two of them living with her for at least ten years, paying $5.00 per week each. The balance of the money she had when married she passed over to him from time to time for improvements on the property, or use in his business. It is true that afterwards buildings of considerable value were put upon these lots; and we do not wish to be understood as affirming that the entire cost of the property was the proceeds of her investment, or her earnings. All that the testimony fairly discloses is, that at the time of her marriage she was possessed of separate property, which was the foundation and largely the source of these subsequent accumulations. So that the conveyances in 1871 were not purely vol-

untary, but meritorious and upon good consideration. The same may be said as to the bonds and mortgages placed in her name in 1874.

It is objected by the appellees that Schreyer's testimony is not to be depended upon, because contradictory, confused and uncertain; that there is no definiteness in it as to amounts and dates; and that wrong in the transactions is evident, because the moneys received for rent after the conveyances, were deposited by Schreyer in his own name in bank, and were obviously managed and handled by him as his own, as no accounts were kept between husband and wife of their separate moneys, but all were mingled in one fund, in his hands. But does all this indicate fraud? If his testimony is worthless and to be rejected, then there is practically no testimony interpreting those transactions, and the court never presumes fraud. The very confusion and carelessness in the dealings between husband and wife make against rather than in favor of the claim of fraud. There is no evidence that he was in debt at the time of these conveyances, at least beyond a trifling amount, which was subsequently paid; and if the parties had intended fraud and wrong, unquestionably their accounts would have been kept carefully and accurately, and books would now be presented showing such accounts. Husband and wife evidently saw no necessity of dealing with each other at arm's length; the title to the property was placed in her name when there was no legal or equitable reason why it should not be done; and the rents and other cash receipts were not unnaturally kept in one account and handled as one fund. The lack of substantial indebtedness and the record of the transfer being established, the carelessness of their dealings tends to prove honesty rather than to establish fraud.

Again, it is objected that the conduct of Schreyer, in respect to the bankrupt proceedings, is suspicious; that the bankrupt proceedings, though nominally at the instance of a creditor, were really at his instance; that the bankrupt and the creditor found their counsel in the same office; and that the other claims proved against him were in some suspicious way fixed up and adjusted, leaving only Vanderbilt's claim unpaid.

Conceding all that is claimed by counsel in reference to these bankrupt proceedings in 1878, it is difficult to deduce therefrom any evidence of wrong in the transactions in 1871 and 1874. It may be that Schreyer did not want to pay Vanderbilt's claim; and it may be, as claimed by counsel, that he improperly sought the assistance of the bankrupt court to be relieved from liability therefrom; but it would be a very unjust conclusion from such facts, that in 1871, when he made the conveyances to his wife, and in 1874, when he made the arrangement for the execution of the bonds and mortgages to his wife, anterior to any known or expected liability to Vanderbilt, he was acting with a view of subsequently going through bankruptcy, or defrauding Vanderbilt or any other creditor.

Recapitulating, the conveyances in 1871 were meritorious, upon good consideration, made by one in debt in only a trifling sum, and retaining an abundance of property for the discharge of those debts, and who in fact subsequently, and as they became due, paid them — made by one continuing and expecting to continue in the same profitable and not hazardous business in which he had been engaged for nearly a score of years, with no thought of entering upon any new or hazardous business, and more than three years before any liability to Vanderbilt was incurred or even thought of. And the placing of the notes, bonds and mortgages in 1874 in Mrs. Schreyer's name was in pursuance of an arrangement entered into when the husband was not in debt, and when no obligation, fixed or contingent, to Vanderbilt had been entered into or thought of.

Under these circumstances it is error to hold that the transactions were fraudulent and void as against Vanderbilt.

The decree of the Circuit Court must be reversed, and the case remanded, with instructions for further proceedings in accordance with the views herein expressed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 762. Argued January 13, 14, 1890. — Decided March 24, 1890.

The act of the legislature of Minnesota, approved March 7, 1887, General Laws of 1887, c. 10, establishing a railroad and warehouse commission, being interpreted by the Supreme Court of that State as providing that the rates of charges for the transportation of property, recommended and published by the commission shall be final and conclusive as to what are equal and reasonable charges, and that there can be no judicial inquiry as to the reasonableness of such rates, and a railroad company, in answer to an application for a mandamus, contending that such rates, in regard to it, are unreasonable, and not being allowed by the state court to put in testimony on the question of the reasonableness of such rates; *Held*, that the act is in conflict with the Constitution of the United States, as depriving the company of its property without due process of law, and depriving it of the equal protection of the laws.

The State had made no irrepealable contract with the company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the State.

This was a writ of error to review a judgment of the Supreme Court of the State of Minnesota, awarding a writ of mandamus against the Chicago, Milwaukee & St. Paul Railway Company.

The case arose on proceedings taken by the Railroad and Warehouse Commission of the State of Minnesota, under an act of the legislature of that State, approved March 7, 1887, General Laws of 1887, c. 10, entitled "An act to regulate common carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers." The act is set forth in full in the margin.[1]

[1] Chapter 10. — An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, and Defining the Duties of such Commission in Relation to Common Carriers.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. (*a*) That the provisions of this act shall apply to any common

The ninth section of that act creates a commission to be known as the "Railroad and Warehouse Commission of the

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carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota:

Provided, That nothing in this act shall apply to street railways or to the carriage, storage or handling by any common carrier of property, free, or at reduced rates for the United States, or for the State of Minnesota, or for any municipal government or corporation within the State, or for any charitable purpose, or to or from fairs, and expositions for exhibition thereat, (or stock for breeding purposes,) or to the issuance of mileage, excursion or commutation passenger tickets, at rates made equal to all, or to transportation to stock shippers with cars, and nothing in the provisions of this act shall be construed to prevent common carriers, subject to the provisions of this act, from issuing passes for the free transportation of passengers.

(*b*) The term "railroad" as used in this act shall include all bridges or ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

SEC. 2. (*a*) That all charges made by any common carrier, subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful.

Provided, That one car-load of freight of any kind or class shall be transported at as low a rate per ton, and per ton per mile, as any greater number of car-loads of the same kind and class from and to the same points of origination or destination.

(*b*) It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any unequal or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any unequal or unreasonable prejudice or disadvantage in any respect whatsoever.

SEC. 3. (*a*) That all common carriers, subject to the provisions of this act, shall, according to their respective powers, provide, at the point of connection, crossing or intersection, ample facilities for transferring cars, and for accommodating and transferring passengers, and traffic of all kinds and classes, from their lines or tracks, to those of any other common car-

State of Minnesota," to consist of three persons to be appointed by the governor by and with the advice and consent of the senate.

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rier whose lines or tracks may connect with, cross or intersect their own, and shall afford all equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, or on freight coming over such lines; but this shall not be construed as requiring any common carrier to use for another common carrier its tracks, equipments or terminal facilities without reasonable compensation.

(*b*) That it shall be unlawful for any common carrier subject to the provisions of this act, to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time or schedule, or by carriage in different cars, or by any other means or devices, the carriage or freight from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freight from being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

(*c*) Every common carrier operating a railway in this State shall, without unreasonable delay, furnish, start and run cars for the transportation of persons and property, which, within a reasonable time theretofore, is offered for transportation at any of its stations on its line of road and at the junctions of other railroads, and at such stopping places as may be established for receiving and discharging passengers and freights; and shall take, receive, transport and discharge such passengers and property at, from and to such stations, junctions and places, on and from all trains advertised to stop at the same, for passengers and freights respectively, upon the due payment or tender of payment, of tolls, freight or fare therefor, if such payment is demanded. Every such common carrier shall permit connections to be made and maintained in a reasonable manner with its side tracks to and from any warehouse, elevator or manufactory without reference to its size or capacity; provided, that this shall not be construed so as to require any common carrier to construct or furnish any side track off from its own land; provided further, that where stations are ten (10) miles or more apart the common carrier, when required to do so by the railroad and warehouse commissioners, shall construct and maintain a side track for the use of shippers between such stations.

(*d*) Whenever any property is received by any common carrier subject to

The first section of the act declares that its provisions shall apply to any common carrier "engaged in the transportation

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the provisions of this act, to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, its common-law liability with reference to such property while in its custody as a common carrier (as hereinbefore mentioned), such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act, to enter into any contract, agreement, or combination with any other common carrier or carriers for the division or pooling of business of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of their business aforesaid each day of its continuance shall be deemed a separate offence.

SEC. 5. That if any common carrier, subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback or other device charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of passengers or property, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 6. That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation for the transportation of passengers or of like kind or class and quantity of property, for a shorter than for a longer distance over the same line, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, subject to the provisions of this act, to charge or receive as great compensation for a shorter as for a longer distance.

Provided, however, That upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commissioners, be authorized to charge less, for longer than for shorter distances, for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

SEC. 7. (*a*) That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation, per ton, per mile, for the contemporaneous transportation of the same class

of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a

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of freight for a longer than for a shorter distance over the same line, in the same general direction, or from the same original point of departure, or to the same point of arrival; but this shall not be construed as authorizing any common carrier, subject to the provisions of this act, to charge as high a rate per ton, per mile, for a longer as for a shorter distance.

(*b*) Whenever any railway company doing business in this State shall be unable, from any reasonable cause, to furnish cars at any railway station or side track, in accordance with the demands made by all persons demanding cars at such stations or side tracks for the shipment of grain or other freight, such cars as are furnished shall be divided as equally as may be among the applicants until each shipper shall have received, at least, one car, when the balance shall be divided ratably in proportion to the amount of daily receipts of grain, or other freight, to each shipper, or to the amount of grain offered at such station on side tracks.

(*c*) There shall in no case be more than one terminal charge for switching or transferring any car, whether the same is loaded or empty, within the limits of any one city or town. If it is necessary that any car pass over the tracks of more than one company, within such city or town limits, in order to reach its final destination, or to be returned therefrom to its owner or owners, then the company first switching or transferring such car shall be entitled to receive the entire charge to be made therefor, and shall be liable to the company or companies doing the subsequent switching or transferring thereof for its or their reasonable and equitable share of the compensation received, and if the companies so jointly interested therein cannot agree upon the share thereof which each is entitled to receive, the same shall be determined by the board of railroad and warehouse commissioners, whose decision thereon shall be final and conclusive upon all parties interested, and the said board are authorized to establish such rules [and] regulations in that behalf as to them may seem just and reasonable and not in conflict with this act.

Sec. 8. (*a*) That every common carrier, subject to the provisions of this act, shall, within sixty (60) days after this act shall take effect, print and thereafter keep for public inspection, schedules showing the classification, rates, fares and charges for the transportation of passengers and property of all kinds and classes which such common carrier has established, and which are in force at the time, upon its railroad, as defined by the first (1st) section of this act. This schedule printed as aforesaid by such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain "classification of freight" in force upon each [of] the lines of such railroad, a distance tariff, and a table of interstation distances, and shall also state separately the terminal charges, and any rules or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates, fares and

common control, management or arrangement, for a carriage or shipment from one place or station to another, both being within the State of Minnesota."

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charges. Such schedules shall be plainly printed in large type, and copies, for the use of the public, shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

(*b*) No change of classification shall be made, and no change shall be made in the rates, fares and charges, which have been established and published as aforesaid, by any common carrier, in compliance with the requirements of this section, except after ten (10) days' public notice, which notice shall plainly state the changes proposed to be made in the schedules then in force, and the time when the changed schedules will go into effect, and the proposed changes will be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection.

(*c*) And when any common carrier shall have established and published its classifications, rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property or for any service in connection therewith, than is specified in such published schedule of classifications, rates, fares and charges as may at the time be in force.

(*d*) Every common carrier, subject to the provisions of this act, shall file with the commission hereafter provided for in section ten (10) of this act, copies of its schedules of classifications, rates, fares and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said commission of all changes proposed to be made in the same. Every [such] common carrier shall also file with said commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act, to which contracts, agreements or arrangements it may be a party. And in cases where passengers or freight pass over lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes, establish joint schedules of rates or fares, or charges or classifications for such lines or routes, copies of such joint schedules shall also, in like manner, be filed with said commission. Such joint schedules of rates, fares, charges and classifications, for such lines, so filed as aforesaid, shall also be made public by such common carriers in the same manner as hereinbefore provided for the publication of tariffs upon its own lines.

(*e*) That in case the commission shall at any time find that any part of the tariffs of rates, fares, charges or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power and is hereby authorized and directed to compel any

The second section declares "that all charges made by any common carrier, subject to the provisions of this act, for any

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common carrier to change the same and adopt such rate, fare, charge or classification as said commission shall declare to be equal and reasonable. To which end the commission shall, in writing, inform such common carrier, in what respect such tariffs of rates, fares, charges or classifications are unequal and unreasonable, and shall recommend what tariffs shall be substituted therefor.

(*f*) In case such common carrier shall neglect or refuse for ten (10) days after such notice to substitute such tariff of rates, fares, charges or classifications, or to adopt the same as recommended by the commission, it shall be the duty of said commission to immediately publish such tariff of rates, fares, charges or classifications as they had declared to be equal and reasonable, and cause the same to be posted at all the regular stations on the line of such common carrier in this State, and thereafter it shall be unlawful for such common carrier to charge or maintain a higher or lower rate, fare, charge, or classification than that so fixed and published by said commission.

(*g*) If any common carrier, subject to the provisions of this act, shall neglect or refuse to publish or file its schedule of classifications, rates, fares or charges or any part thereof as provided in this section, or if any common carrier shall refuse or neglect to carry out such recommendation made and published by such commission, such common carrier shall be subject to a writ of mandamus, to be issued by any judge of the Supreme Court, or of any of the district courts of this State upon application of the commission, to compel compliance with the requirements of this section and with the recommendation of the commission and failure to comply with the requirements of said writ of mandamus shall be punishable as and for contempt, and the said commission, as complainants, may also apply to any such judge for a writ of injunction against such common carrier from receiving or transporting property or passengers within this State until such common carrier shall have complied with the requirements of this section and the recommendation of said commission; and for any wilful violation or failure to comply with such requirements or such recommendation of said commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

SEC. 9. (*a*) That a commission is hereby created and established, to be known as the "Railroad and Warehouse Commission of the State of Minnesota," which shall be composed of three (3) commissioners, who shall be appointed by the governor, by and with the advice and consent of the senate.

(*b*) The commissioners first appointed under this act shall continue in office for the term of one (1) two (2) and three (3) years respectively, and until their successors are appointed and qualified, beginning with the

service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection there-

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first (1st) Monday of January, A.D. 1889; the term of each to be designated by the Governor, but their successors shall be appointed for a term of three (3) years, and until their successors are appointed and qualified, except that, any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Any commissioner may be removed by the Governor for inefficiency, neglect of duty, or malfeasance in office. Said commissioners shall not engage in any other business, vocation, or employment while acting as such commissioners. No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

(*c*) Vacancies occasioned by removal, resignation or other cause shall be filled by the governor as provided in case of original appointments. Not more than two of the commissioners appointed shall be members of the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or any law of this State, or owning stocks or bonds, or other property thereof, or who is in any manner interested therein, shall enter upon the duties of, or hold such office.

(*d*) The decision of a majority of the commission shall be considered the decision of the commission on all questions arising for its consideration. Before entering upon the duties of his office each commissioner shall make and subscribe and file with the Secretary of State an affidavit in the following form: "I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the constitution of the State of Minnesota, and that I will faithfully discharge my duties as a member of the railroad and warehouse commission of the state of Minnesota, according to the best of my ability; and I further declare that I am not in the employ of, or holding any official relation to any common carrier within this state; nor am I in any manner interested in any stock, bonds or other property of such common carrier."

(*e*) Each commissioner so appointed and qualified shall enter into bonds [to] of the State of Minnesota, to be approved by the Governor, in the sum of twenty thousand (20,000) dollars, conditioned for the faithful performance of his duty as a member of such commission, which bond shall be filed with the secretary of state.

(*f*) The commission shall conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the commissioners shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said commission may from time to time make or amend such general rules or orders as may be requisite for the order and regulation of proceedings

with, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every un-

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before it, including forms of notices and service thereof, which shall conform as nearly as may be to those in use in the courts of this State. Any party may appear before said commission and be heard in person or by attorney. Every vote and official act of the commission shall be entered of record and its proceedings shall be public upon the request of either party interested, or at the discretion of the commission. Said commission shall have an official seal which shall be judicially noticed. Any member of the commission may administer oaths and affirmations. The principal office of the commission shall be in the city of St. Paul, where its general session shall be held.

(*g*) Whenever the convenience of the public or of the parties may be promoted, or delay or expenses prevented thereby, the commission may hold special sessions in any part of the State. It may, by one, or more, of the commissioners prosecute any inquiry necessary to its duties in any part of the State, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

(*h*) The attorney general of the State of Minnesota shall be *ex officio* attorney for the commission, and shall give them such counsel and advice as they may from time to time require; and he shall institute and prosecute any and all suits which said railroad and warehouse commission may deem it expedient and proper to institute; and he shall render to such railroad and warehouse commission all counsel, advice and assistance necessary to carry out the provisions of this act, or of any law of this state, according to the true intent and meaning thereof. It shall likewise be the duty of the county attorney of any county in which suit is instituted or prosecuted, to aid in the prosecution of the same to a final issue upon the request of such commission. Said commission are hereby authorized, when the facts in any given case shall in their judgment warrant, to employ any and all additional legal counsel that they may think proper, expedient and necessary to assist the attorney general or any county attorney in the conduct and prosecution of any suit they may determine to bring under the provisions of this act, or of any law of this state.

SEC. 10. (*a*) That the commission hereby created shall have authority to enquire into the management of the business of all common carriers, subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information, necessary to enable the commission to perform the duties and carry out the objects for which it was created; in order to enable said commissioners efficiently to perform their duties under this act, it is hereby made their duty to cause one of their number to visit the various stations on the lines of each railroad as often as practicable, after giving twenty (20) days' notice of such visit and the time and place thereof in the local newspapers,

equal and unreasonable charge for such service is prohibited and declared to be unlawful."

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and at least once in twelve (12) months to visit each county in the State in which is or shall be located a railroad station, and personally enquire into the management of such railroad business, and for this purpose, all railroad companies and common carriers, and their officers and employés, are required to aid and furnish each member of the railroad and warehouse commission with reasonable and proper facilities, and each, or all of the members of said commission, shall have the right, in his or their official capacity, to pass free on any railroad trains on all railroads in this State, and to enter and remain in at all suitable times, any and all cars, offices or depots, or upon the railroads of any railroad company, in this State in the performance of official duties; and whenever, in the judgment of the commission, it shall appear that any common carrier fails in any respect or particular to comply with the laws of this State, or whenever in their judgment, any repairs are necessary upon its railroad, or any addition to or change of its stations or station-houses is necessary, or any change in the mode of operating its road or conducting its business is reasonable or expedient in order to promote the security, convenience and accommodation of the public, said commission shall inform such railroad company, by a notice thereof in writing, to be served as a summons in civil actions is required to be served by the statutes of this State in actions against corporations, certified by the commission's clerk or secretary, and if such common carrier shall neglect or refuse to comply with such order, then the commission may, in its discretion, cause suits or proceedings to be instituted to enforce its orders as provided in this act.

SEC. 11. (*a*) That in case any common carrier, subject to the provisions of this act, shall do, cause to be done, or permit to be done, any act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons, party or parties injured thereby, for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fees shall be taxed and collected as part of the costs in the case.

(*b*) That any person or persons, party or parties claiming to be damaged by the action or non-action of any common carrier, subject to the provisions of this act, may either make complaint to the commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district court of this State of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies at the same time.

(*c*) In any action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver,

The eighth section provides that every common carrier subject to the provisions of the act shall print and keep for

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trustee or agent of any corporation or company, defendant in such suit, to attend, appear and testify in such case, and may compel the production of the books and papers of such corporation or company, party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence shall not be used against such person on the trial of any criminal proceeding.

SEC. 12. That any common carrier, subject to the provisions of this act, or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for, or employed by such corporation, who, alone or with any other corporation, company, person or party, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall wilfully omit or fail to do any act, matter or thing in this act, required to be done, or shall cause or willingly suffer or permit any act, matter or thing so directed or required by this act to be done, not to be so done, or shall aid and abet therein any such omission, or shall be guilty of any wilful infraction of this act, or shall aid or abet therein, shall be deemed guilty of a violation of the provisions of this act and shall, upon conviction thereof in any district court of the State within the jurisdiction of which such offence was committed, be subject to a penalty of not less than two thousand five hundred (2500) dollars or more than five thousand (5000) dollars for the first offence, and not less than five thousand (5000) dollars or more than ten thousand (10,000) dollars for each subsequent offence.

SEC. 13. (*a*) That any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts.

(*b*) Whereupon a statement of the charges thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing within a reasonable time, to be specified by the commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only, for the particular violation of law thus complained of. If such carrier shall not satisfy the complainant within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission summarily to investigate the matter complained of, in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of absence of direct damages to the

public inspection schedules of the charges which it has established for the transportation of property; that it shall make

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complainant. And for the purposes of this act the commission shall have power to require the attendance of witnesses and the production of all books, papers, contracts, agreements and documents relating to any matter under investigation, and, to that end, may invoke the aid of any of the courts of this State, in requiring the attendance of witnesses and the production of books, papers and documents, under the provisions of this act.

(*c*) Any of the district courts of this State, within the jurisdiction of which such inquiry is carried on, shall, in case of contumacy or refusal to obey a subpœna issued by the commissioners to any common carrier subject to the provisions of this act, or, when such common carrier is a corporation, to an officer or agent thereof, or to any person connected therewith, if proceedings are instituted in the name of such commission as plaintiffs, issue an order requiring such common carrier, officer or agent, or person to show cause why such contumacy or refusal should not be punished as and for contempt; and if upon the hearing the court finds that the inquiry is within the jurisdiction of the commission, and that such contumacy or refusal is wilful and the same is persisted in; such contumacy or refusal shall be punished as though the same had taken place in an action pending in the district court for any judicial district in this State. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such persons on the trial of any criminal proceeding.

Sec. 14. (*a*) Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found. All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of, and the record thereof shall be public.

(*b*) If in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either by testimony of witnesses or other evidence, that anything has been done or omitted to be done by any common carrier, in violation of the provisions of this act or of any law cognizable by said commission, or that any injury or damages has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice

no change therein except after ten days' public notice, plainly stating the changes proposed to be made, and the time when

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to said common carrier to cease and desist from such violation and to make reparation for the injury so found to have been done, within a brief but reasonable time, to be specified by the commission; and if within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

(*c*) But if said common carrier shall neglect or refuse, within the time specified, to desist from such violation of law, and make reparation for the injury done in compliance with the report and notice of the commission as aforesaid, it shall be the duty of the commission to forthwith certify the fact of such neglect or refusal, and forward a copy of its report and such certificate to the attorney general of the State, for redress and punishment as hereinafter provided.

Sec. 15. (*a*) That it shall be the duty of the attorney general to whom said commission may forward its report and certificate, as provided in the next preceding section of this act, when it shall appear from such report that any injury or damages has been sustained by any party or parties by reason of such violation of law by such common carrier, to forthwith cause suit to be brought in the district court in the judicial district wherein such violation occurred, on behalf and in the name of the person or persons injured, against such common carrier, for the recovery of damages for such injury as may have been sustained by the injured party, and the cost and expenses of such prosecution shall be paid out of the appropriation hereinafter provided for for the uses and purposes of this act.

(*b*) And the said court shall have power to hear and determine the matter on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice shall be served on such common carrier, his or its officers, agents or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily, and without the formal pleading and proceedings applicable to ordinary suits in equity; but in such manner as to do justice in the premises, and to this end such court shall have power if it thinks fit to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition. And on such hearing the report of said commission shall be prima facie evidence of the matters therein stated.

(*c*) And if it be made to appear to such court, on such hearing, or on report of any such person or persons, that the lawful order or requirement of such commission, drawn in question, has been violated or disobeyed, it

they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that

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shall be lawful for such court to issue a writ of injunction, or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or such disobedience of such order or requirement of said commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same, or against any owner, lessee, trustee, receiver or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred (500) dollars for every day after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court.

Either party to such proceeding before said court may appeal to the Supreme Court of the State, under the same regulations now provided by law in respect to security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon, unless the court hearing or deciding such case should otherwise direct; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

(*d*) In case the attorney general shall not within a period of ten (10) days after the making of any order by the commission, commence judicial proceedings for the enforcement thereof, any railroad company, or other common carrier affected by such order, may at any time within the period of thirty (30) days after the service [of it] upon him or it of such order, and before commencement of proceedings, appeal therefrom to the district court of any judicial district through or into which his or its route may run, by the service of a written notice of such appeal upon some member or the secretary of such commission. And upon the taking of such appeal, and the filing of the notice thereof, with the proof of service, in the office of the clerk of such court, there shall be deemed to be pending in such court a civil action of the character and for the purposes mentioned in sec-

so established and published, for transporting property; that it shall file copies of its schedules with the commission, and

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tions eleven (11) and fifteen (15) of this act. Upon such appeal, and upon the hearing of any application for the enforcement of any such order made by the commission or by the attorney general, the court shall have jurisdiction to examine the whole matter in controversy, including matters of fact as well as questions of law, and to affirm, modify or rescind such order in whole or in part, as justice may require; and in case of any order being modified, as aforesaid, such modified order shall for all the purposes contemplated by this act stand in place of the original order so modified.

No appeal as aforesaid shall stay or supersede the order appealed from in so far as such order shall relate to rates of transportation or to modes of transacting the business of the appellant with the public, unless the court hearing or deciding such case shall so direct.

SEC. 16. (*a*) That whenever facts, in any manner ascertained by said commission, shall, in its judgment warrant a prosecution, it shall be the duty of said commission to immediately cause suit to be instituted and prosecuted against any common carrier who may violate any of the provisions of this act, or of any law of this State. All such prosecutions shall be in the name of the State of Minnesota, except as is otherwise provided in this act, or in any law of this State, and may be instituted in any county in the State through or into which the line of any common carrier so sued may extend, and all penalties recovered under the provisions of this act, or of any law of this State, in any suit instituted in the name of the State, shall be immediately paid into the state treasury by the sheriff or other officer or person collecting the same; and the same shall be by the state treasurer placed to the credit of the general revenue fund.

(*b*) For the purposes of this act, except its penal provisions, the district courts of this State shall be deemed to be always in session.

SEC. 17. (*a*) That the commission is hereby directed to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which said reports shall be made, and to require from such carriers specific answers to all questions upon which the commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same, the dividends paid, the surplus fund, if any, and the number of stockholders, the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment, the number of employés and the salary paid each class, the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts of each branch of business, and from all sources, the operating and other expenses; the balance of profit and loss; and complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet; also the total number of acres of land received as grants

shall notify such commission of all changes proposed to be made; that in case the commission shall find at any time that

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either from the United States or from the State of Minnesota, the number [of] acres of said grants sold, and average price received per acre, the number of acres of grants unsold and the appraised value per acre. Such detailed reports shall also contain such information in relation to rates or regulations concerning fares or freights and agreements, arrangements or contracts with express companies, telegraph companies, sleeping and dining car companies, fast-freight lines, and other common carriers, as the commission may require, with copies of such contracts, agreements or arrangements.

(*b*) And the commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers, subject to the provisions of this act, shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

SEC. 18. (*a*) That such commissioners shall, on or before the first (1st) day of December in each year, and oftener if required by the governor to do so, make a report to the governor of their doings for the preceding year, containing such facts, statements and explanations as will disclose the actual workings of the system of railroad transportation in its bearings upon the business and prosperity of the people of this State, and such suggestions in relation thereto as to them may seem appropriate.

(*b*) They shall also, at such times as the Governor shall direct, examine any particular subject connected with the conditions and management of such railroads, and report to him in writing, their opinion thereon, with their reasons therefor. Said commissioners shall also investigate and consider what, if any, amendment or revision of the railroad laws of this State the best interests of the State demand, and they shall make a special biennial report on said subject to the governor. All such reports made to the governor shall be by him transmitted to the legislature at the earliest practicable time.

(*c*) Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies. *Provided*, That no pending litigation shall in any way be affected by this act.

SEC. 19. Each commissioner shall receive an annual salary of three thousand (3000) dollars, payable in the same manner as the salaries of other state officers. The commissioners shall appoint a secretary, who shall receive an annual salary of eighteen hundred (1800) dollars, payable in like manner. Said secretary shall, before entering upon the duties of his office, make and file with the secretary of state an affidavit in the following form: "I do solemnly swear or affirm (as the case may be) that I

any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same and adopt such charge as the

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will support the Constitution of the United States and the constitution of the State of Minnesota, and that I will faithfully discharge my duties as secretary of the railroad and warehouse commission of the State of Minnesota, according to the best of my ability; and I further declare that I am not in the employ of, or holding any official relation to, any common carrier or grain warehouseman, within said State; nor am I, in any manner, interested in any stock, bonds or other property of such common carrier or grain warehouseman." The said secretary so appointed and qualified shall enter into bonds to the State of Minnesota, to be approved by the governor in the sum of ten thousand (10,000) dollars, conditioned for the faithful performance of his duty as secretary of such commission, which bond shall be filed with the secretary of state. The commission shall have authority to employ and fix the compensation for such other employés as it may find necessary to the proper performance of its duties, subject to the approval of the governor of the State.

The commissioners shall be furnished with a suitable office and all necessary office supplies. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the district courts of the State.

All the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employés under their order, in making any investigation in any other place than the city of St. Paul, shall be allowed and paid out of the state treasury on the presentation of itemized vouchers therefor, approved by the chairman of the commission and the state auditor.

SEC. 20. That the sum of fifteen thousand (15,000) dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending July thirty-first (31st), eighteen hundred and eighty-eight (1888), and the sum of fifteen thousand (15,000) dollars is hereby appropriated for the use and purposes of this act for the fiscal year ending July thirty-first (31st), eighteen hundred and eighty-nine (1889).

SEC. 21. That all acts and parts of acts inconsistent herewith are hereby repealed; *Provided*, That the provisions of this act shall apply to and govern the existing railroad and warehouse commissioners appointed by virtue of an act approved March fifth (5th), eighteen hundred and eighty-five (1885), who are hereby clothed with the powers and charged with the duties and responsibilities of this act, granted to and imposed upon the railroad and warehouse commissioners of the State of Minnesota.

SEC. 22. This act shall take effect and be in force from and after its passage.

Approved March 7th, 1887.

commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that in case the carrier shall neglect for ten days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the act shall neglect to publish or file its schedules of charges, or to carry out such recommendation made and published by the commission, it shall be subject to a writ of mandamus "to be issued by any judge of the Supreme Court or of any of the District Courts" of the State, on application of the commission, to compel compliance with the requirements of section 8 and with the recommendation of the commission, and a failure to comply with the requirements of the mandamus shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the State until it shall have complied with the requirements of section 8 and with the recommendation of the commission, and for any wilful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs and after due deliberation thereon, as may be just.

On the 22d of June, 1887, The Boards-of-Trade Union of Farmington, Northfield, Faribault, and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad, for carriage or shipment from Owatonna, Faribault, Dundas, Northfield, and Farmington,

to the cities of St. Paul and Minneapolis, all of those places being within the State of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield and Farmington to St. Paul and Minneapolis, which were unequal and unreasonable, in that it charged four cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and three cents per gallon from Faribault, Dundas, Northfield and Farmington, to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same and adopt such rates and charges as the commission should declare to be equal and reasonable.

A statement of the complaint thus made was forwarded by the commission, on the 29th of June, 1887, to the railway company, and it was called upon by the commission, on the 6th of July, 1887, to satisfy the complaint or answer it in writing at the office of the commission in St. Paul, on the 13th of July, 1887.

On the 30th of June, 1887, Mr. J. F. Tucker, the assistant general manager of the railway company, addressed a letter from Milwaukee to the secretary of the commission, saying: "I have your favor of the 29th, with complaint as to milk rates being unreasonable and unequal. They may be unequal if unreasonable. They are unreasonably low for the service performed — by passenger train — and are 25 per cent less than the same commodity is charged into New York, with longer distances and hundred times larger volume in favor of New York. I am frank to say it is hard to appreciate complaints from boards of trade that one-tenth of a cent per gallon on milk handled on passenger train one mile is unreasonable. With what is the comparison made that enables such a conclusion? It's not first-class rates by freight train, and was made low to encourage the trade, under the hope and promise that, when the trade were fostered, it would be advanced. This, as usual, has been forgotten."

On the 13th of July, 1887, at the office of the commission

in St. Paul, the company appeared by J. A. Chandler, its duly authorized attorney, and The Boards-of-Trade Union by its attorney, and the commission proceeded to investigate the complaint. An investigation of the rates charged by the company for its services in transporting milk from Owatonna, Faribault, Dundas, Northfield and Farmington, to St. Paul and Minneapolis, was made by the commission, and it found that the charges of the company for transporting milk from Owatonna and Faribault to St. Paul and Minneapolis were three cents per gallon in ten-gallon cans; that such charges were unequal and unreasonable; and that the company's tariff of rates for transporting milk from Owatonna and Faribault to those cities, filed and published by it as provided by chapter 10 of the Laws of 1887, was unequal and unreasonable; and the commission declared that a rate of $2\frac{1}{2}$ cents per gallon in ten-gallon cans was an equal and reasonable rate for such services.

On the 4th of August, 1887, the commission made a report in writing, which included the findings of fact upon which its conclusions were based, its recommendation as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and also a specification of the rates and charges which it declared to be equal and reasonable. This paper was in the shape of a communication, dated at St. Paul, August 4, 1887, signed by the secretary of the commission and addressed to the company. It said: "It appearing from your schedule of rates and charges for the transportation of milk over and upon the Iowa and Minnesota Division of your road, that you charge, collect, and receive for the transportation of milk over and upon said line from Owatonna and Faribault to the cities of St. Paul and Minneapolis three cents per gallon, in ten-gallon cans, and from Dundas, Northfield and Farmington to said cities of St. Paul and Minneapolis two and one-half cents per gallon, in cans of like capacity, and complaint having been made that such rates and charges are unequal and unreasonable, and that the services performed by you in such transportation are not reasonably worth the said sums charged therefor; and this commission having there-

upon, pursuant to the provisions of section eight of an act entitled 'An act to regulate common carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers,' approved March 7, 1887, examined the cause and reasonableness of said complaint, and finding, pursuant to subdivision (*e*) of said section, that your said tariff of rates, so far as appertains to the transportation of milk to the cities of St. Paul and Minneapolis from the other places above named, and insomuch as said tariff provides for or requires the charging or collection of a greater compensation than two and one-half cents per gallon, is unreasonable and excessive. Therefore said commission recommends and directs that you, the said Chicago, Milwaukee & St. Paul Railway Company, shall alter and change your said schedule by the adoption and substitution of a rate not to exceed two and one-half cents per gallon for the services aforesaid from the cities of Owatonna and Faribault, or either of them, to said St. Paul and Minneapolis. The commission, as at present advised, approves of the custom and arrangement which, it is informed, has been adopted and is now in use by the Minnesota & Northwestern R. R. Co., of collecting two and one-half cents per gallon on all milk transported by it, regardless of distance; but this expression of opinion is no part of the decision, notice, or order in this case."

This report was entered of record, and a copy furnished to the Boards-of-Trade Union, and a copy was also delivered, on the 4th of August, 1887, to the company, with a notice to it to desist from charging or receiving such unequal and unreasonable rates for such services. The commission thus informed the company in writing in what respect such tariff of rates and charges was unequal and unreasonable, and recommended to it in writing what tariff should be substituted therefor, to wit, the tariff so found equal and reasonable by the commission.

The company neglected and refused, for more than ten days after such notice, to substitute or adopt such tariff of charges as was recommended by the commission. The latter

thereupon published the tariff of charges which it had declared to be equal and reasonable, and caused it to be posted at the station of the company in Faribault on the 14th of October, 1887, and at all the regular stations on the line of the company in Minnesota prior to November 12, 1887, and in all things complied with the statute.

The tariff so made, published and posted, was dated October 13, 1887, and was headed: "Chicago, Milwaukee and St. Paul Railway Company. (Iowa and Minnesota division.) Freight Tariff on Milk from Owatonna and Faribault to St. Paul and Minneapolis, taking effect October 15, 1887;" and prescribed a charge of 2½ cents per gallon in ten-gallon cans from either the Owatonna station or the Faribault station to either St. Paul or Minneapolis, to be the legal, equal and reasonable maximum charge and compensation for such service, and declared that the same was in force and effect in lieu and place of the charges and compensation theretofore demanded and received therefor by the company.

On the 6th of December, 1887, the commission, by the attorney general of the State, made an application to the Supreme Court of the State for a writ of mandamus to compel the company to comply with the recommendation made to it by the commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and Minneapolis, and to adopt the rates declared by the commission to be equal and reasonable. The application set forth the proceedings hereinbefore detailed; that the company had refused to carry out the recommendation so made, published and posted by the commission; that it continued to charge three cents per gallon for the transportation of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis; that said charge was unequal, unreasonable and excessive; that 2½ cents per gallon for the transportation by it of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis was the maximum reasonable charge for the service; that any rate therefor in excess of 2½ cents per gallon in ten-gallon cans was unequal, unreasonable and excessive; that three cents per gallon in ten-gallon cans was a higher rate

than was charged for the same distances on passenger trains by any express company or by any other railroad company in Minnesota, engaged in transporting milk to St. Paul or Minneapolis; that $2\frac{1}{2}$ cents per gallon in ten-gallon cans was the highest rate charged for like distances on passenger trains by any such company; that the milk transported by the company to St. Paul and Minneapolis, over its Iowa and Minnesota division, (extending from Calmar, in Iowa, to LeRoy, in Minnesota, and from LeRoy, through Owatonna and Faribault, to St. Paul and Minneapolis,) large quantities of which milk were shipped from Faribault, was so transported by the company on a passenger train which ran daily from Owatonna to St. Paul and Minneapolis; and that the company, by means of such excessive charges, subjected the traffic in milk at Faribault and Owatonna to undue and unreasonable prejudice and disadvantage.

Thereupon, an alternative writ of mandamus was issued by the court, returnable before it on the 14th of December, 1887.

On the 23d of December, 1887, the company filed its return to the alternative writ, in which it set up:

(1) That it was not competent for the legislature of Minnesota to delegate to a commission a power of fixing rates for transportation, and that the act of March 7, 1887, so far as it attempted to confer upon the commission power to establish rates for the transportation of freight and passengers, was void under the constitution of the State;

(2) That the company, as the owner of its railroad, franchises, equipment and appurtenances, and entitled to the possession and beneficial use thereof, was authorized to establish rates for the transportation of freight and passengers, subject only to the provision that such rates should be fair and reasonable; that the establishing of such rates by the State against the will of the company was *pro tanto* a taking of its property, and depriving it thereof, without due process of law, in violation of section 1 of Article 14 of the Amendments to the Constitution of the United States; and that the making of the order of October 13, 1887, was *pro tanto* a

taking, and depriving the company, of its property without due process of law, in violation of said section 1, and therefore void and of no effect;

(3) That the rate of three cents per gallon as a freight for carrying milk in ten-gallon cans on passenger trains from Owatonna and Faribault respectively to St. Paul and Minneapolis was a reasonable, fair and just rate; that the rate of 2½ cents per gallon, in ten-gallon cans, so fixed and established by the commission, was not a reasonable, fair or just compensation to the company for the service rendered; and that the establishing of such rate by the commission, against the will of the company, was *pro tanto* a taking of its property without due process of law, in violation of said section 1.

The case came on for hearing upon the alternative writ and the return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the commission was reasonable, fair and just. The court denied the application for a reference, and rendered judgment in favor of the relator and that a peremptory writ of mandamus issue. An application for a reargument was made and denied. The terms of the peremptory writ were directed to be, that the company comply with the requirements of the recommendation and order made by the commission on the 4th of August, 1887, and change its tariff of rates and charges for the transportation of milk from Owatonna and Faribault to St. Paul and Minneapolis, and substitute therefor the tariff recommended, published and posted by the commission, to wit, the rate of 2½ cents per gallon of milk in ten-gallon cans from Owatonna and Faribault to St. Paul and Minneapolis, being the rates published by the commission and declared to be equal and reasonable therefor. Costs were also adjudged against the company. To review this judgment, the company brought a writ of error.

Mr. John W. Cary for plaintiff in error.

I. The court erred in holding that the legislature of Minnesota, either by positive statute or acting through a railroad

commission, is authorized to make, fix and establish the rates and charges for the transportation of persons and property over lines of railway owned by this company and in denying the right of the company, under the Constitution of the United States, to make, fix and establish its rates and charges over its railway, subject, only, to the provision that such rates and charges shall be fair, just and reasonable:

First. Because the exercise of such a power would impair the obligation of the contract contained in the charter under which said road was constructed.

The charter granted in 1856 was a contract between the Territory of Minnesota and the company organized by said charter; and the State of Minnesota, succeeding to the Territory on its admission to statehood, was subject to its provisions.

The road was constructed in pursuance of the charter. The plaintiff in error has succeeded to the ownership of the property and all the rights, franchises and privileges granted by the charter under the laws of the State of Minnesota. Any legislation of the State impinging upon the rights, franchises and privileges granted thereby, is an impairment of the obligation of the contract so made, which the plaintiff in error may lawfully resist.

There is no provision in the charter or in any general statute reserving to the Territory or State of Minnesota the right to alter, amend or repeal said charter, and it remains in full force according to the terms of the grant.

The language in the *Dartmouth College Case*, 4 Wheat. 518, conferring upon the board of trustees power to fill vacancies in their own number, is no more explicit than is the language of this charter; yet this court held that it was a contract that could not be violated or impaired by the legislature fifty years subsequently, and held it an affirmative grant of power for all time, that could not be interfered with.

The cases cited by the Chief Justice in *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, on pages 326 and 327, are not authorities to justify the court in holding the language of the charter in this respect not a contract.

Argument for Plaintiff in Error.

The case of *Providence Bank* v. *Billings*, 4 Pet. 514, was a contention, that a state bank chartered by a legislature was not subject to taxation. There was no provision of any kind in the charter upon that subject, and it was claimed that such an institution could not be taxed on general principles.

Charles River Bridge v. *Warren Bridge*, 11 Pet. 419, was a contention that the legislature, having chartered one bridge, was not authorized to charter another over Charles River, between Boston and Cambridge, because it would injure the property interests of the first. There was no claim that the first charter contained any such restriction, or any affirmative grant that it should have a monopoly of the business.

In *Minot* v. *Philadelphia, Wilmington & Baltimore Railroad*, 18 Wall. 206, the court held, that the provision of the charter, requiring the railroad company to pay annually into the treasury of the State a tax of one quarter of one per cent on its capital stock, without any words indicating the intent of the legislature, that such payment should be in lieu of all other taxation, and that no further or different tax should be subsequently levied for any purpose, was not sufficient to show a contract binding the State not to levy any other taxes for any other purpose.

In *Bailey* v. *Magwire*, 22 Wall. 215, the Missouri Pacific Railroad was exempted from taxation until completed, and it was provided that after its completion, it should be subject to taxation at the rate assessed by the State on other real and personal property of like value. The contention was that under this statute only a state tax could be levied upon the road; but the court held that the provision had no such effect, that it could be taxed as other property for all purposes.

In *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659, the majority of the court held, that the charter of a company authorized to carry on business at a certain place did not allow it to carry on and continue that business after it became a nuisance.

In *Newton* v. *Commissioners*, 100 U. S. 548, this court held, that the term "permanently established," used in statutes of Western States, relating to establishing county seats, did not

mean that the county seat where it was so "permanently established" should forever remain, but only that it was permanently instead of temporarily established as provided in said statutes.

In no one of these cases, unless it be that of the *Fertilizing Company* in 97 U. S., was there any affirmative grant of power to the company by the legislature in question. They were cases in which it was claimed that by inference or construction such affirmative grant or contract was implied, and in the case of the Fertilizing Company, Mr. Justice Swayne, on page 666, states the rule as follows: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely to the corporation. Nothing is to be taken as conceded except what is given in unmistakable terms or by an implication equally clear. *The affirmative must be shown.* Silence is negation and doubt is fatal to the claim."

Applying this most stringent rule of construction to this charter, and it must still be held that it affirmatively creates a contract between the Territory and the company.

Second. The judgment of the court violates the natural right which belongs to every one to fix the price of his services and of his property or its use. Under our form of constitutional government it has ever been held to be the unquestionable right of every freeman to have a perfect and entire property in his goods and estate. 1 Kent Com. 613.

As was said by Lord Ellenborough in *Aldnut* v. *Inglis*, 12 East, 527, in speaking of the right of an owner to charge an unreasonable amount for the use of his warehouse: "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it."

In the case of *The State Freight Tax*, 15 Wall, 232, 277, 278, Mr. Justice Strong, in delivering the opinion of the court, says: "We concede the right and power . . . of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attri-

bute of ownership. . . . The right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor."

The State has no more right to assume the control or management of one of these classes of property than it has of the other, and the right to fix the price of the use of each, inheres in the owner thereof the same in one case as the other, except as above stated, and within the bounds of reasonable compensation, the right of the owner to fix the charges for the use of property clothed by law with a public interest cannot be questioned any more than his right to property not so clothed.

By the authorities cited in the opinion of the Chief Justice in *Munn* v. *Illinois*, 94 U. S., it appears, that the only limitation upon the right of the owner of this sort of property to make his own rates was, that he should charge only a reasonable price for the use of such property, and no claim was made that the legislature had a right to fix such charges. But see *Aldnut* v. *Inglis*, 12 East, 527; *Bolt* v. *Stennett*, 8 T. R. 606.

The *Granger Cases*, so called, reported in 94 U. S., arose on statutes passed in Illinois in 1873, and in Wisconsin, Iowa and Minnesota in 1874. The Wisconsin and Iowa acts were statutes fixing a maximum tariff. The Illinois and Minnesota statutes provided that commissioners should make schedules which should be *prima facie* reasonable rates.

The particular questions involved in the present record aside from the general question of power of the legislature, were not in any of the cases then before the court, except that of *Chicago, Milwaukee &c. Railroad Company* v. *Ackley*, which, it would appear from the opinion, received but slight attention from the court.

Fully admitting the right of the legislature to take such proper action as may be necessary to secure to the people reasonable charges for transportation thereon, we deny its right to arbitrarily and finally fix or determine such charges by positive statute, and most respectfully ask this court to again review the decisions made in the cases of Munn, Peik and Ackley in this respect.

Argument for Plaintiff in Error.

That the police power of the State, founded upon the maxim *sic utere tuo ut alienum non laedas*, is proper authority for statutes regulating the management, operation and control of a railroad so far as it affects the protection of the lives, limbs, comfort, safety and quiet of all persons, and the protection of all property in the State, is admitted.

But we deny that this power gives to the legislature the right to limit or fix the tolls or charges for transportation which the company would otherwise have the right to make.

Thorpe v. *Rutland & Burlington Railroad Co.*, 27 Vermont, 140; *S. C.* 62 Am. Dec. 625; Hale's De Portibus Maris: Cooley's Const. Lim. 88, 91; *People* v. *Draper*, 15 N. Y. 532; *Wynehamer* v. *People*, 13 N. Y. 378; *Aldnut* v. *Inglis*, *ubi sup.*; Tiedman's Limitation of Police Powers, 231; *Parker* v. *Metropolitan Railway*, 109 Mass. 506; 1 Bl. Com. 160; *Newland* v. *Marsh*, 19 Illinois, 376; *Ervine's Appeal*, 16 Penn. St. 256; *S. C.* 55 Am. Dec. 499.

II. The court erred in holding that the schedules of rates fixed by said commission were final and conclusive as to what were lawful, equal and reasonable rates, and that they "are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable," instead of simply holding them as advisory and *prima facie* or presumptively equal, and subject to review by the court.

III. The court erred in holding that the rate fixed by said commission, which is not a fair or reasonable rate or just compensation to the owner for the service required, was a lawful rate which the owner was bound to submit to and obey, and in granting a peremptory writ of mandamus compelling the owner to transport freight over its line of railway at the rate so fixed.

IV. The court erred in holding that the State of Minnesota, since the passage by Congress of an act entitled "An Act to regulate Commerce," approved February 4, 1887, has the power to regulate, fix, or establish the tariff rates for the transportation of freight and passengers over the lines of the Chicago, Milwaukee & St. Paul Railway, it being an interstate railway engaged in interstate traffic.

Argument for Defendant in Error.

Mr. Moses E. Clapp and *Mr. H. W. Childs*, for defendant in error, after discussing a question concerning the jurisdiction of the court below, continued:

It remains to inquire whether the law in question, as interpreted by the Supreme Court of Minnesota, is in conflict with the Fourteenth Amendment to the Federal Constitution, and in considering this law, as interpreted by the state court we should keep in mind that, while the Supreme Court of the State held that the reasonableness of the rates as fixed by the commission, could not be the subject of judicial review, yet it did not leave the commission an irresponsible body, answerable in no case to the courts, but on the contrary limited its power to the exercise of an honest judgment.

It will relieve the discussion of this case from some embarrassment, if it is borne in mind that, in the case made by plaintiff in error to the alternative writ, no allegations are made that the enforcing the rate established by the board would so affect the earnings of the road as to impair its ability to meet any of its obligations or to seriously affect its revenues.

Neither is it claimed by plaintiff in error that it is protected by any express contract or charter exemption from legislative interference in the matter of fixing rates, the company contenting itself as above stated, with the allegation that the commission "unjustly, unreasonably and oppressively" fixed the rate, and that the establishment of such rate was a *pro tanto* taking of the property of the plaintiff in error.

This case then involves a determination of the question, can the legislature prescribe what is a reasonable rate for transportation of freight and passengers by a common carrier, when unrestrained by any provision in the charter of the company?

In view of the repeated adjudications of this court sustaining the right of legislatures to establish the rates which common carriers may charge, and to declare by legislative action what are reasonable rates, we confess to some hesitation in entering upon an extended discussion of the question.

In *Munn* v. *Illinois*, 94 U. S. 113, 133, 134, in the opinion of

the late Chief Justice Waite, is to be found a history of legislative control of property clothed with public interest, as well as also an exhaustive discussion of the principles upon which such legislative control rests.

In the consideration of the questions involved in that case, the court, after reviewing the history of the subject and supporting the position contended for by ample and pertinent illustrations, says:

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

"As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it, the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than the other. Rights of property which have been created by the common law cannot be taken away without due process; but

the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge 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.

"We know that this is a power which may be abused; but this is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

See, also, *Chicago, Burlington & Quincy Railroad* v. *Iowa*, 94 U. S. 155; *Peik* v. *Chicago & Northwestern Railway*, 94 U. S. 164; *Chicago, Milwaukee & St. Paul Railroad* v. *Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad* v. *Blake*, 94 U. S. 180.

In *Ruggles* v. *Illinois*, 108 U. S. 526, 531, the court, citing and referring to the *Granger Cases*, says: "It was determined that a 'State may limit the amount of charges by railroad companies for fares and freights unless restrained by some contract in the charter.' . . . The company by its original charter was authorized to transport passengers and property and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in *Munn* v. *Illinois*, 94 U. S. 113, and the several railroad cases decided at the same time, require the company to carry at reasonable rates and leave the legislature at liberty to fix the maximum of what would be reasonable."

Discussing the effect of a provision of its charter, as amended, which empowered the board of directors to fix rates, the court says, page 533: "When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the State, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-

laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the State. This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common law limitation of reasonableness; for in the absence of a statute or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that when a maximum is so established the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws." Instead of *Ruggles* v. *Illinois* modifying the rule laid down in the *Granger Cases*, we insist that it is a plain affirmance of that rule.

Another case which it was urged modified the rule in the *Granger Cases* is the case of *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307; after referring to the *Granger Cases*, the court says:

"From what has been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defence that such tariff so fixed is unjust.'"

The principles here expressed will doubtless be pressed upon the court with great force, it being insisted that in the case at bar the rates have been fixed, but it may be said in reply that in nearly all the *Granger Cases*, the court was called upon to pass upon a law which had in fact fixed a rate.

Argument for Defendant in Error.

However, as stated in the outset, the return to the writ of mandamus in the case at bar contains no allegations that could support a claim that the operation of the law would require the carrier to transport persons or property without reward, or would amount to a taking of private property for public use without just compensation. The most that is alleged is that the rate so established is unjust and unreasonable, and the statement in general terms that it amounts to a *pro tanto* taking of the property of the company without due process of law. But as was said by the court in the case last cited:

"General statutes regulating the use of railroads in a State, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation, owning or operating a railroad within the State, of its property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws." *Munn* v. *Illinois*, 94 U. S. 113, 134, 135; *Railroad Co.* v. *Richmond*, 96 U. S. 521, 529; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354.

In *Dow* v. *Beidelman*, 125 U. S. 680, the court says, concerning a law of Arkansas fixing a maximum rate for carrying passengers: "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."

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, the principle contended for again received judicial sanction.

Thus we have an unbroken line of decisions of this court commencing with the case of *Munn* v. *Illinois*, decided in 1876, and terminating with the case of *Georgia Railroad & Banking Co.* v. *Smith*, decided in 1888, to support the proposition that when unrestrained by contract or charter stipulation, the legislature of a State may determine what is a just

and reasonable rate for a common carrier to charge for the transportation of freight and passengers; that the question of the reasonableness of the rate is a question for legislative determination, and when so determined, ceases to be the subject of judicial inquiry.

Mr. W. C. Goudy closed for appellant.

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

The opinion of the Supreme Court of Minnesota is reported in 38 Minnesota, 281. In it the court in the first place construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision.

It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and, hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

The Chicago, Milwaukee and St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to LeRoy, in Minnesota, and from Leroy, through Owatonna and Faribault, to St. Paul and Minneapolis, the line from Calmar to St. Paul and Minneapolis being known as the "Iowa and Minnesota Division," and being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the Territory of Minnesota to the Minneapolis and Cedar Valley Railroad Company, by an act approved March 1, 1856, Laws of 1856, c. 166, p. 325, to construct a railroad from the Iowa line, at or near the crossing of said line by the Cedar River, through the valley of Strait River to Minneapolis. Section 9 of that act provided that the directors of the corporation should have power to make all needful rules, regulations and by-laws touching "the rates of toll and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the Territory of Minnesota, or adjoining States or Territories, and should have power to consolidate its stock with any other company or companies.

By an act passed March 3, 1857, c. 99, (11 Stat. 195,) the Congress of the United States made a grant of land to the Territory of Minnesota to aid in constructing certain railroads. By an act of the legislature of the Territory, approved May 22, 1857, (Laws of 1857, extra session, p. 20,) a portion of such grant was conferred upon the Minneapolis and Cedar Valley

Railroad Company. Subsequently, in 1860, the State of Minnesota, by proper proceedings, became the owner of the rights, franchises and property of that company. By an act approved March 10, 1862, c. 17, (Special Laws of 1862, p. 226,) the State incorporated the Minneapolis, Faribault and Cedar Valley Railroad Company, and conveyed to it all the franchises and property of the Minneapolis and Cedar Valley Railroad Company which the State had so acquired; and by an act approved February 1, 1864, (Special Laws of 1864, p. 164,) the name of the Minneapolis, Faribault and Cedar Valley Railroad Company was changed to that of the Minnesota Central Railway Company. That company constructed the road from Minneapolis and St. Paul to LeRoy, in Minnesota; and the road from LeRoy to Calmar, in Iowa, and thence to McGregor, in the latter State, was consolidated with it. In August, 1867, the entire road from McGregor, by way of Calmar, LeRoy, Austin, Owatonna and Faribault, to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee and St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis and Cedar Valley Railroad Company.

It is contended for the railway company that the State of Minnesota is bound by the contract made by the Territory in the charter granted to the Minneapolis and Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates of toll; that any legislation by the State infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the Territory or to the State the right to alter or amend the charter; and that no subsequent legislation of the Territory or of the State could deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable.

But we are of opinion that the general language of the ninth section of the charter of the Minneapolis and Cedar Valley Railroad Company cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the State.

It was held by this court in *Pennsylvania Railroad Co.* v. *Miller*, 132 U. S. 75, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the State, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject matter involved; and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the State parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company.

In *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 325, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at, that the right of a State reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which grants to a railroad company the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation," does not deprive the State of its power, within the limits of its general authority, as controlled by the Constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said (p. 331): "From what has thus been said, it is not to be inferred that this power of limitation or

regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

There being, therefore, no contract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be reëxamined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and, therefore, in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United

States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation.

In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.

It is provided by section 4 of article 10 of the constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural and other productions and manufactures on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the constitution of Minnesota.

The issuing of the peremptory writ of mandamus in this case was, therefore, unlawful, because in violation of the Constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the Supreme Court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court.

In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a mandamus, if the

court should adhere to its opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and

The judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May 4, 1888, awarding a peremptory writ of mandamus in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.

MR. JUSTICE MILLER concurring.

I concur with some hesitation in the judgment of the court, but wish to make a few suggestions of the principles which I think should govern this class of questions in the courts. Not desiring to make a dissent, nor a prolonged argument in favor of any views I may have, I will state them in the form of propositions.

1. In regard to the business of common carriers limited to points within a single State, that State has the legislative power to establish the rates of compensation for such carriage.

2. The power which the legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the legislature of Minnesota by the act now under consideration.

3. Neither the legislature nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established

either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

5. But until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

8. But in the present case, where an application is made to the Supreme Court of the State to compel the common carriers, namely, the railroad companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void.

Mr. Justice Bradley (with whom concurred Mr. Justice Gray and Mr. Justice Lamar) dissenting.

I cannot agree to the decision of the court in this case. It practically overrules *Munn* v. *Illinois*, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is preëminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so declared by statute; implied, by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will.

Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: When the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law, (which is the same thing,) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there.

It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and

freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. The assertion of jurisdiction by this court makes it the duty of every court of general jurisdiction, state or federal, to entertain complaints against the decisions of the boards of commissioners appointed by the States to regulate their railroads; for all courts are bound by the Constitution of the United States, the same as we are. Our jurisdiction is merely appellate.

The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies, — a question of more or less. In the one case the company charged three cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to $2\frac{1}{2}$ cents. In the other case the company charged $1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and $1.50 for loaded cars; and the commission decided that $1.00 per car was a sufficient charge in all cases. The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The state court held that the legislature had the right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right, and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through

the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command, — just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

In the case of *Davidson* v. *City of New Orleans*, 96 U. S. 97, we decided that the appointment of a board of assessors for assessing damages was not only due process of law, but the proper method for making assessments to distribute the burden of a public work amongst those who are benefited by it. No one questions the constitutionality or propriety of boards for assessing property for taxation, or for the improvement of streets, sewers and the like, or of commissions to establish county seats, and for doing many other things appertaining to the administrative management of public affairs. Due process of law does not always require a court. It merely requires such tribunals and proceedings as are proper to the subject in hand. In the *Railroad Commission Cases*, 116 U. S. 307, we held that a board of commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. It seems to me, therefore, that the law of Minnesota did not prescribe anything that was not in accordance with due process of law in creating such a board, and investing it with the powers in question.

It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect — courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose.

If not in terms, yet in effect, the present cases are treated as if the constitutional prohibition was, that no state shall take private property for public use without just compensation, — and as if it was our duty to judge of the compensation. But there is no such clause in the constitution of the United States. The Fifth Amendment is prohibitory upon the federal government only, and not upon the state governments. In this matter, — just compensation for property taken for public use, — the states make their own regulations, by constitution, or otherwise. They are only required by the federal Constitution to provide "due process of law." It was alleged in *Davidson v. New Orleans*, 96 U. S. 97, that the property assessed was not benefited by the improvement; but we held that that was a matter with which we would not interfere; the question was, whether there was due process of law. p. 106. If a state court renders an unjust judgment, we cannot remedy it.

I do not mean to say that the legislature, or its constituted board of commissioners, or other legislative agency, may not so act as to deprive parties of their property without due process of law. The Constitution contemplates the possibility of such an invasion of rights. But, acting within their jurisdiction, (as in these cases they have done,) the invasion should be clear and unmistakable to bring the case within that category. Nothing of the kind exists in the cases before us. The legislature, in establishing the commission, did not exceed its power; and the commission, in acting upon the cases, did not

exceed its jurisdiction, and was not chargeable with fraudulent behavior. There was merely a difference of judgment as to amount, between the commission and the companies, without any indication of intent on the part of the former to do injustice. The board may have erred; but if they did, as the matter was within their rightful jurisdiction, their decision was final and conclusive unless their proceedings could be impeached for fraud. Deprivation of property by mere arbitrary power on the part of the legislature, or fraud on the part of the commission, are the only grounds on which judicial relief may be sought against their action. There was, in truth, no deprivation of property in these cases at all. There was merely a regulation as to the enjoyment of property, made by a strictly competent authority, in a matter entirely within its jurisdiction.

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the Constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers that ordinarily belong to the legislative branch of government, they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.

I am authorized to say that Mr. Justice Gray and Mr. Justice Lamar agree with me in this dissenting opinion.

MINNEAPOLIS EASTERN RAILWAY COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 1113. Argued January 13, 14, 1890.—Decided March 24, 1890.

The case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *State of Minnesota*, *ante*, 418, affirmed, on substantially the same state of facts.

The statutory provisions existing in the present case as to the fixing by the railroad company of reasonable charges for the transportation of property, did not constitute such a contract with it, as to deprive the legislature of its power to regulate those charges.

THIS was argued with *Chicago, Milwaukee & St. Paul Railway Co.* v. *State of Minnesota*, *ante*, 418, the two causes presenting substantially the same questions. The case is stated in the opinion.

Mr. W. C. Goudy and *Mr. James H. Howe* for plaintiff in error. *Mr. W. H. Norris* filed a brief for same.

Mr. Moses E. Clapp and *Mr. H. W. Childs*, for defendant in error, urged the same considerations as in the previous case, and further, on the point on which the opinion turns, as follows:

The act in question does not amount to taking property without due process of law.

We do not think it necessary to follow counsel for plaintiff in error in their discussion of what is meant by due process of law. Stress is laid upon the fact that, by the terms of the law under consideration, no notice was given of the contemplated action of the commission. We think counsel have confounded an attempted taking of property by the State with the simple exercise of a legislative function in the enactment of a law.

While the order in question was made by the commission, yet under the construction of the law placed upon it by the

Supreme Court of Minnesota, which construction is binding upon this court, the act of establishing the rate in question is a legislative act. In fact it is upon this theory that it had to be sustained. The rate as fixed must be considered as fixed by the legislature and no notice was necessary. Had the legislature by express terms declared that the plaintiff should charge no rate above one dollar per car, it would not be suggested that such an act would be void because the company had received no notice of its contemplated passage. If a legislature may regulate rates, and in doing so act through the medium of a commission, a notice of any contemplated action by the commission would no more be required, unless required by the terms of the act itself, than notice of the probable passage of the act.

The operation of the act would not amount to a taking of private property without compensation.

That this would be the effect of any and all regulations is, it seems to us, a sufficient answer in itself. Any regulation that, in the slightest degree, reduces the earnings of a common carrier must then be said to amount to a taking of property without compensation; but this court has affirmed the right to regulate rates when unrestrained by special charter, and until the case at bar, the right has not been questioned. The right to regulate necessarily involves the right to reduce the income of the company.

In *Railroad Commission Cases*, 116 U. S. 307, the court says: "General Statutes, regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation, owning or operating a railroad within the State, of its property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, nor take away from the corporation the equal protection of the laws. *Munn* v. *Illinois*, 94 U. S. 113, 134, 135; *Railroad Company* v. *Richmond*, 96 U. S. 521, 529; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 354."

In *Georgia Banking Co.* v. *Smith*, 128 U. S. 174, 179, the

court says, "It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 325, 331; *Dow* v. *Beidelman*, 125 U. S. 680."

Mr. Justice Blatchford delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Minnesota, to review its judgment awarding a peremptory writ of mandamus against the Minneapolis Eastern Railway Company, commanding it to comply with the requirements of the recommendation and order made by the Railroad and Warehouse Commission of the State of Minnesota, on the 2d of August, 1887, and to change its tariff of rates and charges for handling and switching any car over the lines of its railway in the city of Minneapolis, regardless of the distance or the character of the freight in such car, and to substitute therefor the tariff recommended, published and posted by said commission, to wit, the rate of $1.00 for handling and switching any car over its line of railway in said city, regardless of the distance or the character of the freight in such car, being the rate published by the commission and declared to be equal and reasonable. The case arose under the same statute considered in the case of *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, just decided, *ante*, 418.

The Minneapolis Eastern Railway Company was and is a railroad corporation duly created and organized under the general railroad law of the State of Minnesota, operating one or more lines of railway in the city of Minneapolis in that State, and a common carrier engaged in transporting freight

and property by rail within the limits of that city, and more particularly engaged in the business of handling and switching cars over its line or lines of railroad within said limits, and, as such common carrier, enjoying the right to conduct its business within the State of Minnesota, subject to the provision of section 4, of article 10 of the constitution of that State, and bound to carry minerals, agricultural and other productions and manufactures on equal and reasonable terms. Prior to the 7th of July, 1887, the company had and maintained in force a schedule of its tariff of rates within the city of Minneapolis, as follows: For handling and switching empty cars over its lines of railway within the limits of the city, $1.25 per car; for handling and switching loaded cars over its lines of railway within the limits of the city, $1.50 per car; and prior thereto said schedule of rates had been published by the company.

On the 7th of July, 1887, the Railroad Commission constituted by said act made an order which was served upon the company, and on the 2d of August, 1887, made a further order, a notice of which was served on the company in the following terms:

"Whereas, at a regular meeting of the Railroad and Warehouse Commission of the State of Minnesota, held at the office of said commission, in the city of St. Paul, in said state, on the 7th day of July last, and pursuant to section 8 of an act entitled 'An act to regulate common carriers, and creating the Railroad and Warehouse Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers,' approved March 7th, 1887, a notice of order was then and there made and issued by said commission and duly served upon you, of which the following is a copy, namely:

"'Whereas, all railroad companies owning or operating terminal or switching facilities at or within the city of Minneapolis, in said State, with the exception of the Chicago, Milwaukee and St. Paul Railway Company, pursuant to subdivision (*d*) of section 8 of an act entitled "An act to regulate common carriers, and creating the Railroad and Warehouse

Commission of the State of Minnesota, and defining the duties of such commission in relation to common carriers," approved March 7th, 1887, have filed with this commission copies of their several schedules of rates and charges for switching cars on their respective tracks at and within said city; and whereas it appears from said schedule that the rates and charges made by said companies vary from twenty-five cents per car for empty cars to two dollars per car for loaded cars; and whereas said commission, after due and careful inquiry and consideration, do find that each and every charge in excess of one dollar per car for switching within the limits of said city of Minneapolis is unreasonable and an excessive compensation for the service performed: Now, therefore, it is ordered and determined by this commission, pursuant to the authority in them vested by the aforesaid legislative act, that all such schedules be changed by striking therefrom all charges or rates in excess of one dollar per car for the switching or transfer thereof and insert in room of the words or figures stricken out the words "one dollar" or the appropriate sign and figure therefor. It is the object and purpose of this order to establish one dollar as the maximum charge for the switching or transfer of any car at or within the limits of said city without regard to distance or the kind of goods or merchandise with which the car so switched or transferred may be loaded;'

"And whereas, by the subsequent action of said commission, of which said action you were duly notified by order of the commission, the said order or notice should not take effect or be considered to be of binding force upon you until the fifteenth day of said month;

"And whereas you have neglected and refused for more than ten days after and since the fifteenth day of July last to substitute such tariff of rates or charges or to adopt the same as recommended and directed by said commission, as in and by said notice and order you were recommended and required to do, and do still so neglect and refuse:

"Now, therefore, we, the said commission, do hereby publish and declare the said tariff of rates, namely, one dollar per

car for the switching or transfer of any loaded car by you within the limits of the said city of Minneapolis, as and to be the legal, equal and reasonable charge for such switching or transfer of cars by you, and that the same is now in force and effect in place of the charges and rate of compensation by you heretofore charged for such service.

"You, the said railway company, your agents and employés, will act accordingly or answer for a violation of the section and act to which reference is above made."

On the 10th of January, 1889, the commission, by the attorney general of the State made application in writing to the Supreme Court of the State to compel the company to comply with the recommendations made to it by the commission to change its tariff of rates for handling or switching cars within the city of Minneapolis, and to substitute therefor the tariff recommended by the commission, and to adopt the rates declared by the commission to be equal and reasonable for such services. The application set forth the schedule or tariff of rates so maintained by the company prior to the 7th of July, 1887, for switching empty and loaded cars over its lines of railway within the limits of the city of Minneapolis, the finding of the commission, on the 7th of July, 1887, that such schedule of rates was unequal and unreasonable, and its order establishing one dollar as the maximum charge for switching or transferring any car within the limits of the city, without regard to distance or the kind of goods with which it might be loaded; that the company had been duly notified of such action of the commission, and had neglected, for more than ten days after the 15th of July, 1887, to substitute or adopt the tariff of charges recommended and directed by the commission; that the commission had duly posted and published the tariff declared by it to be equal and reasonable; and that the company still refused to carry out the recommendation of the commission so made, published and posted, and continued to charge the rates so specified as its schedule tariff.

An alternative writ of mandamus was applied for and issued, commanding the company to adopt the rate of charges so declared by the commission to be equal and reasonable for

handling and switching cars within the city of Minneapolis, or to show cause why it had not done so, on the 15th of January, 1889.

By its return, filed January 21, 1889, the company made answer to the alternative writ as follows:

"That this respondent was organized as a railway company under and by virtue of the General Laws of the State of Minnesota, on or about the 17th day of June, A.D. 1878.

"That on or about the 27th day of January, A.D. 1879, its articles of association were amended so as to declare and make the general nature of its business to be the building and operating of a railway from the city of Minneapolis, in the county of Hennepin, and State of Minnesota, to the city of St. Paul, in the county of Ramsey, in said State, with branches connecting with any and all railroads then built or thereafter to be built or secured or constructed to or into the said cities or either of them; also branches to mills and manufactories in said cities or in either of them; the said railway and branches to be constructed and operated with one or more tracks and with necessary side-tracks, turn-outs and connections and all necessary roadways, right of way, depot grounds, yards, machine shops, warehouses, elevators, station-houses, structures and buildings, rolling stock, and all other real estate and personal property necessary or convenient for the operation and management of said railway.

"That the total length of its tracks heretofore constructed is about three and one-half ($3\frac{1}{2}$) miles, and that said tracks are and at all times have been wholly within the city of Minneapolis.

"That the total cost to this respondent of its said system of railway and of the equipment thereof is the sum of two hundred and fifty-three thousand one hundred and forty-eight dollars and eleven cents ($253,148.11), embracing the following items:

"For right of way and damage to buildings, one hundred thousand one hundred and two dollars and ninety-nine cents $100,102 99

"For grading and surfacing, nine thousand two hundred and thirty-seven dollars and sixty-four cents	9,237 64
"For bridges, docking and trestle, sixty-four thousand seven hundred and six dollars and ninety-four cents	64,706 94
"For ties, iron and steel, track-laying, crossing, switches and side-tracks, twenty-nine thousand twenty dollars and sixty-seven cents	29,020 67
"For buildings, two thousand two hundred and fifty-two dollars and seventy cents	2,252 70
"For incorporation and legal expenses and engineering, six thousand one hundred and fifteen dollars and sixteen cents	6,115 16
"For office furniture and track-scales, four hundred and forty-seven dollars and fifty-five cents	447 55
"For one (1) locomotive engine and one (1) hand car, six thousand one hundred and fifty-four dollars and seventy-seven cents	6,154 77
"And for divers other items, thirty-five thousand one hundred and nine dollars and sixty-nine cents	35,109 69

"That, since the acquisition of this respondent's said right of way, the value of real estate in the city of Minneapolis, as well adjacent to said railway as in said city at large, has increased many fold, and the acquisition of said right of way would at this time cost many times the amount laid out and expended therefor by this respondent.

"That but thirty thousand ($30,000) dollars of its capital stock has ever been issued.

"That on or about the 1st day of January, A.D. 1879, this respondent, being thereto duly authorized by law, made, executed and delivered to Sherburne S. Merrill and William H. Ferry as mortgagees, in trust to secure the payment of the bonds hereinafter mentioned, with the interest thereon, a mortgage or deed of trust, bearing date on that day, whereby it granted, bargained, sold and conveyed unto the said trustees

all its railroad then in course of construction on the west side of the Mississippi River, being much the greater proportion of its entire present system, including all the railways, ways, rights of way, depot grounds and other lands for rights of way or for railway uses; all tracks, bridges, viaducts, culverts, fences and other structures; all depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses and other buildings; all shops then held or thereafter to be acquired or used in connection with said railroad or the business thereof, and all locomotives, tenders, cars, rolling stock or equipment; all machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing said railroad or any part thereof, or of any part of its equipment or appurtenances then held or thereafter to be acquired; also all franchises connected with or relating to said railroad or to the construction, maintenance, or use thereof then held or thereafter to be acquired by the said respondent, including the franchise to be a corporation, and all and singular the hereditaments thereunto belonging or in anywise appertaining, and all the real estate, right, title, interest, property, possession, claims and demands whatsoever, as well in law as in equity, of the said respondent of, in, and to the same and any and every part thereof; which mortgage or deed of trust expressly provided that the trust thereby created should not affect any further extension or branches of said line of railroad, or any property acquired or to be acquired for use in connection with such extension or branch, and which said mortgage or deed of trust was recorded in the office of the register of deeds in and for the said county of Hennepin, in volume 54 of mortgages, on pages 377 to 387 inclusive.

"That under and by virtue of the said mortgage or deed of trust, and pursuant to the tenor thereof, this respondent, on or about the first day of January, 1879, made and executed in due form of law, and thereafter negotiated and disposed of one hundred and fifty (150) bonds or writings obligatory for the sum of one thousand ($1000) dollars each, and all of like tenor, bearing date the 1st day of January, 1879, and payable in thirty (30) years after the date thereof, with interest at the

rate of seven (7) per cent per annum, payable semi-annually, on the first days of January and July in each year, upon the presentation and surrender of coupons thereto respectively annexed, representing and requiring the payment of each such instalment of interest, by reason whereof this respondent became liable to pay the sum of ten thousand and five hundred ($10,500) dollars per annum for such interest on its said bonds so issued and negotiated; which mortgage is still in full force and effect and all which bonds and coupons are still outstanding and wholly unpaid.

"That all the proceeds of said stock so issued and all the proceeds of said bonds so negotiated were used in the construction and equipment of respondent's said railway.

"That all such proceeds were insufficient for that purpose, and this respondent therefore, from time to time, for that purpose, effected and further became indebted for further loans of money, without security therefor, to the amount of about ninety thousand ($90,000) dollars; all which was used in the construction and equipment aforesaid.

"That this respondent began the operation of the said railway on or about the 1st day of June, 1879, and has continued to operate the same at all times hitherto.

"That its whole business now is, and at all times has been, the receipt, transportation and delivery, commonly called switching, of cars between the tracks of other railway companies and mills, warehouses and industries situated upon its own lines within said city of Minneapolis.

"That, until the 1st day of September, 1882, it charged for its services in switching only the sum of one dollar ($1.00) per loaded car; that on the day last aforesaid it raised its charge for such service, and has ever since charged and received for such service the sum of one dollar and fifty cents ($1.50) per loaded car.

"That the service so rendered by this respondent is of a character which would otherwise be performed by drays or wagons, at an expense to patrons very much greater than the last-mentioned rate of charge of this respondent.

"That the rate of one dollar and fifty cents ($1.50) per

loaded car above stated does not exceed, but is, a fair and reasonable charge for such service.

"This respondent further says, that from the beginning of the operation of said railway to and including the 30th day of June, 1887, notwithstanding such increase of rate, the gross earnings of this respondent were less than the amount of its operating expenses and of the interest to that date accrued upon its said mortgage bonds, by the sum of twenty-one thousand two hundred and twenty-three dollars and seventy-six cents ($21,223.76).

"That all the excess of its gross earnings over its operating expenses has been, from year to year, applied to the repayment of the aforesaid unsecured indebtedness for moneys used in construction and equipment and the interest thereon.

"That on the 30th day of June, 1888, there nevertheless remained unpaid of the indebtedness last mentioned and interest thereon the sum of twelve thousand two hundred and eleven dollars and two cents ($12,211.02), of which last-mentioned sum, by like application of such excess, the sum of ten thousand dollars ($10,000) was paid on or before the 30th day of November, 1888, then still leaving a balance of such unsecured indebtedness and of the interest thereon, in the sum of two thousand two hundred and eleven dollars and two cents ($2211.02).

"That, by reason of such application of the excess of gross earnings over operating expenses, no interest whatever has ever been hitherto paid, and this respondent has had no funds wherewith to pay any interest whatever upon its aforesaid bonded indebtedness, but that the same has accumulated and remains unpaid to the amount of one hundred and five thousand ($105,000) dollars.

"This respondent further says, that, in the year ending on the 30th day of June, 1888, its last-completed fiscal year, it transported over its lines twenty-seven thousand two hundred and seventy-two (27,272) loaded cars, which was its entire business, and that it received as compensation therefor, at the rate of one dollar and fifty cents ($1.50) per car, the sum of forty thousand nine hundred and eight ($40,908) dollars, which last-mentioned sum constituted its entire receipts for that year.

"That it therewith paid its operating expenses for the same year, amounting to twenty-two thousand five hundred and eighty-three dollars and seventy-eight cents ($22,583.78), and paid the whole residue thereof on account and in reduction of its unsecured indebtedness aforesaid and the interest thereon.

"That the said year was an unusually prosperous one, and was the first year in the history of this respondent when it earned a sum equal to the amount of its operating expenses and one year's interest upon its said bonded indebtedness.

"That, induced by its gradual reduction and payment as aforesaid of its said unsecured indebtedness, the creditors of this respondent for the said unsecured indebtedness have hitherto, with the assent and at the request of this respondent, as the said interest coupons have from time to time become due, advanced the amounts thereof to the holders of said coupons, and thereupon and thereby taken the same up from such holders by way of payments for the honor and for the protection of the credit of this respondent, in order to avoid any foreclosure on the part of the holders of said bonds by reason of default in the payment of any such coupons, and that so, and not otherwise, has this respondent hitherto been able to avoid such foreclosure.

"The respondent further says, that a portion of its said railroad upon the west side of said river, about one thousand and two hundred (1200) feet in length, is upon wooden trestlework, which is now nearly ten (10) years old, and about one thousand one hundred (1100) feet in length of which is so decayed and worn that the same must be almost entirely renewed and rebuilt within the current year 1889, if the operation of said railroad is to be continued.

"That this respondent has no source of revenue to meet the expense of rebuilding other than its earnings.

"That, if said trestle is rebuilt of wood, the cost thereof will exceed the sum of fifteen thousand ($15,000) dollars, and if of iron or steel will exceed the sum of eighty thousand ($80,000) dollars.

"The respondent further says, that if the order of the relators set forth in said alternative writ had been forthwith and

hitherto enforced, and if this respondent had received but one ($1.00) dollar per car for the service rendered during its last fiscal year aforesaid, the entire receipts from all its business in said year would have been but twenty-seven thousand two hundred and seventy-two ($27,272.00) dollars, which would have left this respondent but four thousand six hundred and eighty-eight dollars and twenty-two ($4688.22) cents wherewith to pay the residue of its unsecured indebtedness aforesaid, then exceeding twelve thousand dollars ($12,000), or to pay the sum of ten thousand and five hundred dollars ($10,500) interest accrued upon the said bonded debt, leaving nothing for extraordinary repairs, and nothing for renewals of trestles, bridges, or rails.

"That this respondent is the owner of all the railway used in conducting its said business, subject only to the lien of said mortgage.

"That it is entitled to the possession and beneficial use thereof to the same extent as the owners of other property are entitled to the beneficial use thereof; that it has the right to fix the price for the use of its property by others, and at the rate at which it will do business for others, subject only to the qualification that the rates so fixed shall be equal and reasonable.

"That the rate of one dollar and fifty cents ($1.50) per car so fixed and collected by it as aforesaid is fair, just, equal and reasonable; that the rate of one dollar ($1.00) per car specified in said order of relators is grossly unfair, unjust, unequal and unreasonable, and beyond the jurisdiction and power of the said relators in that behalf.

"That the said recommendation of the said relators set forth in said alternative writ, by means whereof they seek to compel a reduction in the rate fixed by this respondent from one dollar and fifty cents ($1.50) per car to one dollar ($1.00) per car and a consequent loss in revenue of one-third ($\frac{1}{3}$) of its entire earnings, was made by said relators without notice to this respondent, and without giving it any opportunity to be heard in its own behalf, and that for that reason the said recommendation is against the common rights of American citizens and is in

violation of the Constitution of the United States, and is wholly void.

"And this respondent further says, that if the said order be enforced by the mandate of this court, it will take the property of this respondent against its will, without due process or any process of law, and in violation of section 1 of article 14 of the Constitution of the United States; that, if the said order of the said relators be enforced against this respondent, and if its charge be reduced to one dollar ($1.00) per car, this respondent will be thereby deprived of the ability to pay the interest upon its said bonded indebtedness, as it has, with the consent of the State of Minnesota, contracted to do, and that any law of the said State, or any order of the said relators, or any judgment of this court, preventing the respondent from performing its said contract, when without such law, order, or judgment it might have performed the same, or might thereafter perform the same, is and will be a law, order and judgment impairing the obligation of a contract, and is and will be in violation of section 10 of article 1 of the Constitution of the United States, and is and will be wholly void.

"This respondent, further making return, says, that the said order of the said relators, set forth in said alternative writ, will, if enforced, deprive it of its property for the use and benefit of private citizens, without making any compensation unto it as the owner thereof, in violation of section 13 of article 1 of the constitution of the State of Minnesota, and is and will be wholly void.

"And this respondent, further making return, says that, by the provisions of section 4 of article 10 of the constitution of said State, this respondent, being a common carrier, enjoying the right of way in pursuance of the provisions of the said constitution, is bound to carry the mineral, agricultural and other productions of the people of said State on equal and reasonable terms; that it has always so carried the same whenever tendered or offered to it for that purpose; that the terms offered by it have always been equal and uniform to all persons and have always been reasonable in amount.

"And this respondent avers, that it is entitled to have and

receive reasonable compensation for the service it is so bound to render, and that the said order of said relators, set forth in said alternative writ, assumes to fix a grossly inadequate and unreasonable compensation therefor, is in violation of the constitutional provision last mentioned, and is wholly null and void.

"That, by reason of the matters hereinbefore set forth, this respondent has not complied, and ought not to be by the mandate of this honorable court compelled to comply, with the requirements of the recommendation and order made on the 2d day of August, 1887, and in said alternative writ set forth.

"Wherefore this respondent prays the judgment of the court that the said alternative writ may be discharged and that this respondent may be hence dismissed."

On a hearing on the return, on the 29th of January, 1889, the company asked leave to make proof of the matters set forth in the return, at such time as the court might appoint; but the request was denied, and the company excepted. On the motion of the attorney general, judgment was then entered on the application, the alternative writ and the return, for the issuing of a peremptory writ of mandamus, to review which judgment this writ of error is sued out.

The Supreme Court rendered an opinion stating that, as the case was similar to that of *The State ex rel. The Railroad and Warehouse Commission* v. *The Chicago, Milwaukee & St. Paul Railway Co.*, before decided by it, the decision would follow the decision in that case and upon the reasons stated in the opinion filed therein.

The views and considerations applicable to that case, *Chicago, Milwaukee & St. Paul Railway Co.* v. *Minnesota*, which has just been decided by us, *ante*, 418, apply with even greater force to the present case, as appears by the return above set forth at length.

The Minneapolis Eastern Railway company was organized as a corporation in June, 1878, under title 1, chapter 34 of the General Statutes of Minnesota. By § 2 of an act of the legislature, approved March 3, 1869, (Laws of 1869, c. 78, 95,) it was provided "that any railroad company or corporation

organized under the title to which this is an amendment, may charge and receive for the transportation of passengers and freight on their road such reasonable rate as may be from time to time fixed by said corporation or prescribed by law." By § 8 of chapter 103 of the General Laws of Minnesota of 1875, it was provided as follows: "No railroad company shall charge, demand or receive from any person, company, or corporation an unreasonable price for the transportation of persons or property, or for the hauling or storing of any freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation." We do not perceive that these statutory provisions constitute such a contract with the corporation as to the fixing by it of its rates of charges, as to deprive the legislature of its power to regulate those charges.

The decision of the commission in the present case appears to be merely a general finding that each and every charge in excess of $1.00 per car for switching within the limits of the city of Minneapolis is an unreasonable and excessive compensation for the service performed. The commission states that it made such finding after due and careful inquiry and consideration; but it does not appear that the Minneapolis Eastern Railway Company had any prior notice of any hearing at which such finding was made, or any opportunity of being heard in regard thereto; while it does appear that it asked leave of the court to make proof of the matters so set up in its return, that its request was denied, and that it excepted to such denial; and it further appears by its return that it claimed that the rate of $1.00 per car would be so unfair, unequal, unjust and unreasonable as to take its property against its will without due process of law.

For the reasons set forth in the other case just decided, *ante*, 418,

The judgment of the Supreme Court of Minnesota, rendered February 27, 1889, awarding a peremptory writ of mandamus against the railway company, is reversed, and the case is remanded to that court with an instruction to take further proceedings not inconsistent with the opinion of this court.

UNITED STATES *v.* JONES.

APPEAL FROM THE COURT OF CLAIMS.

No. 1554. Submitted March 3, 1890. — Decided March 24, 1890.

The decision of a commissioner of a Circuit Court of the United States upon a motion for bail and the sufficiency thereof, and his decision upon a motion for a continuance of the hearing of a criminal charge, are judicial acts in the "hearing and deciding on criminal charges" within the meaning of Rev. Stat. § 847, providing for a *per diem* compensation in such cases.

The approval of a commissioner's account by a Circuit Court of the United States is *prima facie* evidence of its correctness, and, in the absence of clear and unequivocal proof of mistake on the part of the court, should be conclusive.

This was an appeal from a judgment rendered by the Court of Claims against the United States in favor of Richard M. Jones, for services rendered by him as a commissioner of the Circuit Court of the United States for the Western District of North Carolina.

The material facts of the case, as found by the court upon the evidence, were, that the claimant had been a commissioner of the said court from 1883 to the bringing of the action; that from December 3, 1885, to June 30, 1886, as such commissioner, he issued warrants in six cases in which issue was joined and testimony taken; in three cases in which issue was joined and no testimony was taken; and in three cases in which issue was not joined, the defendants discharged, and no testimony taken; and that he duly made his docket entries in each and all of those cases by order and authority of the court, and in the manner required by its rules.

His accounts for fees and for keeping his dockets were verified by oath, and presented to the court in the presence of the district attorney, and approved by the court in due form. For those accounts, thus approved, he was allowed a fee of three dollars in each case where issue was joined and testimony taken, two dollars where issue was joined but no testimony taken, and one dollar where issue was not joined,

and the defendant discharged. His account also showed charges on eleven different days from March 12, 1884, to September 15, 1887, in as many criminal cases, each of which charges was either "for hearing and deciding on criminal charges, in deciding on amount of bail and sufficiency thereof," or "for hearing and deciding on criminal charges, in hearing and deciding on motion for continuance." These charges were approved by the Circuit Court, but not paid.

The court found as a conclusion of law that the claimant was entitled to $55 for these last eleven cases, and entered a judgment in his favor for $76. From that judgment the United States brought this appeal.

The only assignment of error presented by the government in this appeal was, that the court erred in finding that claimant is entitled to $55 for hearing and deciding on amount of bail and sufficiency thereof in four cases, and for hearing and deciding on motion for continuance in seven cases.

Mr. Assistant Attorney General Cotton and *Mr. F. P. Dewees* for appellants.

The words "hearing and deciding on criminal charges" are plain and unequivocal in meaning and without ambiguity. The words have application to the charges made and the hearing and decision thereon. There must be a "hearing" relative to the "charges" and a "deciding" of some point relative to the "charges." The granting of a motion for a continuance is the deferring of "hearing and deciding on criminal charges." A determination upon the sufficiency of bail is either precedent or subsequent to the "hearing and deciding on criminal charges."

The approval of a commissioner's account by a Circuit Court of the United States under the provisions of the act of February 22, 1875, 18 Stat. 333, c. 95, is not a judicial determination of the rights of the parties. It is *prima facie* evidence that the work was done. *Turner* v. *United States*, 19 C. Cl. 629; *Wallace* v. *United States*, 116 U. S. 398.

It is not disputed in the case at bar that continuances were

Counsel for Appellee.

granted and bail taken by commissioner. His power to render such service is admitted. It is recognized that a commissioner exercises functions of the highest importance to the administration of justice. His powers are fixed by law and enumerated by Mr. Justice Field in *United States* v. *Schumann*, 2 Abb. (U. S.) 523.

The payment of the commissioner is by prescribed fees and only such fees can be paid for services.

It is not contended that for "hearing and deciding" the commissioner must be employed the whole of one day, but if he hears and decides a number of cases on the same day, payment can only be allowed for one. It therefore follows that the payment is not only intended for the service, but that the "time actually employed" is an element to be considered.

The construction given to a statute by the executive or accounting officers has been held by this court to be entitled to respect. It appears that on this subject there was conflict of opinion. The views of the accounting officers of the treasury were overruled by Assistant Secretary Otto. For a number of years payments were made in accordance with his decision. Since 1883 the accounting officers have required proof of the character of the service before making payments. The construction given by executive officers has, it will be seen, not been uniform.

To evade the construction of the law as given by the accounting officers, the present suit was brought in the Court of Claims without any demand having been made on the treasury. The case was decided by the court below in favor of claimant as coming within the decision in *Harper's Case*, 21 C. Cl. 56. That case has not been reviewed by this court. Attorney General Black, 9 Opinions Attys. Gen. 170, 171, says: "It is plain to me that *examination of the person charged* means *investigation of the case*."

It is submitted that the words "hearing and deciding on criminal charges" do not include taking "bail" and "continuing" cases.

Mr. George A. King for appellee.

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

A brief reference to the powers and duties of a commissioner, as an examining and committing magistrate, will be sufficient to dispose of the only question presented by this appeal. Section 1014 of the Revised Statutes of the United States provides that, "for any crime or offence against the United States, the offender may, by . . . any commissioner of the Circuit Court to take bail, . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case," etc., etc.

By section 1015 it is further provided that "bail may be admitted" by such commissioner "upon all arrests in criminal cases where the offence is not punishable by death."

By section 1982 such commissioners are vested with the power to institute proceedings against persons violating any of the provisions of chapter seven of the Title "Crimes."

Section 1983 provides for the increase of the number of commissioners "so as to afford a speedy and convenient means for the arrest and examination of persons charged with the crimes referred to in the preceding section."

By section 1984 these officers are vested with other important powers; and by section 1985 every marshal and deputy marshal is required to obey and execute all warrants or other process that the commissioners may issue in the lawful performance of their duties.

By other sections numerous duties of a purely clerical and ministerial character are attached to this office. The compensation of a commissioner is clearly prescribed and classified by section 847 of the Revised Statutes according to the character of the services performed. For acts purely clerical and ministerial, such as administering oaths, taking acknowledgments, taking and certifying depositions to file, or furnishing a copy

of the same, specific fees are provided, and for issuing writs or warrants or other services he has the same compensation as is allowed to clerks for like services. For acts not merely clerical, but which are performed by the commissioner in his judicial capacity, his fees are regulated on a basis of per diem compensation. Among the provisions of this kind is the one upon which this controversy has arisen, viz.: "For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."

It is admitted that from March 12, 1884, to June 20, 1888, the period covered by the claim in dispute, there came before the appellee, in his capacity as commissioner, on eleven different days, eleven separate cases to be heard and decided against various persons, each charged with a crime against the laws of the United States; that in four of these cases he heard and decided motions upon bail, and the sufficiency thereof; and in the other seven motions for continuance were heard and decided by him.

There can be but one answer, in our opinion, to the question whether the commissioner should be allowed a fee of five dollars a day for his services on those eleven days. The decision, upon a motion for bail and the sufficiency thereof, is a judicial determination of the very matter which the statutes authorize and require him "to hear and decide," to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged, or committed on bail for trial, and in default thereof imprisoned. With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offence charged against him and to a sufficient time for the summoning of his witnesses as well as for employing and consulting with counsel to aid him in his defence.

It is contended by the Assistant Attorney General that the per diem fee in such case is not only intended for the service specified, but that the "time actually employed is also an ele-

Counsel for Parties.

ment to be considered." A sufficient answer to this objection is furnished in the findings of the court below that the account of the commissioner for the fees charged for the services in question was verified by oath and presented to the United States court of which he was the commissioner, in open court, in the presence of the district attorney, approved by the court, and an order, approving the same as being in accordance with law and just, was entered upon the records of the court. The approval of a commissioner's account by a Circuit Court of the United States, under the act of February 22, 1875, 18 Stat. 333, is *prima facie* evidence of the correctness of the items of that account; and in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive.

We think the authorities cited by the attorney for the appellee in support of the claim in question are directly in point.

The judgment of the Court of Claims is

Affirmed.

IN RE THE LOUISVILLE UNDERWRITERS, Petitioners.

ORIGINAL.

No. 8. Original. Argued March 10, 1890. — Decided March 31, 1890.

The provision of the Act of March 3, 1887, c. 373, § 1, 24 Stat. 552, that "no civil suit" shall be brought before a Circuit or District Court against any person in any other district than that of which he is an inhabitant, does not apply to cases in admiralty.

A libel in admiralty *in personam* may be maintained against a corporation in any district by service there upon an attorney appointed by the corporation, as required by the statutes of the State, to be served with legal process.

THIS was a petition for a writ of prohibition. The case is stated in the opinion.

Mr. J. R. Beckwith for the petitioners.

Mr. O. B. Sansum opposing.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a petition by a corporation of the State of Kentucky for a writ of prohibition to the judge of the District Court of the United States for the Eastern District of Louisiana, to prohibit him from entertaining jurisdiction of a libel in admiralty *in personam*, filed April 23, 1889, by the Natchez and New Orleans Packet and Transportation Company, also a corporation of Kentucky, against the petitioner, "in a cause of contract civil and maritime," upon a policy of insurance by which the petitioner insured against perils of the seas and rivers and other perils a steamboat of the libellant employed in the navigation of the Mississippi River.

By the public statute of Louisiana of February 26, 1877, c. 21, no insurance company organized under the laws of any other State shall take risks or transact any business through an agent in Louisiana, without having filed in the office of the secretary of State a certified copy of a vote of its directors, appointing such an agent there to transact business and to take risks, accompanied by a warrant of appointment from the company, containing an express consent that service of legal process on him shall be as valid as if served on the company.

By a copy of the record of the proceedings in the District Court, annexed to the return to the rule to show cause why a writ of prohibition should not issue, it appears that the libellee had filed with the secretary of State of Louisiana a copy of a vote of its directors, as well as a warrant of appointment, appointing William M. Railey its attorney at New Orleans, as required by the statute of Louisiana; that the policy sued on was signed by the libellee's president and secretary at Louisville in the State of Kentucky, was not to be binding until countersigned by its authorized agent at New Orleans, and was countersigned by Railey; that a citation to the libellee was issued by the District Court, and served by the marshal upon Railey in person; that a motion to quash the libel, and an exception to it, upon the ground, among others, that neither party was an inhabitant of the Eastern District of

Louisiana and that the libellee had no property or credits within the district, were overruled by the District Court, and the libellee ordered to answer; and that the libellee thereupon answered, and took depositions under commission.

Before the cause had been brought to a hearing, the petition for a writ of prohibition was presented to this court.

It is admitted that the District Courts of the United States, sitting in admiralty, have jurisdiction of the matter of the libel. *Insurance Co.* v. *Dunham*, 11 Wall. 1. But it is argued, in support of the prohibition, that no libel *in personam* can be sustained against a corporation in a district not within the State in which it is incorporated; and this argument is rested on the latter part of the following provision in the act of March 3, 1887, c. 373, § 1:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant." 24 Stat. 552.

A brief reference to previous acts of Congress and decisions of this court makes it clear that this provision has no application to causes of admiralty and maritime jurisdiction.

By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his; and this practice has been recognized and upheld by the rules and decisions of this court. Rule 2 in Admiralty; *Manro* v. *Almeida*, 10 Wheat. 473; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272; *New England Ins. Co.* v. *Detroit & Cleveland Steam Navigation Co.*, 18 Wall. 307; *Cushing* v. *Laird*, 107 U. S. 69; *Devoe Manufacturing Co., Petitioner*, 108 U. S. 401.

The judgment, delivered at October term, 1873, in *Atkins* v. *Disintegrating Co.*, just cited, is really decisive of this case.

The question there presented was the construction of that provision of the Judiciary Act of September 24, 1789, c. 20,

§ 11, by which, after defining the jurisdiction of the Circuit Courts in "suits of a civil nature at common law or in equity," in which the United States were plaintiffs, or an alien was a party, or the suit was between a citizen of the State where it was brought and a citizen of another State; and also defining the criminal jurisdiction of the Circuit and District Courts; it was provided as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 79.

Upon a consideration of the acts of Congress upon the subject, and especially of other sections of the Judiciary Act of 1789, of which section 9 conferred upon the District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction," and jurisdiction concurrent with the Circuit Courts of certain "suits at common law" by the United States; 1 Stat. 77; section 21 authorized "final decrees in a District Court in causes of admiralty and maritime jurisdiction" to be reviewed in the Circuit Court on appeal, and section 22 authorized "final decrees and judgments in civil actions in a District Court" to be reviewed in the Circuit Court by writ of error; 1 Stat. 83, 84; it was demonstrated that the provision of section 11, above quoted, restricting "civil suits" to the district of which the defendant was an inhabitant or in which he might be found, did not include causes of admiralty jurisdiction; and it was therefore adjudged that a libel in admiralty *in personam* might be maintained against a corporation by attachment of its goods in a district not within the State in which it was incorporated.

The provisions of sections 9, 11, 21 and 22 of the Judiciary Act of 1789, above quoted, were reënacted in substantially the same words in the Revised Statutes. Rev. Stat. §§ 563, cls. 4, 8; 629, cls. 1–3; 631, 633, 739.

The provision of section 11 of the act of 1789, embodied in

§ 739 of the Revised Statutes, was reënacted with no material alteration in the act of March 3, 1875, c. 137, § 1, as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding." 18 Stat. 470.

The only changes (beyond the substitution of "person" for "inhabitant of the United States") consisted in inserting, in the middle of the sentence, after the words "any original process," the words "or proceeding;" and in substituting, at the end of the sentence, for the words "serving the writ," the words "serving such process or commencing such proceeding." These changes in no way extended the meaning of the leading words "civil action" and "civil suit;" but merely affected the mode of commencing such action or suit, and were probably intended to cover actions at law commenced otherwise than by process, according to the practice, pleadings and forms of proceeding in the courts of the States, which had been made applicable to the Circuit and District Courts of the United States by the act of 1872, reënacted in the Revised Statutes. Act of June 1, 1872, c. 255, § 5, 17 Stat. 197; Rev. Stat. § 914.

The provision of the act of 1887 on which the petitioner relies differs from the corresponding provision of the act of 1875 in two particulars only:

1st. In the clerical mistake, "process of proceeding" for "process or proceeding," which has been set right by the act of 1888 correcting the enrolment of the act of 1887. Act of August 13, 1888, c. 866, § 1, 25 Stat. 433.

2d. In striking out the last clause, permitting civil suits to be brought in the district in which the defendant is found at the time of service, and thus confining them to the district of which he is an inhabitant. This change, far from weakening the reason of the decision in *Atkins* v. *Disintegrating Co.*, above cited, greatly strengthens it.

Opinion of the Court.

Courts of admiralty are established for the settlement of disputes between persons engaged in commerce and navigation, who, on the one hand, may be absent from their homes for long periods of time, and, on the other hand, often have property or credits in other places. In all nations, as observed by an early writer, such courts "have been directed to proceed at such times, and in such manner, as might best consist with the opportunities of trade, and least hinder or detain men from their employments." Zouch. Adm. Jur. 141. In the same spirit this court has more than once said: "Courts of admiralty have been found necessary in all commercial countries, for the safety and convenience of commerce and the speedy decision of controversies, where delay would often be ruin." *The Genesee Chief*, 12 How. 443, 454; *Insurance Co.* v. *Dunham*, 11 Wall. 1, 24. To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons or his goods or credits attached, would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice.

In the present case, the libellee had, in compliance with the law of Louisiana, appointed an agent at New Orleans, on whom legal process might be served, and the monition was there served upon him. This would have been a good service in an action at law in any court of the State or of the United States in Louisiana. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146. And no reason has been or can be suggested why it should not be held equally good in admiralty.

The District Court for the Eastern District of Louisiana having jurisdiction both of the cause and of the parties, the

Writ of prohibition is denied.

A similar decision was made in the case, argued and decided at the same time, No. 9, Original, *Ex parte* THE ST. PAUL FIRE AND

MARINE INSURANCE COMPANY OF ST. PAUL, MINNESOTA, which differed only in the petitioner and libellee being a corporation of Minnesota.

HATHAWAY *v.* FIRST NATIONAL BANK OF CAMBRIDGE.

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

No. 223. Argued March 20, 21, 1890. — Decided March 31, 1890.

Where a case is tried by the Circuit Court without a jury, and it makes a special finding of facts, with conclusions of law, alleged errors of fact are not, on a writ of error, subject to revision by this court, if there was any evidence on which such findings could be made.

Where the Circuit Court finds ultimate facts, which justify the judgment rendered, its refusal to find certain specified facts, and certain propositions of law based on those facts, will not be reviewed by this court, on a writ of error, if they were either immaterial facts or incidental facts, amounting only to evidence bearing on the ultimate facts found.

THE case is stated in the opinion.

Mr. Duane E. Fox for plaintiff in error. *Mr. L. D. Norris* filed a brief for plaintiff in error.

Mr. George F. Hoar (with whom was *Mr. William Gaston* on the brief) for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

THIS is an action at law, brought in the Circuit Court of the United States for the District of Massachusetts, by a writ, dated September 22, 1881, by James S. P. Hathaway against The First National Bank of Cambridge, a national banking corporation.

The declaration contains three counts in tort, the substance of which is that the defendant had converted to its own use certain bonds of the United States, with the interest coupons thereon, the property of the plaintiff; and that it had con-

verted to its own use the proceeds of the unlawful and unauthorized sale by it of such bonds, with the coupons thereon, the property of the plaintiff; and that it had unlawfully sold such bonds, with the interest coupons thereon, the property of the plaintiff, and converted the proceeds to its own use. The bonds were seven bonds of $1000 each, commonly called 5-20 bonds, with interest coupons attached; five of the same bonds, of $500 each, with coupons; and five of the same bonds, of $100 each, with coupons.

The declaration also contains two counts in contract, one for money received by the defendant for the sale of the bonds, and for interest on the money so received, from the time of the sale. The second count in contract alleges that Gilbert Hathaway, the father of the plaintiff, in 1865, placed with the defendant and in the hands of its cashier certain bonds, his property, which were to stand as collateral security for the payment of certain notes which might become due to the defendant from one Appleton Hubbard; that those bonds were afterwards converted by the defendant into such 5-20 bonds, and thenceforth, by agreement of the parties, the 5-20 bonds were to be held by the defendant as collateral security for the payment of any notes which might thereafter become due to the defendant from Hubbard; that certain notes were afterwards made by Hubbard to the defendant, for which the bonds were to stand as collateral security, but only on the express agreement by the defendant that it had no right to sell or dispose of any of the bonds, except upon and after the maturity and non-payment by Hubbard of such notes, and then only to such an amount as would be sufficient to pay any overdue and unpaid note; that the defendant knew that the bonds were the property of Gilbert Hathaway, and not the property of Hubbard; that Hathaway died in 1871, and the plaintiff, as residuary legatee under his will, which had been duly proved, became the owner of the bonds and coupons; that the defendant agreed with Gilbert Hathaway, and after his death agreed with the plaintiff, to keep the bonds safely and return them to the plaintiff on his demand therefor, subject only to the right to sell sufficient of them to

pay any overdue and unpaid note of Hubbard, for which the bonds were so held as collateral security; that the defendant sold all of the bonds at a time when no note of Hubbard was due and unpaid to it, and when it had no right to sell the same; and that the defendant owes the plaintiff $20,000, for the proceeds of the sale of such bonds, and for the interest coupons attached thereto, and for interest on such proceeds from May 1, 1879, when the same was demanded by the plaintiff from the defendant, and which the defendant then refused to pay to the plaintiff.

The answer of the defendant denies all the allegations of the writ and the declaration, and sets up that whatever bonds were sold by it were rightfully sold; that it had the legal right to retain whatever money it had retained from the proceeds of the sale of any of the bonds; and that whatever of the acts complained of were done by the defendant were done by the consent of the plaintiff, so far as his consent was necessary and proper to the validity of such acts, and were ratified by the plaintiff, so far as he had any interest therein.

There was a trial in 1883 by a jury, which failed to agree on a verdict. In September, 1885, by a written stipulation, a trial by a jury was waived, and the case was tried by the court without a jury. On the 16th of January, 1886, the court found as facts:

(1) That, prior to April 24, 1879, the plaintiff's testator delivered to Appleton Hubbard, of Cambridge, certain bonds of the United States, amounting, at their face value, to $10,000, with power and authority to dispose of them and to deal with them in the manner in which the same were disposed of and dealt with by said Hubbard, as hereinafter stated;

(2) That, after such delivery, Hubbard pledged them to the defendant as collateral security for the payment of twenty-five promissory notes made by said Hubbard and payable to and owned by the defendant, which notes were in the whole for the sum of $10,000, and were to mature on different days from the 24th of April, 1879, to the 5th of August, 1879;

(3) That, on the 24th of April, 1879, Hubbard agreed with the defendant that said bonds should be sold and the proceeds invested in other bonds of the United States;

(4) That, on the 25th of April, 1879, the defendant sold said bonds and received for them the sum of $10,156.25;

(5) That, on the 29th or 30th of April, 1889, Hubbard agreed with the defendant that the proceeds of the sale of said bonds should not be invested in other bonds of the United States, but that such proceeds should be applied by the defendant to the payment of the notes of Hubbard then held by the defendant, part of which were due and part of which were to become due, and that proper allowances of interest by way of charge or rebate should be made in respect of said notes;

(6) That thereupon the defendant applied said proceeds according to said agreement, and that the surplus of said proceeds over and above the amount of all said notes, with allowance of interest as aforesaid, was $175.85;

(7) That, on the 16th of May, 1879, the defendant paid said sum of $175.85 to Hubbard, and on the 19th of May, 1879, Hubbard paid the same amount to the plaintiff;

(8) That the plaintiff afterwards had knowledge of all the facts hereinbefore stated, and, having knowledge of the same, ratified and confirmed the said contracts, dealings and transactions between Hubbard and the defendant.

On these findings of fact the court held as matter of law: 1, That the evidence offered by the defendant to prove proceedings in insolvency against Appleton Hubbard is irrelevant and inadmissible; 2, That the above findings of fact may lawfully be made from the evidence admitted and considered; 3, That, on the above findings of fact, there should be judgment for the defendant, for costs.

On the same day, a judgment was entered that the plaintiff take nothing by his writ, and that the defendant recover the costs of suit from the plaintiff.

There is a bill of exceptions, which states that each party introduced evidence to maintain on his part the issue joined; that the evidence on both sides is annexed to the bill of exceptions and made part thereof; that, after the close of the evidence, the plaintiff insisted that he was entitled to judgment, and filed with the court certain prayers for findings of fact and of law, which are annexed to and made part of the

bill of exceptions; that the court refused to make any of such findings, except in so far as they were consistent with the findings of fact and of law which the court afterwards made, being the findings above set forth, to which refusal the plaintiff excepted; and that the plaintiff also filed exceptions to the findings of fact and of law so made, and to the refusal of the court to make the findings of fact and of law so requested by the plaintiff.

The plaintiff brought a writ of error to review the judgment; and, he having died, the writ is prosecuted in the name of his executrix.

The assignments of error filed in the Circuit Court and sent up with the record allege that the court erred, first, in making the finding of fact numbered (1); second, in making the finding of fact numbered (5); third, in making the findings of fact numbered respectively (7) and (8); fourth and fifth, in making its findings of law numbered 2 and 3; and sixth, in making its mixed finding of law and fact, that there was ratification and confirmation of the dealings of Hubbard and the defendant concerning the $10,000, face value, of the United States government bonds, in controversy.

The first three assignments of error allege errors merely in the findings of fact by the court. Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be made. *The Francis Wright*, 105 U. S. 381, 387; *McClure* v. *United States*, 116 U. S. 145, 152; *Union Pacific Railway* v. *United States*, 116 U. S. 154, 157; *Merchants' Ins. Co.* v. *Allen*, 120 U. S. 67, 71. Those three assignments of error amount, in substance, to the same thing as the alleged error in finding as a matter of law that the findings of fact stated could lawfully be made from the evidence admitted and considered.

The assignment of error numbered 6 raises the same question which is raised by that numbered 4, namely, whether there was any evidence in the case which authorized the court to make the finding of fact numbered (8), covered by the assignment of error numbered 3, as to ratification and confirmation.

Opinion of the Court.

As to the findings of fact numbered (1) and (2) we are of opinion that, on the evidence of Hubbard, and that of the defendant's cashier, Bullard, and that of the plaintiff, and the other evidence in the case, the court was justified in making those findings. It was, like a jury, the sole judge of the credibility of the witnesses, and the questions were questions of fact, on the evidence. It would serve no good purpose to examine the evidence critically, nor is it our province to do so. It is sufficient to say that the case was not one where there was no evidence to justify the findings of the court.

The same remarks may be made as to the other findings of fact made by the court, and especially as to its finding that the plaintiff, with knowledge of all the facts found by the court, ratified and confirmed the contracts, dealings and transactions between Hubbard and the defendant, set forth by the court.

As to the refusal of the court to find certain facts specified by the plaintiff, and certain propositions of law based on those facts, they were either immaterial facts or incidental facts amounting only to evidence bearing on the ultimate facts found. *The Francis Wright*, 105 U. S. 381, 389; *McClure* v. *United States*, 116 U. S. 145, 152; *Union Pacific Railway* v. *United States*, 116 U. S. 154, 157; *Merchants' Ins. Co.* v. *Allen*, 120 U. S. 67, 71.

The action being founded on the alleged wrongful acts of the defendant in selling the bonds and using the proceeds to pay the notes of Hubbard, it follows that, if Hubbard consented to such acts, and if, by the arrangement between Hubbard and Gilbert Hathaway, the former had authority to consent to such acts, and if the plaintiff, having full knowledge of the transactions, ratified and confirmed what was done, he could not maintain this action.

Judgment affirmed.

ELWELL *v.* FOSDICK.

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

No. 216. Argued March 19, 20, 1890. — Decided March 31, 1890.

The holder of $14,000 out of $955,000 of railroad bonds secured by a mortgage was permitted by the Circuit Court to appeal to this court, in the name of the trustee in the mortgage, from a decree which it was claimed affected the interest of such holder. It appearing that some time before the appeal was taken the trustee had executed a release of his right to appeal, and of errors in the decree, and that the court had, in the decree, found that there was no proof showing that the trustee had not acted in good faith: *Held*, that the release bound all the bondholders represented by the trustee; that it was properly brought before this court, though not found in the transcript of the record; that the appeal was the appeal of the trustee; and that, on the motion of the appellee, it must be dismissed.

This case grows out of proceedings which took place in the Circuit Court of the United States for the Northern District of Illinois, in the suit of William R. Fosdick and James D. Fish, mortgagees in trust, against The Chicago, Danville and Vincennes Railroad Company and others, wherein this court, in *Chicago & Vincennes Railroad* v. *Fosdick*, and *The Same* v. *Huidekoper*, 106 U. S. 47, on the appeal of the railroad company, had under review decrees made by the Circuit Court in the cause.

The suit was brought March 27, 1875, to foreclose a mortgage executed by the company, on March 10, 1869, to Fosdick and Fish as trustees, to secure $2,500,000 of bonds. The defendants in the bill were the railroad company and James W. Elwell, one of the two trustees, (the other being the said James D. Fish,) in a second mortgage executed by the company December 16, 1872, to secure $1,000,000 of convertible bonds. Elwell, as such trustee, filed a cross-bill, May 17, 1875, setting up a default in the payment of interest on the bonds secured by the second mortgage, and praying for a foreclosure of it. A receiver was appointed, May 20, 1875, and an

amended bill was filed by Fosdick and Fish, September 14, 1875. Answers were filed by the company and by Elwell to the amended bill, and answers to the cross-bill of Elwell by the company and by Fosdick and Fish. The cause was referred to a master, whose report, made June 24, 1876, sustained the allegations of the original bill, and fixed the amount due under the mortgage to Fosdick and Fish and also that due under the mortgage to Elwell. A decree of foreclosure and sale was entered on the 5th of December, 1876. The property was sold under that decree by a master, February 7, 1877, and was purchased by Huidekoper and others, a committee of the first-mortgage bondholders, the purchase price being $1,450,000. The purchasers paid in cash $362,500, being one-fourth of their bid, and petitioned the court, on February 17, 1877, to be allowed to discharge the remainder of their bid by surrendering $2,315,000 of the first-mortgage bonds held by them, and to be let into possession of the property. On the 23d of February, 1877, Elwell answered this petition, denying the right of the purchasers to a deed, on the ground that, as the statute of Illinois provided for a redemption at any time within fifteen months after the sale, he ought to be allowed that time in which to redeem from the sale. The master made to the court a report of the sale, the court confirmed the report on the 12th of April, 1877, and, on the 16th of April, 1877, the master reported that he had executed a deed to the purchasers. They conveyed the property, on the 28th of August, 1877, to The Chicago and Nashville Railroad Company, a corporation which had been organized on the 7th of February, 1877, and which, on the 28th of August, 1877, was consolidated with an Indiana corporation, by the name of The Chicago and Eastern Illinois Railroad Company.

The decree of foreclosure, made December 5, 1876, was reversed by this court, by its decision in 106 U. S., and the mandate thereon, dated May 17, 1882, was filed in the Circuit Court on the 25th of May, 1882. The grounds of the reversal were, that it was not shown that default in the payment of interest on the bonds had been continued for six months prior to the filing of the bill, nor that the trustee received a written

request from the holders of a majority of the bonds to commence proceedings for foreclosure, as provided by the terms of the first mortgage.

After the cause returned to the Circuit Court, and on the 7th of July, 1882, Fosdick and Fish filed an amended and supplemental bill, setting forth (1) that there had been default, continued more than six months after presentation and demand, in the payment of interest coupons on the first-mortgage bonds; and (2) that a majority of the bondholders, being the holders of more than 92 per cent of all the outstanding bonds, had in writing demanded that the trustees immediately declare the principal of the bonds due and payable, and obtain a final decree to appropriate the net proceeds of the sale of the property, as such sale was confirmed, to the payment of the first-mortgage bonds and interest thereon. But immediate foreclosure for the full amount of principal and interest was prayed for. The Chicago, Danville and Vincennes Railroad Company demurred to the amended and supplemental bill, and petitioned the court to appoint a receiver to take possession of the property out of the hands of The Chicago and Eastern Illinois Railroad Company.

The Chicago and Eastern Illinois Railroad Company was made a party defendant to the suit. It answered the amended and supplemental bill, and on the 6th of December, 1882, filed its cross-bill against The Chicago, Danville and Vincennes Railroad Company, Fosdick and Fish, trustees, and Elwell, trustee. The material allegations of this cross-bill were as follows: The purchasers at the master's sale were *bona fide* purchasers at an open sale, which was attended with much competition, and the property brought a full and fair price. The sale was reported by the master and was confirmed by the court, and neither The Chicago, Danville and Vincennes Railroad Company nor Elwell had ever filed exceptions to the report or appealed from the decree of confirmation. Nearly all of the $362,500 paid by the purchasers at the master's sale had been paid out to creditors of The Chicago, Danville and Vincennes Railroad Company, under decrees of the court. A large part of that amount was contributed by the holders of Indiana Division

bonds, who were strangers to the record and innocent purchasers for value. On September 1, 1877, The Chicago and Eastern Illinois Railroad Company issued, negotiated and put in general circulation $3,000,000 of 6 per cent bonds, secured by a trust deed on the property so purchased at the sale; and on December 1, 1877, issued $1,000,000 of income bonds. The Chicago and Eastern Illinois Railroad Company had also issued $3,000,000 of capital stock; and by consolidation with the Danville and Grape Creek Railroad Company had incurred an additional bonded debt of $750,000. By means of certain perpetual leases The Chicago and Eastern Illinois Railroad Company had acquired additional railroad, and had also built certain branches, and procured additional rolling stock. The appeal from the foreclosure decree of December 5, 1876, was not prayed until October 30, 1878, and was not perfected until January 29, 1879. During the five years which intervened between the purchase of the property by Huidekoper and others, on the 7th of February, 1877, and March 6, 1882, when the decree of foreclosure of December 5, 1876, was reversed by this court, the $4,000,000 of bonds and $3,000,000 of capital stock issued by The Chicago and Eastern Illinois Railroad Company, on the faith of its title to the property, had been largely dealt in on the stock exchanges of Boston and New York, and had so far changed ownership that, on March 6, 1882, when the decree of foreclosure was reversed, nearly all the bonds and a majority of the stock were owned by strangers to the litigation, who had purchased in good faith for full value.

The prayer of the cross-bill was that the title of The Chicago and Eastern Illinois Railroad Company, and of its stockholders and bondholders, to the property be forever quieted, as against The Chicago, Danville and Vincennes Railroad Company, Fosdick and Fish, and Elwell; and that it be decreed that The Chicago and Eastern Illinois Railroad Company had acquired a good title in fee simple absolute as against each of the defendants.

Answers were filed to the cross-bill by each of the defendants, and replications to such answers; and, on a reference, a

master took a large amount of testimony on the issues joined, and filed the same, with his report, on the 9th of June, 1884.

On the 24th of June, 1884, The National City Bank of Ottawa, Illinois, a corporation, filed a petition as the owner and holder of $14,000 of the convertible mortgage bonds of The Chicago, Danville and Vincennes Railroad Company, secured by the mortgage to Fish and Elwell, praying to be made a party defendant to the suit, and to be allowed to file an answer in the suit, on the ground that Elwell was not properly protecting the rights of the bank in the premises.

The case was heard on all the pleadings and proofs, before Judge Blodgett, and on the 30th of June, 1884, a decree was entered finding the equities of the cause in favor of the original plaintiffs as against all the defendants except the Chicago and Eastern Illinois Railroad Company, and also finding the equities of the cause in favor of the latter company by reason of the matters set forth in its cross-bill, as against all of the defendants thereto. The decree also contained the following provisions: "By virtue of the original deed of Henry W. Bishop, master in chancery, dated April 16, 1877, to Huidekoper, Shannon and Dennison, and the confirmation thereof by this court, and by the subsequent conveyance by said Huidekoper, Shannon and Dennison to the Chicago and Nashville Railroad Company, on August 28, 1877, and the subsequent consolidation between the Chicago and Nashville Railroad Company and the State Line and Covington Railroad Company, on August 28, 1877, as set forth in its cross-bill, the Chicago and Eastern Illinois Railroad Company acquired a perfect and indefeasible title to all and singular the Illinois Division of said Chicago, Danville and Vincennes Railroad, as hereinbefore specifically described, and also as described in said master's deed of April 16, 1877, reference being thereto had, free and clear of all lien, claim, title or equity of any kind whatever of said William R. Fosdick, James D. Fish, James W. Elwell, R. Biddle Roberts, and the Chicago, Danville and Vincennes Railroad Company, or either of them, or any of the bondholders, stockholders or creditors of said Chicago, Danville and Vincennes Railroad Company, or any persons claiming by or

under it or any of said trustees. . . . And it is further ordered that the petition of the National City Bank of Ottawa, Illinois, filed herein on the 24th day of June, 1884, for leave to intervene herein as holders of certain second-mortgage bonds of said Chicago, Danville and Vincennes Railroad Company, be dismissed at the cost of said petitioner; it appearing to the court that the trustees under said second mortgage are parties to this suit and have appeared and answered herein, and that there is no proof showing that said trustees are not acting in good faith."

On the 11th of October, 1884, The National City Bank of Ottawa prayed the Circuit Court for leave to prosecute an appeal in its own name to this court from the decree of June 30, 1884, the grounds of its prayer being the facts set forth in its intervening petition of June 24, 1884, and also the fact that such decree was entered by consent of all the parties to the record, including Elwell, notwithstanding the effect of the decree was to leave the bank wholly without remedy on its bonds, while other holders of like bonds were provided for by a secret agreement, with the knowledge and consent of Elwell, and against the protest of the bank, and that Elwell had refused to appeal from such decree.

On the 3d of August, 1885, the court made an order authorizing the bank to appeal from the decree of June 30, 1884, in the name of James W. Elwell, trustee, on executing to him an indemnity against all costs and expenses which might be incurred. The appeal thus allowed was not perfected, but on the 28th of June, 1886, the court entered an order which recited the fact that the bank had requested Elwell, as trustee, to perfect an appeal to this court from the decree of June 30, 1884, and that he had refused to comply with such request; and ordering that the bank have leave to appeal from that decree to this court, in the name of Elwell, as trustee, on condition that it should give a bond to indemnify Elwell, and on the further condition that the bank, or some one in its behalf, should give the usual appeal bond, in the sum of $1000, both of said bonds to be filed on or before June 30, 1886. Those bonds were duly filed, and the transcript of the record was

filed in this court on October 18, 1886, and an addition thereto, by stipulation between the parties, on January 14, 1890. The appeal bond runs to Fosdick and Fish, trustees, "for the use and benefit of themselves and for the use and benefit of each and all parties affected or to be affected by the appeal in the condition hereunder written to this obligation." The bond recites that the appeal is from the decree of June 30, 1884, made on the original and supplemental bills of Fosdick and Fish, the cross-bill of Elwell, the cross-bill of The Chicago and Eastern Illinois Railroad Company, and another cross-bill.

The Chicago and Eastern Illinois Railroad Company now moves to dismiss the appeal of Elwell, trustee, by The National City Bank of Ottawa, on the ground, among others, that Elwell, trustee, on the 16th of October, 1884, before the appeal was allowed, executed and delivered to the Chicago and Eastern Illinois Railroad Company, a written release of all errors had or committed in and concerning such decree, and especially releasing and waiving his right as such trustee to appeal from the decree; which release, on the 15th of November, 1884, was filed in the office of the clerk of the Circuit Court. A duly certified copy of such release is presented to this court as part of the moving papers. Its execution and authenticity are not denied on the part of the bank. It is entitled in the bill filed by Fosdick and Fish, and in the cross-bill brought by The Chicago and Eastern Illinois Railroad Company. It contains this statement:

"Comes now James W. Elwell, trustee, etc., one of the defendants in the above entitled cause and cross-cause, and says that of the one million convertible mortgage bonds referred to in said original bill, secured by trust deed, of which he is sole trustee, as therein charged, forty-five of said bonds, of one thousand dollars each, have not been issued by the company, and are now deposited with the clerk of said court. Fifty-eight of said bonds, representing fifty-eight thousand dollars, were issued in exchange for coupons, under the funding contract or scheme referred to in said original bill and decree. That all of said coupons have been paid out of the proceeds of sale of said railroad and property, as provided by

said decree. And that the holders of six hundred and seventeen of the balance of said bonds, amounting to six hundred and seventeen thousand dollars, do not desire further litigation in said cause and cross-cause; and that the holders of the balance of said bonds have hitherto declined to contribute to the cost of this litigation, or to protect him, as such trustee, against loss or the payment of costs or counsel fees. Now, therefore, the said James W. Elwell, trustee, as in said trust deed provided, representing the bondholders in said deed mentioned, for himself as such trustee, releases all errors whatsoever had or committed in or concerning the decree entered in the aforesaid cause and cross-cause by said court on the thirtieth (30th) day of June, A.D. 1884, and in and about the proceedings in said cause leading to said decree, and especially releases all his right, as such trustee, of appeal from said decree and proceedings, without intending, however, to prejudice the right of the holders of any of said convertible mortgage bonds to enforce the payment of their said bonds, or any part thereof."

Mr. W. H. Lyford for the Chicago and Eastern Illinois Railroad Company, one of the appellees, in support of the motion to dismiss.

Mr. Charles M. Osborn and *Mr. Samuel A. Lynde*, for the appellant, opposing.

The decree from which this appeal is prosecuted was not a joint decree within the meaning of the rule requiring all of the parties against whom a joint decree shall be rendered to join in the appeal.

The general rule, that all of the parties against whom a joint decree or judgment is rendered must join in the appeal or writ of error, is clearly stated in the decisions of this court, which are cited by counsel in the argument upon this point. The reasons upon which this rule is founded are first fully stated in *Owings* v. *Kincannon*, 7 Pet. 399, 402. The court there says: "Upon principle, it would seem reasonable that

the whole cause ought to be brought before the court, *and that all the parties who are united in interest ought to unite in the appeal.*" Since that decision, it is said in *Simpson* v. *Greeley*, 20 Wall. 152, 157: "The question has frequently been presented to this court, and has uniformly been determined in the same way, where *it appeared that the interest was joint.* . . . Where the interest is joint and the interest of all is affected by the judgment, the rule is universal that all must join in the writ of error. . . ."

In all of the cases where this rule is stated and applied, it is clearly announced that the rule exists only where the decree or judgment is joint, and the rule is held to have no application when the interest of the parties is not joint, and they are not jointly affected by the decree. *Simpson* v. *Greeley*, 20 Wall. *ubi supra; Germain* v. *Mason*, 12 Wall. 259; *Forgay* v. *Conrad*, 6 How. 201; *Brewster* v. *Wakefield*, 22 How. 118, 128; *Milner* v. *Meek*, 95 U. S. 252; *Railroad* v. *Johnson*, 15 Wall. 8.

If the trustees under the first mortgage and the Danville company should have joined in the appeal from this decree, the order of the Circuit Court allowing this appeal amounts to a sufficient severance of the parties to authorize the prosecution of this appeal in the name of Elwell alone.

There is no strict technical proceeding, that must be followed to work a severance of parties against whom a joint decree is rendered, so as to authorize an appeal by one of the parties.

In *Masterson* v. *Herndon*, 10 Wall. 416, 418, the court says: "We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join." The court further says that there should be a written notice and due service, or the record should show the appearance and refusal, and that the court on that ground granted an appeal to the party praying for it as to his own interest. See also *O'Dowd* v. *Russell*, 14 Wall. 402; *Sage* v. *Central Railroad Co.*, 93 U. S. 412.

Argument against the Motion.

By the execution of releases of error, waiving all right to appeal, the trustees in the first mortgage, the trustee in the chattel mortgage and the Danville company, had, at the time when the National City Bank was granted leave to prosecute this appeal in the name of its trustee, Elwell, estopped themselves from prosecuting an appeal or joining with the appellant in this appeal. These releases of error worked a severance of any joint interest or right to appeal, and the appeal was properly allowed in the name of Elwell alone.

We contend that the decree is not joint, and that Elwell had separate and distinct interests in the controversy, which were affected by the decree, and that he not only could appeal separately from the decree, but in order to have that portion of the decree reviewed which finds in favor of the trustees under the first mortgage, he had to appeal separately; that the order granting this appeal was made on notice to all parties, and with all parties present in court, so that a severance was effected, if that was necessary; and that the other parties have, by their releases of error and waiver of right to appeal, voluntarily made a severance.

Elwell had no power or authority as trustee in the second mortgage to release errors in the foreclosure proceedings and decree, and to waive the right to appeal from the decree. His attempt to release errors, and waive the right to appeal, was a gross breach of trust and clearly outside of the power and duties conferred upon him by the trust deed; and it cannot bar the right of the National City Bank as holder of bonds secured by the trust deed to him, to prosecute by leave of court this appeal in his name, or furnish good reason for dismissing this appeal.

The second ground, urged in support of this motion, that Elwell's release of errors and waiver of right to appeal bars the prosecution of this appeal, seems to us so utterly unreasonable and inequitable as to require but little argument.

We cannot denounce Elwell's conduct in this matter in strong enough terms, so gross was the breach of trust which he attempted to perpetrate.

It appeared as a matter of record in this cause at the time

when this alleged release of errors was filed and put on record, that this bondholder, now prosecuting this appeal, had sought to become a party to the cause before the decree because of its belief and fears of Elwell's bad faith; that it had served notice and request on Elwell to take an appeal, and had offered him all protection and indemnity against costs, expenses or damages; and had afterwards petitioned the court to be allowed to appeal on its own behalf because of Elwell's collusion and breach of trust. The proposition that Elwell could come into court and by releasing errors and making a formal waiver of the right to appeal, cut off the rights and equities of any of his *cestuis que trust*, who did not give their express consent to this action, is monstrous, and all the more so when the record shows that the bondholder, to defeat whose rights this attempted release is used, expressly charged the trustee with bad faith and breach of trust, and sought the privilege of becoming a party to the cause in order to protect itself against him and to assert its rights in its own name.

A trustee can neither waive the lien given him by the trust deed, nor the right to enforce that lien, and thereby deprive the *cestui que trust* of the benefit of the security and lien or estop and bar him from enforcing it. Nor can he by his assent, release or waiver estop his *cestui que trust* from prosecuting an appeal under the authority of the court in his name, any more than he can assent for his *cestui que trust* to a diversion of the trust estate or a waiver of the lien. He has no personal right or title, but acts purely in a representative capacity. If he acts in good faith and within the powers vested in him, whatever binds him in any legal proceedings which he may begin and carry on to enforce the trust, binds his *cestui que trust*, and whatever forecloses the trustee, in the absence of fraud, forecloses the bondholders. *Richter* v. *Jerome*, 123 U. S. 233, 246. But he cannot foreclose the bondholders by refusing to enforce the trust, or by waiving the right to appeal from the decree that may be rendered adverse to their interests. Nothing short of the express consent of all of the holders of bonds secured by his trust deed could warrant the trustee to attempt to release errors or waive the right to

appeal; and whatever action he may attempt in that regard is fruitless against any bondholder who does not consent.

We wish before concluding to make this further suggestion. Elwell's release closes with the statement: "Without intending, however, to prejudice the right of the holders of any of said convertible mortgage bonds to enforce the payment of their said bonds or any part thereof." It is evident, therefore, that the release itself, even if within his power to execute, is wholly nugatory so far as having any effect upon this appeal is concerned. The appellant here is holder of certain of these bonds who has been given leave by the court to prosecute this appeal and use Elwell's name for that purpose, and the release cannot be considered as including this case.

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

It is contended for the bank that Elwell had no authority, as trustee in the second mortgage, to release errors in the foreclosure proceedings or in the decree and to waive the right to appeal from the decree; that his attempt to do so was a breach of trust, and outside of the powers and duties conferred upon him by the trust deed; and that the release does not bar the right of the bank, as the holder of bonds secured by the trust deed to Elwell and Fish, to prosecute this appeal by the leave of the court, in the name of Elwell, nor furnish any reason for dismissing it. In the petition of intervention filed by the bank on the 24th of June, 1884, six days before the final decree was entered, it was alleged "that, neither before the rendition of the final decree in this cause in this court, nor after its reversal by the supreme court, has the said Elwell shown any diligence or attempted to make any arrangement to prevent a sacrifice of the interests of your petitioner and others similarly situated;" and "that, unless it shall be permitted to become a party to this suit and file its answer therein, it will lose its rights in the premises under some collusive compromise or colorable sale, or through the indifference or neglect of the said Elwell." The court denied the prayer of the

intervening petition of the bank, stating "that the trustees under said second mortgage are parties to this suit and have appeared and answered herein, and that there is no proof showing that said trustees are not acting in good faith."

It thus appears that the court passed upon the question of collusion on the part of Elwell, and held that the bank was bound by the acts of Elwell representing it as trustee. No action was taken by the bank to appeal for more than three months. By an order made August 3, 1885, it was allowed to appeal in the name of Elwell, trustee, but it failed to perfect any appeal under such allowance. Such appeal was re-allowed on the 28th of June, 1886, and was perfected on the 30th of June, 1886, being exactly two years after the entry of the final decree and the last day on which the appeal could be taken. Meantime, by an instrument executed in October, 1884, and filed in the Circuit Court in November, 1884, at a time when no appeal was pending from the decree, the release of errors was executed by Elwell, trustee.

We are of opinion that this release bound all the bondholders represented by Elwell. It appears by the release that only 955 of the convertible bonds were issued; that 58 were issued in exchange for coupons, all of which coupons had been paid out of the proceeds of the sale of the property; that, of the remaining 897, the holders of 617 did not desire further litigation; and that the holders of the remaining 280 had hitherto declined to contribute to the cost of the litigation or to protect the trustee against loss or the payment of costs or counsel fees. No substantial reasons appear for permitting the bank, as the holder of only $14,000 of the bonds, to defeat the plainly expressed will of the holders of the remainder. *Sage* v. *Central Railroad Co.*, 99 U. S. 334.

The allegation of neglect or collusion on the part of Elwell, as trustee, was found by the Circuit Court to be untrue. The trustee represented the bondholders not only in the proceedings which resulted in the entry of the decree, so that the bondholders were not necessary parties, but he also bound them by his release of errors. His relations to them had not changed between the time of the entry of the decree

and the time of the execution of the release. *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611, 612; *Bank* v. *Shedd*, 121 U. S. 74, 86; *Barnes* v. *Chicago, Milwaukee &c. Railway*, 122 U. S. 1.

The release of errors, although not found in the transcript of the record, is properly brought before this court, for the purpose for which it is presented. In *Dakota County* v. *Glidden*, 113 U. S. 222, 225, this court, speaking by Mr. Justice Miller, said: "But this court is compelled, as all courts are, to receive evidence *dehors* the record affecting their proceedings in a case before them on error or appeal. The death of one of the parties after a writ of error or appeal requires a new proceeding to supply its place. The transfer of the interest of one of the parties by assignment or by a judicial proceeding in another court, as in bankruptcy or otherwise, is brought to the attention of the court by evidence outside of the original record, and acted on. A release of errors may be filed as a bar to the writ. A settlement of the controversy, with an agreement to dismiss the appeal or writ of error, or any stipulation as to proceedings in this court, signed by the parties, will be enforced."

By the provisions of the mortgage to Elwell, he, as trustee, could proceed to collect the mortgage debt, by litigation or otherwise, only at the request of the holders of a majority of the bonds. As appears from the terms of the release, and is not controverted, the majority of such holders desired the litigation to cease. The trustee was authorized to put an end to it, and his waiver of an appeal binds all who act in his name as trustee. The bank was not a party to the suit, and its right to appeal depended entirely upon the action of the trustee. *Ex parte Cutting*, 94 U. S. 14, 21; *Ex parte Cockcroft*, 104 U. S. 578. All that the Circuit Court did was to allow the bank to appeal in the name of the trustee. The bank is bound by all the preceding acts of the trustee, done in good faith. On the facts of the case, the appeal must be considered as the appeal of the trustee, and as barred by his release executed long before the appeal was granted.

The result is that the appeal must be dismissed, and it is so ordered.

MR. CHIEF JUSTICE FULLER, having been of counsel in this case, did not sit in it or take any part in its decision.

SMALL *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 226. Submitted March 21, 1890. — Decided March 31, 1890.

When the record is not filed in this court at the term succeeding the allowance of an appeal, the appeal ceases to have any operation or effect, and the case stands as if it had never been allowed.

THE case is stated in the opinion.

Mr. John G. Woolley for appellant.

Mr. W. P. Clough, *Mr. A. H. Garland* and *Mr. H. J. May* for appellee.

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

This appeal must be dismissed for want of jurisdiction. Small filed his bill in the District Court of the Fourth Judicial District of the State of Minnesota, whence the cause was subsequently removed into the Circuit Court of the United States for the District of Minnesota, and, upon hearing, resulted on the 24th day of June, 1884, in a decree dismissing the complainant's bill, and rendering judgment in favor of the defendant for its costs to be taxed. On the 25th day of June, 1884, the complainant prayed an appeal to this court, which was granted. On the 21st day of May, 1886, complainant filed an

appeal bond and a citation was issued, returnable at the October term, 1886, dated April 30, 1886. The record herein was filed October 19, 1886. The only appeal which from the record before us appears to have been prayed and allowed was that of the 25th day of June, 1884.

But, as we have said many times before, inasmuch as the record was not filed at the term succeeding the allowance of the appeal, that appeal ceased to have any operation or effect, and the case stood as if it had never been allowed. There was no allowance of an appeal after that, and when the record was filed on the 19th day of October, 1886, this was not done in pursuance of an appeal still in force, nor could an appeal then have been allowed, as two years had expired from the date of the final decree. This appeal was not "taken" as provided, and we are, therefore, compelled to dismiss it. *Credit Company* v. *Arkansas Central Railway*, 128 U. S. 258; *Richardson* v. *Green*, 130 U. S. 104; *Evans* v. *State National Bank*, *ante*, 330.

Appeal dismissed for want of jurisdiction.

HILL v. MERCHANTS' MUTUAL INSURANCE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 215. Submitted March 19, 1890. — Decided March 31, 1890.

A state statute which confers upon a judgment creditor of a corporation, when execution on a judgment against the corporation is returned unsatisfied, the power to summon in a stockholder who has not fully paid the subscription to his stock, and obtain judgment and execution against him for the amount so unpaid, in no way increases the liability of the stockholder to pay that amount; and, inasmuch as he was before then liable to an action at law by the corporation to recover from him such unpaid amount at law, as well as to a suit in equity, in common with other similar stockholders, to compel contribution for the benefit of creditors, no substantial right of the stockholder is violated.

Statement of the Case.

THE court, in its opinion, stated the case as follows:

This writ of error brings up for reëxamination a judgment of the Supreme Court of Missouri, and presents the question whether a certain statute to which that judgment gave effect, impaired the obligation of a contract arising out of a subscription by Britton A. Hill to the stock of an insurance company created by the laws of Missouri.

By the second section of an act of the Missouri legislature, approved March 3, 1857, creating the Washington Insurance Company, it was provided in reference to subscriptions to its stock, that, "at the time of subscribing there shall be paid on each share one dollar, and nine dollars more within twenty days after the first election of directors; if any stockholder fails to make such payment, such stockholder shall forfeit the amount paid on such stock at the time of subscribing; the balance due on each share shall be subject to the call of the directors, and the said company shall not be authorized to make any policy or contract of insurance until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand by approved notes or mortgages on real estate." The same act contained the following provisions: "This act shall be, and the same is hereby declared, a public act, and the same shall be deemed and construed as such; and the corporation established by this act shall be, and the same is hereby exempted from the operation of sections seven, thirteen, fourteen, fifteen, sixteen and eighteen of article first of the act entitled 'An act concerning corporations,' approved November 23, 1855; and said sections shall be deemed as repealed, so far as the same concern the corporation hereby established." Laws of Missouri, 1856–7, pp. 544, 545, §§ 2, 8.

Sections seven, thirteen, fourteen, fifteen, sixteen and eighteen of the above act of 1855, from the operation of which the Washington Insurance Company was thus exempted, are as follows:

"§ 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

Statement of the Case.

"§ 13. In all corporations hereafter created by the legislature, unless otherwise specified in their charter, in case of deficiency of corporate property, or estate liable to execution, the individual property, rights and credits of every member of the copartnership, or body politic, having a share or shares therein, shall be liable to be taken on execution, to an additional amount, equal to that of the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock; and such liability shall continue, notwithstanding any subsequent transfer of such stock, for the term of one year after the record of the transfer thereof on the books of the corporation, and for the term of six months after judgment recovered against such corporation, in any suit commenced within the year aforesaid: *Provided*, That in every such case the officer holding the execution shall first ascertain and certify upon such execution that he cannot find corporate property or estate.

"§ 14. In such case, the officer may cause the property of such stockholder to be levied upon by execution in the same manner as if the same were against him individually, after giving him forty-eight hours' previous notice of his intention, and the amount of the debt or deficiency, if he resides within the county, or if not within the county, to his agent, if he have any within the county, otherwise to the clerk or cashier or some other officer of the corporation, unless such stockholder, his agent, or the clerk or other officer, on demand and notice as aforesaid, shall disclose and show to the execution creditor, or the said officer, corporate property or estate subject to execution sufficient to satisfy said execution and all fees.

"§ 15. Such creditor, after demand and notice as mentioned in the preceding section, at his election, may have an action against any such stockholder or stockholders, on whom such demand and notice may have been served, jointly or severally, or so many of them as he may elect, to recover of him, or them, individually, the amount of his execution and costs, or of the deficiency as aforesaid, not exceeding the amount of the stock held by such stockholder or stockholders.

"§ 16. The clerk, or other officer having charge of the

books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence (so far as to him known) and the amount of liability of every person liable as aforesaid."

"§ 18. Every corporation hereafter created shall give notice annually in some newspaper printed in the county where the corporation is established, and in case no paper is printed therein, then in the nearest paper, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any of the said corporators shall fail so to do, all the stockholders of the corporation shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such notice shall be given." Rev. Stat. Missouri 1865, pp. 372–3.

By an act of the legislature of Missouri, approved February 9, 1859, the Excelsior Insurance Company was created. That act is as follows:

"§ 1. That an insurance company be, and is hereby, established in the city of St. Louis, to be known by the name and style of the 'Excelsior Insurance Company,' the stockholders of which are hereby declared a body corporate and politic, with the same amount of capital stock and period of existence, and the same rights, privileges and restrictions, as were conferred upon the 'Washington Insurance Company' of St. Louis, by an act of the General Assembly of the State of Missouri, approved March the third, eighteen hundred and fifty-seven, with the exception of so much of section eight of said act, as declares the same a public act, and exempts said corporation from the operation of section eighteen of article first of the act, entitled 'An act concerning Corporations,' approved November the twenty-third, eighteen hundred and fifty-five.

"§ 2. James H. Lucas, Henry L. Patterson, Thomas Stein, Morris Collins, James G. Brown and John C. Porter, or any three of them, or such person or persons as they may appoint, are hereby constituted commissioners to open books for subscription to the capital stock, in the same manner as is prescribed in the charter of said Washington Insurance Company.

This act to take effect from and after its passage." Sess. Acts Missouri, 1859, p. 74.

Section 6, article 8 of the constitution of Missouri, which went into effect in 1865, provides as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock."

In order to give effect to this constitutional provision, the legislature, by an act which went into effect March 19, 1866, amended section 13 of the above act of 1855, so as to read as follows:

"§ 11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon: *Provided always*, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly." Rev. Stat. Missouri, 1866, 328.

In July, 1866, Hill subscribed for 64 shares, of the par value of $100 for each share, of the stock of the Excelsior Insurance Company, paying part cash and giving to the company four notes for $750 each, dated respectively July 20, 1866, and one note dated July 11, 1866, for $1800. Each one of these notes was payable on demand to the order of the insurance company. At the commencement of these proceedings his stock had become reduced to 37 shares.

The constitution of Missouri of 1875 provided that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." Art. 12, § 9.

Argument for Plaintiff in Error.

In 1879 the statutes of Missouri were revised, and the above section of the act of 1866 was amended so as to read as follows:

"§ 736. If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned: *Provided, always*, That no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such court may order execution to issue accordingly: *And provided further*, That no stockholder shall be individually liable in any amount over and above the amount of stock owned."

The present action was brought under the statute last quoted. It was commenced by notice to Hill on behalf of the Merchants' Mutual Insurance Company that it would move the Circuit Court of the city of St. Louis for execution against him, as a stockholder of the Excelsior Insurance Company, for the balance unpaid upon his thirty-seven shares of the capital stock of the Excelsior Insurance Company. The proceeding was docketed as a suit against that company by the Merchants' Insurance Company. Hill appeared, and upon the trial of the action the court found that the unpaid balance on said shares was $2127.50. For that amount, with costs, an execution was directed to be issued against Hill. Upon appeal to the St. Louis Court of Appeals that judgment was affirmed, and the judgment of the Court of Appeals was affirmed by the Supreme Court of the State. 12 Missouri App. 148; 86 Missouri, 466.

Mr. G. M. Stewart for plaintiff in error.

Under the law as it stood when plaintiff in error subscribed for his stock, a creditor of the Excelsior Insurance Co., if there was an insufficiency of corporate property, had no action

at law against a stockholder. His remedy was in equity in behalf of himself and other creditors who might join him. In such case the stockholder or stockholders so impleaded would have had the right by answer, or cross-bill or both to have all the other stockholders who were subject to assessments brought into court and their respective liabilities determined, because in the case at bar, when and long before this process was issued the Excelsior Insurance Company was in liquidation.

In *Fairchild* v. *Hunt*, 71 Missouri, 526, it was expressly decided, in reference to these very sections of the Revised Statutes of 1855, 1865 and 1879, that when a revision includes a previous law, it is only thereby intended to continue it in force, and not to make it operate as an original act to take effect from the date of the revised law, and that § 11, of the act of 1865, could not retroact so as to affect Mrs. Hunt, a stockholder under a charter of 1853.

This fact is apparently conceded, but it has been argued by counsel and by the courts below, that it is harmless inasmuch as these statutes were only remedial, and did not prejudice the contractual rights of plaintiff in error.

By its charter the Excelsior Insurance Company was exempted from sec. 7, c. 34, Rev. Stat. Mo. 1855, c. 37, which provided that the charter of every corporation which should *thereafter* be granted should be subject to legislative control. The plain meaning of this provision is that no subsequent legislation could affect the charter rights of this corporation. Of these, one was that a stockholder should not be subject to the summary process invoked in this case. Another that when called upon to pay his *pro rata* share of the indebtedness of the company, when in liquidation, the amount he should pay would be determined by the proportion which the total amount of the unpaid stock due from solvent holders bore to the total indebtedness of the company.

In the court below it was argued that by his subscription to the capital stock of the Excelsior Insurance Company, the appellant agreed absolutely to pay the full amount of his subscription, and hence he cannot complain that he has been forced to pay it by this proceeding.

With all due respect to the lower court, we submit that a subscriber to the capital stock of this corporation did not unconditionally agree to pay the full amount of his subscription, nor is such the inflexible rule of law.

It is true, he becomes liable, under certain contingencies, to pay the same in full, but this is only when the necessities of the corporate business require that each shareholder shall pay the full amount of his subscription.

This is especially true where the enterprise has been abandoned as in the case at bar. In such case there is no use for capital except for winding up the company's business.

If there are no unpaid creditors, the liability of a member of the company to contribute his share of the capital, would, by the implied terms of his contract, have ceased.

If, however, there are debts of the corporation to be paid, then each shareholder agrees to contribute or pay upon his unpaid stock his *pro rata* share of such indebtedness, and, when this is paid, his liability is at an end.

This court has decided that the remedy subsisting when a contract was made, is a part of the obligation, and any subsequent law of the State, which so affects that remedy as substantially to impair or lessen the value of that contract is forbidden by the Constitution of the United States. *Edwards* v. *Kearzy*, 96 U. S. 595; *Seibert* v. *Lewis*, 122 U. S. 284, 294; *Denny* v. *Bennett*, 128 U. S. 489, 494, 495. This court has also held that the remedy provided by the charter of a corporation is the only remedy that can be applied in recovering from a stockholder for his unpaid stock. *Pollard* v. *Bailey*, 20 Wall. 520; *Terry* v. *Tubman*, 92 U. S. 156; *Hornor* v. *Henning*, 93 U. S. 228; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747.

The proceeding in the case at bar was such that plaintiff in error could interpose no pleadings. The only defence possible to him was to show the amount unpaid on his stock, but he could not show that under the contract made when he subscribed for the stock he was only liable for his *pro rata* share. In other words, he was denied the right to show the total indebtedness of the company, or the amount of unpaid stock held by solvent stockholders and thus establish the extent of

his liability. He could not even show that there were available corporate assets to pay the debt of defendant in error.

A subsequent act, which impairs rights acquired, or creates new grounds of action, or takes away defences which might be made under existing laws, or imposes new liabilities in respect of past transactions, is unconstitutional. *Hope Mut. Ins. Co.* v. *Flynn*, 38 Missouri, 483; *S. C.* 90 Am. Dec. 438; *Provident Savings Inst.* v. *Bathing Rink*, 52 Missouri, 557; *Fairchild* v. *Hunt*, 71 Missouri, 526, 531; *Woart* v. *Winnick*, 3 N. H. 473, 477; *Society for Propagation of Gospel* v. *Wheeler*, 2 Gallison, 105.

At common law no action would lie by a creditor of the corporation against a stockholder, because there was no privity of contract between them, though in equity he could have a bill against all or some of the stockholders of an insolvent corporation, upon an equity worked out through the liability of the corporation to him and of the stockholders to the corporation for a balance of unpaid stock, by a species of subrogation, to compel them to contribute their *pro rata* shares (within the amounts owed by them) towards making up the amount of the creditor's demand against the corporation; in which an account could be taken, and claims of set-off and other equitable defences could be adjusted, and an apportionment made of the common burden among all the defendants. *Lionberger* v. *Broadway Savings Bank*, 10 Missouri App. 499; *Vose* v. *Grant*, 15 Mass. 505; *Spear* v. *Grant*, 16 Mass. 915; *Wood* v. *Dummer*, 3 Mason, 308; *Briggs* v. *Penniman*, 8 Cowen, 387; *S. C.* 18 Am. Dec. 454; *Nathan* v. *Whitlock*, 9 Paige, 152; *Mann* v. *Pentz*, 3 N. Y. (3 Comst.) 415, 422.

The case of *Hatch* v. *Dana*, 101 U. S. 205, does not militate against this position. In that case a bill in equity was brought to enforce a demand against an insolvent corporation, against several but not all of the stockholders, and in answer to a complaint made, on appeal, that all should be joined, this court said that this was not necessary, inasmuch as those stockholders who were impleaded could secure the necessary protection by applying for a receiver, or by filing a cross-bill they might have obtained a discovery of the other stock-

holders, brought them in and enforced contribution from all who had not paid their stock subscription. In the proceeding invoked in the case at bar, plaintiff in error was deprived of all these rights, and it is that of which we complain and which we insist was guaranteed to him by the charter of his corporation, and of which he could not be legally deprived by subsequent legislation.

Mr. Everett W. Pattison for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

The plaintiff in error contends that the act creating the Excelsior Insurance Company was a private act, and its charter exempted from alteration, suspension or repeal by subsequent legislation; that its stockholders were exempted from the levy of an execution upon their individual property at the instance of a judgment creditor of the corporation in case of a deficiency of corporate property, and from actions at law by creditors; that the rights of its stockholders were not affected by subsequent legislation of a general nature; and that the method of collecting unpaid stock, specially provided for in the company's charter, was exclusive of any other remedy, except that supplied by a court of equity.

The assignment of error which gives this court jurisdiction to reëxamine the judgment of the state court is, that when the testator of the plaintiff in error purchased the stock of the Excelsior Insurance Company he entered into a contractual relation, not only with the company, but with the State, both as to the method of paying for his stock, and in respect to the extent of his liability; and that the rights vested in him by the contract were taken away, and, therefore, the obligations of his contract were impaired, by the legislation of 1879, the validity of which was sustained by the court below.

We assume, in conformity with the decision of the Supreme Court of Missouri — and that view is favorable to the plaintiff in error — that the Excelsior Insurance Company was not subject to the seventh section of the general statute of November 23, 1855, declaring that the charters of all corporations there-

after created should be granted subject to alteration, suspension and repeal in the discretion of the legislature; and that the other sections of that statute, specially named in the charter of the insurance company, were to stand as repealed so far as that company was concerned. The result of this construction of the charter of the insurance company is, that prior to the passage of the act of 1866, which took effect March 19, 1866, no specific remedy was prescribed for creditors seeking to reach the unpaid subscriptions of stockholders. But it was open to them to proceed by a suit in equity. That such a remedy could be used without violating any provision of the company's charter, or any right of a stockholder, cannot be doubted. But neither the company nor its stockholders had any vested right in that particular remedy. They could only insist that the extent of their liability should not be increased. The act of 1866 authorized an execution to be issued against a stockholder "to an extent equal in amount to the amount of stock by him or her owned together with any amount unpaid thereon," where no property or effects of the corporation could be found. This statute, if given a retrospective operation, certainly did increase the liability of those who became stockholders in the Excelsior Insurance Company prior to its passage. But the defendant in error contends that it was applicable to all who, like Hill, became stockholders after its passage. Waiving any consideration of this question it is certain that the act of 1879, under which this action was instituted, did not increase Hill's liability. He was liable, by virtue of his original subscription and by his notes to the company, to pay the whole amount of his subscription. The statute of 1879 did not enlarge this liability, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only "to the extent of the amount of the unpaid balance of such stock by him or her owned." While, under the original charter of the company, he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. In either mode he had opportunity to make defence.

It is, however, contended that under the charter of the company the stockholder was not bound to pay any amount beyond ten dollars on each share except upon a call of the directors, and that the provision allowing an execution for the unpaid balance, pursuant to the judgment of the court, was a change of the contract. The provision in the company's charter, that "the balance due on each share shall be subject to the call of the directors," did not give the stockholder the right, as between himself and the company, or as between him and the company's creditors, to withhold payment of the balance due from him until the necessities of the company required payment in full for the shares subscribed. The company was forbidden to make any policy or contract of insurance "until the whole amount of shares subscribed shall be actually paid in, or secured to be paid on demand, by approved notes or mortgages on real estate." Hence Hill executed demand notes, with surety, for the entire balance due on his original subscription. The authority of the company to call for the payment of those notes, by instalments, did not give him a right, as a part of his contract, to make payment in that particular mode. His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf — such remedy not increasing the debtor's liability. As said by this court in *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 580, the condition is implied in every grant of corporate existence that "the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created."

Upon the point made by the plaintiff in error, that under the original charter of the company Hill was liable only to a suit in equity, to which all the stockholders could be made parties, and in which he could compel contribution from other

Counsel for Parties.

stockholders, whereas under the statute of 1879 he could be proceeded against alone, it is sufficient to say that if neither the statute of 1866 nor that of 1879 had been passed, he could have been sued at law upon the notes he gave the company. The proceeding authorized by the statute of 1879 is, in effect, a suit upon his notes for the amount due thereon. His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. *Hatch* v. *Dana*, 101 U. S. 205. The statute restricts any judgment against him to the amount he originally assumed to pay. Consequently, no substantial right of his has been violated. "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." *Bronson* v. *Kinzie*, 1 How. 311, 316; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 755, and cases there cited.

Judgment affirmed.

WHITTEMORE *v.* AMOSKEAG NATIONAL BANK.

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

No. 219. Argued and submitted March 20, 1890. — Decided March 31, 1890.

In an action against a national bank in a Circuit Court of the United States, if all the parties are citizens of the district in which the bank is situated, and the action does not come under section 5209 or section 5239 of the Revised Statutes, the Circuit Court has no jurisdiction; and, if it has taken jurisdiction and dismissed the bill upon another ground, its decree will be reversed and the cause remanded with a direction to dismiss the bill for want of jurisdiction.

THE case is stated in the opinion.

Mr. H. G. Wood for appellant.

Mr. Thomas L. Livermore, with whom was *Mr. Frederick P. Fish* on the brief, for appellees.

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

David C. Whittemore, of Manchester, in the District of New Hampshire, in his own behalf and in behalf of such stockholders of the Amoskeag National Bank, a corporation duly established under the laws of the United States, and having its principal place of business at said Manchester, as might join therein, brought his bill of complaint, May 9, 1885, against the Amoskeag National Bank, Moody Currier, George B. Chandler, David B. Varney, John B. Varick, Henry Chandler, John S. Kidder, Edson Hill, and Reed P. Silver, all of Manchester, in said district, six of them directors, one of them the cashier, and the other a former director, of said bank, alleging in substance that complainant was the owner of five shares of the capital stock of the bank; that in 1875, a firm styled Dunn, Harris & Co. was adjudicated bankrupt by the United States District Court for said District of New Hampshire, and an assignee appointed, being indebted at the time to the bank in the sum of one thousand dollars, and one of the members of the firm, Cyrus Dunn, being indebted to the bank in the sum of five thousand dollars; that the firm offered a composition of fifteen per cent to their creditors, and Cyrus Dunn offered a composition of twenty per cent to his creditors; that the bank, by a vote of its directors, constituted one of their number its agent in the bankruptcy proceedings, and he entered into an agreement with Cyrus Dunn that, in consideration that the bank should furnish him with money sufficient to carry out the compromise, he would pay the agent of the bank a sum equal to the sum due to the bank; that in pursuance of this agreement, the bank advanced from its funds a large sum without security, in doing which the directors and officers violated their duties and obligations to the bank's stockholders, and their acts were in violation of the charter of the bank and the laws of the United States; that the sum advanced was used in purchasing claims against Cyrus Dunn; that the compromise was confirmed, and the property of Cyrus Dunn conveyed by the assignee to the agent of the bank, and by him

to the bank; that afterwards the composition was set aside and the assignee brought suit against the bank to recover the property, which was decided by the District Court in favor of the assignee; that in 1876, a note was given to the bank, signed by two of its directors and Cyrus Dunn of the insolvent firm, for the money advanced by said bank in excess of what was received from the assignee, and this note was included as part of the assets of the bank; and that the bank has made no attempt to collect the note, and has expended large sums of money in defence of its illegal acts; and complainant prays that the respondents, the directors of the bank, may be decreed to pay to the bank whatever it may have lost by reason of this illegal conduct; and that a receiver may be appointed to collect said note, and for such other relief as may be just, etc. The bill was demurred to by the respondents, and the demurrer sustained upon the ground that the plaintiff could not maintain his bill because of his failure to bring himself within equity rule 94; and thereupon a decree was entered dismissing the bill with costs, and an appeal was prayed to this court.

All the parties were citizens of the District of New Hampshire, and the bank was located therein; and in our judgment the Circuit Court for that district had no jurisdiction. A motion to dismiss the appeal on this ground has heretofore been made, but was overruled, as this court undoubtedly has appellate jurisdiction to determine whether the Circuit Court had original jurisdiction.

Prior to July 12, 1882, suits might be brought by or against national banks in the Circuit Courts of the United States in the district where the banks were located, but by the act of that date it was provided that "the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be

doing business when such suits may be begun." 22 Stat. 162, 163, c. 290, sec. 4.

But counsel for complainant claims that the Circuit Court had jurisdiction under §§ 5209 and 5239 of the Revised Statutes. Section 5209 prescribes punishment for the embezzlement, abstraction, or wilful misapplication of any of the moneys, funds, or credits of a national banking association, by any president, director, cashier, teller, clerk, or agent thereof, and for other acts done without authority of the directors with intent to defraud the bank; and section 5239 provides for a suit by the Comptroller of the Currency to forfeit the franchises of national banks for the intentional violation by their directors, or the intentional permission by them of such violation by any of the officers, agents, or servants of the association, of any of the provisions of the title of the Revised Statutes relating to national banks. This bill obviously cannot be retained by reason of anything contained in those sections.

As the Circuit Court had no jurisdiction, but dismissed the bill upon another ground, we reverse its decree, with a direction to dismiss the bill for want of jurisdiction.

BROWN *v.* LAKE SUPERIOR IRON COMPANY.

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

No. 227. Argued and submitted March 24, 1890. — Decided April 7, 1890.

An insolvent corporation, with large properties scattered in different States, having, for the purpose of keeping those properties together as a whole, assented to the filing of a creditors' bill by three creditors, (the debts of two of them not having matured and no execution having been issued on that of the third,) and having assented to the appointment of a receiver under that bill, and having for nine months lain inactive while the receiver was managing the property and assuming liabilities in reducing it to possession, cannot at the expiration of that time, when the great majority of its creditors have become parties to the suit, and its property is about to be ratably distributed by the court among all its creditors,

interpose the objection of want of jurisdiction on the ground that a court of equity could not obtain jurisdiction when the plaintiff's creditors had plain, adequate and complete remedies at the common law, or that their debts had not been converted into judgments, or that no execution had issued and been returned *nulla bona* — whatever weight might have been given to those defences if interposed in the first instance.

The maxim that "he who seeks equity must do equity" is applicable to the defendant as well as to the complainant.

Good faith and early assertion of rights are as essential on the part of a defendant in equity as they are on the part of the complainant.

IN EQUITY. The case is stated in the opinion.

Mr. Henry Crawford, for appellant, submitted on his brief.

Mr. Francis J. Wing and *Mr. C. C. Baldwin* for appellees. *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson* and *Mr. C. D. Hine* were also on the brief with *Mr. Baldwin*.

MR. JUSTICE BREWER delivered the opinion of the court.

On February 20, 1883, two of the appellees, the Lake Superior Iron Company and the Jackson Iron Company, together with the Negaunee Concentrating Company, filed their bill against the appellant, in the Circuit Court of the United States for the Northern District of Ohio. The appellant was a corporation, created under the laws of the State of Ohio, and each of the complainants was a creditor; two holding claims evidenced by notes not then due, and the other, the Negaunee Concentrating Company, holding a judgment. The prayer of the bill was for the appointment of a receiver to take charge of the property and assets of the defendant, and for such other and further relief as was proper. On the same day the defendant entered its appearance, and accepted service of notice of a motion for the appointment of a receiver; and Fayette Brown was thereupon, immediately, appointed receiver. On the next day subpœna was served on the defendant. On March 28 a supplemental bill was filed making other parties defendants, and on June 14 an order *pro confesso* was entered against all of the defendants in the original and supplemental bills. On April 23 an order was

entered directing all creditors to file their claims by petition, and on October 20 nearly every creditor had appeared and filed his petition. On July 17 an order was entered appointing a special master to report on the claims of creditors and marshal the liens thereof.

Up to the 23d of November, the appellant made no opposition to the proceeding, and apparently assented to the action which was being taken by the creditors, looking to the appropriation of its property to the payment of their claims. On that day a change took place in its attitude towards this suit. It went into the state courts and confessed judgment in behalf of several of its creditors; and on the 24th deposited in the registry of the Circuit Court money enough to pay off the judgment in favor of the Concentrating Company, and filed two pleas — one setting forth the fact of payment, and the other that the original and supplemental bills disclosed that the complainants had a plain, adequate and complete remedy at law; and that therefore the court, sitting as a court of equity, had no jurisdiction; and praying a dismissal of the bills. Subsequently, on December 18, it filed a motion to discharge the receiver. This motion was overruled, the pleas seem to have been ignored, the master reported upon the claims presented, and on February 23, 1886, the court entered a decree which, finding the indebtedness to be as stated by the master, also what property was in possession of the receiver, decreed that upon default in the payment of those debts the property be sold in satisfaction thereof. From this decree the defendant has brought this appeal; and its principal contention is, that the Circuit Court had no jurisdiction whatever over the subject matter of the suit, because it appeared upon the face of the bills, original and supplemental, that the complainants had a plain, adequate and complete remedy at law.

As heretofore stated the bill showed that two of the complainants held claims not yet due, and the third only a judgment with no execution. The supplemental bill alleged that execution had, since the filing of the original bill, been issued on that judgment, and returned *nulla bona*. The original

bill, besides disclosing the nature of complainants' claims, set forth that they were proceeding not alone in their own behalf, but in that of all other creditors, whose number was so great as to make it impossible to join them as parties; it then averred the insolvency of the defendant; that it was engaged in large and various business, manufacturing and mining; that its plant and good will were of great extent and value; and that it employed operatives to the number of at least four thousand; and then alleged as follows: "And your orators further say that vexatious litigation has been commenced against the said defendant, and many more such are threatened, and that such litigations are accompanied by attachments and seizures of property, and such threatened litigations will also be accompanied by attachments and seizures, and that such attachments and seizures will give to those creditors who are pursuing them undue and unfair advantage and priority over your complainants, whose claims are not yet due, and make them irreparable injury and damage; that if such litigations be further instituted and its property seized in attachment, as it already has been, there is great danger that the valuable property of the defendant will be irreparably injured and to a great extent destroyed, and your orators say that such seizures and interference with the business and the property of the defendant would wholly destroy the value of the good will of the company as an asset, and wholly break up its long-established business, and thereby cause detriment and irreparable injury to your orators and all other creditors. And your orators further say that unless this court shall interfere and protect and preserve the property and assets of said defendant by putting it into the hands of a receiver, the said property will be in great danger of destruction and dissipation by the large number of operatives who would necessarily be discharged and left without work or means of obtaining it, and such operatives, by reason of the great distrust they already have and on account of a fear that they will not in future receive remuneration, will abandon their employment and thereby cause a stoppage of the extensive business of said defendant, to the extent that the creditors of said defendant

would not be able to realize one-half of the amount upon the several claims that they would if the said business of the defendant were continued."

The appellees, while admitting the general rule to be that creditors must show that they have exhausted legal remedies before coming into a court of equity, insist that the bill disclosed a case in equity on two grounds: First, that upon the insolvency of a corporation its properties become a trust fund for the benefit of its creditors, which can be seized and disposed of by a receiver, and in equitable proceedings; and, second, that the vast interests and properties of this corporation, with their threatened disintegration through several attachment suits, justified the interference of a court of equity to preserve, for the benefit of creditors, that large value which resulted from the unity of the properties. In support of these propositions counsel cite as especially applicable, *Terry* v. *Anderson*, 95 U. S. 628; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434; *Sage* v. *Memphis &c. Railroad*, 125 U. S. 361; *Mellen* v. *Moline Iron Works*, 131 U. S. 352; *Barbour* v. *Exchange Bank*, 45 Ohio State, 133; *Rouse, Trustee*, v. *Bank*, 46 Ohio State, 493.

But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession, and defeated the action, still the decree of the Circuit Court must be sustained. Whatever rights of objection and defence the appellant had, it lost by inaction and acquiescence. Obviously the proceedings had were with its consent. Immediately on filing the bill it entered its appearance; and the same day a receiver was appointed, without objection on its part. It suffered the bills to be taken *pro confesso*. It permitted the receiver to go on in the possession of these properties for nine months, transacting large business, entering into many contracts and assuming large obligations, without any intimation of a lack of authority, or any objection to the proceedings. After a lapse of nine months, suddenly its policy changed — it contested where theretofore it had acquiesced. And this, not because of any restored solvency

or purpose to resume business, but with the evident intent to prevent the equality among creditors which the existing equitable proceedings would secure, and to give preference to certain creditors. For clearly it was the thought of the president of the corporation, himself the owner of a large majority of its stock, whose management had wrought its financial ruin, that after the setting aside of the equitable proceedings the lien of the confessed judgments would attach, and thus those favored creditors would be preferred.

So the case stands in this attitude. The corporation was insolvent. Its extensive and scattered properties had been brought into single ownership, and so operated together that large benefit resulted in preserving the unity of ownership and operation. Disintegration was threatened through separate attacks, by different creditors, on scattered properties. The preservation of this unity, with its consequent value, and the appropriation of the properties for the benefit of all the creditors equally, were matters deserving large consideration in any proper suit. Certain creditors, acting for all, initiated proceedings looking towards this end. In such proceedings the corporation acquiesced. Substantially all of the creditors came into the proceedings. After months had passed, much business had been transacted and large responsibilities assumed, the corporation, for the benefit of a few creditors and to destroy the equality between all, comes in with the technical objection that the creditors initiating the proceedings should have taken one step more at law before coming into equity. But the maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence and plead an unsubstantial technicality to overthrow protracted, extensive and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before this court, in *Reynes* v. *Dumont*, 130 U. S. 354,

395, and was carefully considered, and the rule, with its limitations, thus stated: "The rule as stated in 1 Daniell's Chancery Practice, 555, 4th Am. ed., is, that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defence at large, the court, having the general jurisdiction, will exercise it; and in a note on page 550, many cases are cited to establish that 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject matter.' . . . It was held in *Lewis* v. *Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings, nor suggested by counsel. To the same effect is *Oelrichs* v. *Spain*, 15 Wall. 211. The doctrine of these and similar cases is, that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late, even though, if taken *in limine*, it might have been worthy of attention." See also *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434, 468.

Further comment is unnecessary. The ruling of the Circuit Court was correct, and its decree is therefore

Affirmed.

WHEELER v. CLOYD.

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

No. 147. Argued December 6, 1889. — Decided April 7, 1890.

Gibson v. *Shufeldt*, 122 U. S. 27, affirmed to the point that "in a suit in equity brought in the Circuit Court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only, to each of whom more than $5000 is decreed."

MOTION TO DISMISS an appeal in equity upon the ground that "the decree appealed from was not a joint decree, and imposed no joint debt, liability or obligation," but that it was a series of distinct decrees against distinct parties, on distinct causes of action. The case is stated in the opinion. The cause was argued on its merits as well as on the motion to dismiss.

Mr. H. Tompkins, for appellants, (*Mr. James McCartney* and *Mr. T. J. Golden* were with him on the brief,) made the following points in opposing the motion to dismiss. These are the points referred to by the court.

This is an attempt, by supplemental bill, to reopen a part of the subject matter of an original suit of foreclosure by and against new parties alleging over $1,000,000 as the matter in dispute, and that appellants were not, but should have been parties to the original suit: a matter which was open and notoriously known when the original suit was brought. By this proceeding it is sought to foreclose 100,000 acres in parcels of 40 acres, the value of each parcel being less than $500. The gravamen of the action and decree is to enjoin, annul, ignore and render void proceedings in the courts of the State of Illinois, had before this proceeding was commenced.

The whole proceeding is in violation of Rev. Stat. § 723, and the Circuit Court had no jurisdiction. An appeal lies, as the jurisdiction of the court below is a proper subject for re-

view. *Dred Scott* v. *Sandford*, 19 How. 393; *Grignon* v. *Astor*, 2 How. 319.

Parties cannot join to give jurisdiction. *Oliver* v. *Alexander*, 6 Pet. 143; *Spear* v. *Place*, 11 How. 522. Each complainant must be able to sue each defendant. *Rich* v. *Lambert*, 12 How. 347; *Strawbridge* v. *Curtiss*, 3 Cranch, 257; *Paving Co.* v. *Mulford*, 100 U. S. 147. And when the record shows, as this record does show, that the Circuit Court was without jurisdiction, this court will remand the case with directions to dismiss it for want of jurisdiction.

The Revised Statutes provide, § 723, that suits in equity shall not be entertained in the courts of the United States in any cause where a plain and adequate remedy at law may be had. In this cause the plaintiffs had their full and adequate remedies at law, and the court, as a court of equity, was consequently without jurisdiction.

An appeal lies in the case at bar, as the gravamen of appellee's action is to enjoin the Supreme Court of the State of Illinois against further proceedings, as alleged by appellees in the case of *Scates* v. *King*, until the appellees can foreclose in this court the 100,000 acres, or so much as each appellee may desire.

If the action is to foreclose, then it is *in solido* for the whole debt.

By "matter in dispute" is meant the subject of litigation. The matter for which suit is brought, and on which issue is joined. The matter in dispute is the debt claimed, not the damages or prayer for judgment. *Rich* v. *Lambert*, 12 How. 347, 352; *Lee* v. *Watson*, 1 Wall. 337; *Wilson* v. *Daniel*, 3 Dall. 401, 408.

"Purchasers of the equity of redemption, to redeem must pay the whole debt." There can be no severance until the debt is paid, or foreclosed, under a legal proceeding. Jones on Mortgages, §§ 1063, 1070, 1075; Powell on Mortgages, 342; *Bradley* v. *Snyder*, 14 Illinois, 263; *S. C.* 58 Am. Dec. 564; *Meacham* v. *Steele*, 93 Illinois, 135.

Equity of redemption, under the statute, is a privilege to be exercised within a limited time. The case at bar seeks, by

supplemental proceedings, to compel a redemption, against parties who have not been foreclosed, by subrogation to the rights of the original parties, claiming an equity by the deraignment of title, under a void foreclosure.

A supplemental bill to a foreclosure suit, alleging the equity of deeds by a deraignment through purchase at a master's sale, praying to be subrogated and have a foreclosure against parties in possession through purchase from the so-called mortgagor before the foreclosure suit was commenced, opens up the whole case, and all previous decrees and orders are vacated, that the original suit may be heard at the same time; and all parties must be brought in. *Gibson* v. *Rees*, 50 Illinois, 383.

Mr. Lucien Birdseye and *Mr. Edwin Beecher* for appellees, and in support of the motion.

Mr. Justice Lamar delivered the opinion of the court.

This was a motion to dismiss an appeal upon the ground that the interests of each of the appellants in the case are separate and distinct, and do not involve an amount sufficient to give this court jurisdiction.

The case grew out of *Kenicott* v. *Supervisors*, 16 Wall. 452, and *Supervisors* v. *Kennicott*, 94 U. S. 498; and those cases are referred to for a more minute statement of all the early facts of the controversy than is necessary to be made for the purpose of considering the question now before us. A brief summary of some of the leading facts of the controversy will be sufficient for present purposes.

On the 20th of April, 1859, the county of Wayne in the State of Illinois, by virtue of an authority derived from an act of the state legislature, executed a mortgage and a deed of trust upon about 100,000 acres of its swamp and overflowed lands, to Isaac Seymour of New York City, as trustee, to secure the payment of $800,000 of its bonds, which had been issued for the purpose of raising funds with which to construct a railroad. On the same day the Mount Vernon Railroad Company, the corporation that had been organized to build the

road for the benefit of which the aforesaid aid had been granted, as a part of the same general transaction of raising funds with which to build its road, executed a mortgage to Seymour, upon its contemplated railroad, its appurtenances, franchises and other property and effects both present and prospective, as an additional security for the aforesaid bonds. The bonds were sold and came into the hands of *bona fide* purchasers for value, and default having been made in the payment of the interest on them, as it came due, a bill for foreclosure of the mortgages and deed of trust was filed, on the 7th of March, 1865, by John W. Kennicott and others, claimants of a number of the bonds which had been sold, against the county of Wayne and the Mount Vernon Railroad Company. The railroad company defaulted, and, upon a hearing in the Circuit Court of the United States for the Southern District of Illinois, the bill was dismissed as to the county of Wayne, on the ground that the mortgage was invalid because the proofs failed to show that at the date it was made there was any line of railroad constructed or authorized to be constructed through that county, with which the Mount Vernon railroad was connected in any manner. Upon appeal, this court reversed that decree, and held that the mortgage in controversy was valid, as to *bona fide* holders of the bonds it was intended to secure, and that the complainants were entitled to a decree in their favor. *Kenicott* v. *Supervisors*, *supra*. A final decree in the case was rendered by the Circuit Court in June, 1874, which was affirmed by this court on appeal. *Supervisors* v. *Kennicott*, *supra*. In pursuance of that decree the lands covered by the mortgage were sold at a master's sale on the 18th of September, 1877, for an amount insufficient to satisfy the claims of the bondholders, and, the time for redemption having expired, the master, on May 27, 1879, executed and delivered a deed for them to one Broadwell, who had come into possession of the certificates of purchase at the aforesaid sale. The appellees in this case, who were complainants below, claim under Broadwell.

Between the date of the execution of the deed of trust and the mortgage before mentioned, and March 7, 1865, when the

foreclosure suit was commenced, the county of Wayne had sold a large amount of the lands embraced in those encumbrances to individuals who were not made parties to the foreclosure proceedings. The appellants here claim under those purchases from the county.

The case, as it now stands, is a consolidation of four others and an intervening petition filed by leave of the court. The first of those consolidated cases was a suit in equity brought on the 25th of January, 1882, by the appellee, J. C. Cloyd, a citizen of New York, against Clarissa Jordan and some twenty-four or more other defendants, all but two of whom were citizens of Illinois, one of those two being a citizen of Ohio, and the other a citizen of Colorado. The bill set out, somewhat in detail, the various steps in the proceedings above referred to, and further alleged that, by reason thereof and also by reason of the conveyances before mentioned, the county of Wayne had no right, title or interest in and to the lands in dispute and was not in any other manner interested in the present suit.

The prayer of the bill was that a subpœna issue commanding each of the defendants to appear and answer, but not under oath, all and singular the allegations of the bill; that an account be taken, under the direction of the court, to ascertain how much was due on the decree in the case of *Kenicott* v. *Supervisors*, *supra*, and also to ascertain the amount for which each tract of land involved in the suit was sold at the master's sale, with interest. It then continued as follows: "That said defendants, within a short time to be fixed by this court, pay to complainant the amount so found to be due on said decree, or, in the alternative, that each of said defendants pay to your orator the amount for which the lands so claimed by each of said defendants was sold for at said master's sale, with the interest thereon, and in default of making such payment that your honor, by a decree of this court, declare the equity of redemption of said defendants be forever barred and foreclosed; and if your honor should deem it right and equitable that the equity of redemption of said defendants in and to said premises should be sold, then that your honor order the

same to be sold in such manner as may seem best to your honor;" and concluded with a prayer for other and further relief, etc.

The second and third of the consolidated cases were brought on the same day as the first one, in the court below, and were similar in every respect to that one. The second one was brought by C. T. Austin, a citizen of New York, against Michael Book and four other defendants, all citizens of Illinois: and the third one was brought by John B. Cornell, also a citizen of New York, against Thomas J. Pettijohn and some fifty-five or more other defendants, all of whom were citizens of Illinois, except C. M. Wakefield, who was a citizen of Texas.

The fourth one was brought in the court below on the 26th of January, 1882, by Elizabeth H. Taylor, J. Sargent Smith and Arthur F. Gould, citizens of Massachusetts; Henry M. Alexander, administrator of the last will and testament of Peter McMartin, deceased, Joseph Waxelbaum and Charles A. Coe, citizens of New York; and William L. Rolston, a citizen of Ohio; against J. B. Bozarth and sixty-five other defendants, who were all citizens of Illinois; and was similar to the three preceding cases in every respect, except that the lands involved were described, and the name of the owner of each particular tract was set forth in the bill itself, instead of in an exhibit thereto, as was the case in the others.

These cases were consolidated by an order of court entered January 2, 1884, and were ordered to proceed as one case, under the title of the first one; and at the same time leave was given to amend the bills in all of the causes in order to make them harmonious.

By leave of the court, on the 4th day of April, 1884, Fernando B. Hane, a citizen of Ohio, filed his intervening petition in the case, as consolidated, against all of the defendants impleaded therein, and also against John J. Backman and one hundred and seventy-four other defendants, all citizens of Illinois, alleging substantially the same facts as did the preceding cases, with a like prayer and with an additional prayer for an injunction against a number of the defendants and their attorney, H. Tompkins, to restrain and enjoin them from

prosecuting certain suits brought by them in the Circuit Court of Wayne County against certain vendees of petitioner based upon the claim that the aforesaid mortgage and deed of trust were invalid, and, therefore, not binding upon them, until the final hearing of this cause.

To these pleadings various defendants interposed demurrers, some filed separate answers, and the rest filed a joint answer. The main ground of defence was, that upon a similar state of facts to those alleged by complainants in this case the Supreme Court of Illinois, in *Scates* v. *King*, 110 Illinois, 456, had affirmed a decree rendered by the Circuit Court of Wayne County in a case regularly brought before it, which held that a conveyance of a part of the lands sold at the mortgage sale aforesaid, made by a claimant under Broadwell, was a cloud upon the title thereto of a party claiming under a sale made by the county between the date of the execution of the beforementioned mortgage and deed of trust and the commencement of the foreclosure proceedings, and should be set aside.

Replications having been filed, and also intervening petitions by W. S. Rolston, J. C. Cloyd and Lucinda A. Walker, the case was finally put at issue. Proofs were taken by the respective parties, and, upon a hearing on the pleadings and proofs, the court below, on the 25th of January, 1886, rendered a decree finding the material facts substantially as we have recited them. The decree then set out and exhibited, in its seventh finding of facts, a list and schedule of the lands involved in this consolidated suit, "together with the names, respectively, of the several and respective persons to whom the county of Wayne sold its equity of redemption or residuary interest." That list and schedule further contained a statement of the present owners, respectively, of the title acquired by the master's sale aforesaid, which afterwards passed to Broadwell and from him by mesne conveyances; and also "a statement of the amounts, respectively, which were bid at said decretal sale for said tracts of land respectively."

The court then found as matter of law:

"1. That the opinions and decisions of the Supreme Court of the United States upon the appeals heretofore prosecuted

from the decrees of this court and reported in 16th Wallace's Reports, page 452, and in 94 U. S. Reports, page 498, are binding upon this court, and there is nothing in record or evidence in this case as consolidated to invalidate the said mortgage and trust deed or the respective amounts found due to the several parties to this suit as consolidated. Both the findings as to the said several amounts so found due should be sustained.

"2. The purchasers from Wayne County, after the recording of the mortgage, took the lands purchased by them severally subject to the lien of the mortgage, and the proceedings to foreclose the said trust deed and mortgage did not release or discharge this lien so long as the mortgage debt remains unsatisfied.

"3. The purchasers from the county, both after the recording of the mortgage and after the service of process on Wayne County on March 11, 1865, cannot acquire tax titles as against the mortgagees or those acquiring title under the foreclosure sale.

"4. That the master's deed under the decretal sale of September 18, 1877, transferred to the several purchasers thereat an equitable right to so much of the mortgage debt as was bid upon each tract severally.

"5. That the *lis pendens* as to purchasers from the county attaches from the 11th of March, A.D. 1865, the date of service of process on Wayne County, and that upon the facts averred in the several bills and sustained by the proofs the purchasers of lands at the decretal sale which were sold by Wayne County between April 20, 1859, and March 11, 1865, are entitled to file a bill in the nature of a supplemental bill against the parties holding title from the county subject to the mortgage to have the lien of the mortgage enforced by a decree of foreclosure."

The decree then continued as follows:

"That each of said owners of the said equity of redemption or residuary interest of the county of Wayne of, in and to said several tracts of land which were purchased from the

county between April 20, 1859, and March 11, 1865, who have been summoned in this case, or who may have entered their voluntary appearance therein, or their assigns, respectively, *each acting for himself or herself, and not for any other, may and shall redeem the respective tracts of land of which they, at date of service upon them, respectively, of process or entry of appearance, respectively, held and owned the equity of redemption or residuary interest of the county of Wayne* within or at the expiration of one year from this date, by paying into this court the amount for which each of said tracts of land was bid and sold at said decretal sale, for the use and benefit of the owners, respectively, under title deraigned from said decretal sale of the tract or tracts so redeemed, and that the judgment creditors, respectively, of any such persons so owning the equity of redemption may and shall redeem any tracts thereof in default of such parties so redeeming, at any time within three months of and after the expiration of said twelve months, by paying the amount so decreed to be redeemed from, in accordance with the statutes of the State of Illinois concerning redemption from judicial sales; and it is further ordered, adjudged and decreed that the decree of foreclosure of June 25, 1874, hereinbefore referred to, shall be vacated and annulled as to each and every tract (but as to none others) thus redeemed as aforesaid, and that in default of redemption, as provided for herein as aforesaid, then and from the date of the expiration of such period of limitation all rights of such owners of the said equity of redemption, or their respective assigns, so failing to redeem shall be forever barred and foreclosed of their equities of redemption, respectively, and of all rights of, in and to said lands of any kind or nature adversely to the owners under title deraigned from said decretal sale, and that each and all of such defendants so being barred and foreclosed, and their agents, attorneys, solicitors and servants or assigns shall, from and after the expiration of said fifteen months, cease to exercise any acts of ownership over said lands, and shall at once thereafter vacate, abandon and leave the same, and not intermeddle any further therewith under pain of being considered in contempt of this court, and that

the respective titles of said several and respective tracts of land not so redeemed shall be, and they are, confirmed in said several parties so owning the same by title deraigned from said decretal sale, as aforesaid, and their assigns, and that any tax deed or certificate to any tract of land, and not thus redeemed, which may belong to any such person thus entitled, but failing to redeem such tract, is hereby declared to be vacated, annulled, and for nothing taken hereafter." The italics are the court's.

On the same day that the decree was entered a motion for rehearing was filed, the first ground of which recited as follows: "That the result of the decree in said cause would be a great hardship to the respondents, as there is not enough in amount in any case to allow an appeal." This motion was denied on the 29th of March, 1886, but on the 31st of May following it was ordered by the court that said motion "stand continued until the next June term" of the court. On the 10th of June following the motion for rehearing was again considered, and again denied, an order being entered "that the order of March 29th, 1886, denying the application for a rehearing of the cause, stand affirmed."

On the 13th of July, 1886, a motion was made to correct the decree by striking from it the names of thirty-seven of the defendants, thirty-four of whom, it was alleged, had neither entered their appearance nor been served with summons, and the other three had disclaimed; and on the 5th of August, 1886, a petition for summons and severance on appeal, and also an appeal bond, were filed by fifty-six of the defendants jointly.

It is clear that the appeal must be dismissed. The decree from which it is taken was not a joint decree, as is readily observed by a mere inspection of it. The liability of each one of the defendants under that decree can be neither increased nor diminished by any action on the part of any of his co-defendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants. The amount adjudged against any one of them, in order that he might redeem his respective tract or tracts of

land, does not in any case reach the amount necessary to give us jurisdiction to entertain the appeal. In no case is it $5000.

In *Ex parte Phœnix Insurance Co.*, 117 U. S. 367, 369, Chief Justice Waite, delivering the opinion of the court, said: "The rule is well settled that distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal;" citing a long list of authorities. The question was finally put at rest in *Gibson* v. *Shufeldt*, 122 U. S. 27, where, after a thorough examination of the subject, on principle, and an exhaustive review of the authorities bearing upon it, the court sustained a motion to dismiss an appeal similar in all its essential features to the motion in this case, and in concluding its opinion said: "This result, as we have seen, is in accordance with a long series of decisions of this court, extending over more than half a century. During that period Congress has often legislated on the subject of our appellate jurisdiction, without changing the phraseology which had received judicial construction. The court should not now unsettle a rule so long established and recognized." (pp. 39, 40.) See, also, *McMurray* v. *Moran*, at this term, *ante*, 150.

It is not necessary to multiply authorities upon a point so well settled. Neither do we think any of the points made by the appellants, in their brief, in opposition to the motion to dismiss, are well taken.

The motion to dismiss the appeal is granted.

LITTLE *v.* BOWERS.

ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

No. 194. Argued on the merits January 30, 1890. Motion to dismiss submitted March 3, 1890. — Decided April 7, 1890.

The voluntary payment of a municipal tax while a suit is pending in this court between the party taxed and the officers of the corporation, to

Statement of the Case.

determine whether it was legally assessed, leaves no existing cause of action, and requires the dismissal of the writ of error.

Robertson v. *Bradbury*, 132 U. S. 491, distinguished from this case.

The fact that there is no controversy between the parties may be shown at any time before the decision of the case; and there is no laches in delaying to bring it before the court until after argument heard on the merits.

The case, as stated by the court in its opinion, was as follows:

This was a writ of *certiorari* issued out of the Supreme Court of the State of New Jersey, on the 6th of November, 1882, at the instance of Henry S. Little, receiver of the Central Railroad Company of New Jersey, a corporation of that State, commanding Samuel D. Bowers, comptroller of the city of Elizabeth, and the city of Elizabeth, to certify and send to that court their proceedings relative to an assessment of certain taxes made by that city upon real property of the company within the city limits, particularly described in the writ, for the year 1876.

Upon the hearing of the case in that court, the investigation extended to like assessments made by the city for the years 1877 to 1882, inclusive; and the judgment of the court was, that the assessments should stand affirmed. That judgment having been affirmed by the Court of Errors and Appeals of the State, this writ of error was prosecuted. The federal question involved was as to whether these assessments impaired the obligation of a contract which the company claimed existed between it and the State by virtue of an act of the state legislature, approved March 17, 1854, and were, therefore, violative of sec. 10, art. 1, of the Constitution of the United States.

After the argument of the case in this court upon its merits, the defendants in error were given leave to file briefs, a privilege of which they availed themselves; and they also filed a motion to dismiss the writ of error. This motion was based upon the following grounds:

First. Because the taxes levied on the property of the company in the city of Elizabeth in and for the years 1876 to

1882, inclusive, being the same taxes mentioned in the record in this cause, have been paid and satisfied in full since the writ of error was issued, together with the costs in the case.

Second. Because the writ of error is being prosecuted by the plaintiff in error for the sole purpose of obtaining the opinion of this court as to the validity of an alleged contract on the subject of taxation between the State of New Jersey and the company, and the State is not a party in the form or sense in which a party in interest must be a party to a litigation in order to be bound by the judgment of the court.

Third. Because the plaintiff in error does not owe any taxes to the city of Elizabeth, to Samuel D. Bowers, the former comptroller of the city, or to any existing officer of the city, nor does the company owe any sum of money to the city for taxes.

Fourth. Because all claims for taxes heretofore made or held by the city of Elizabeth, or any officer thereof, against the Central Railroad Company of New Jersey, or the property of the company, or any receiver of it, have been adjusted, compromised, and paid in full, voluntarily, by the railroad company or its appropriate officer or representative.

The motion was supported by a number of affidavits of the tax officers of the city of Elizabeth, including the present comptroller and the commissioners of adjustment. From these affidavits it appeared that, during the year 1887, by virtue of a statute of the State, passed in 1886, the commissioners of adjustment for the city of Elizabeth readjusted and reduced, to a considerable extent, the taxes levied by the city upon the property of the railroad company for the years 1876 to 1882, inclusive, and also for the year 1883; that, during the progress of that revision and readjustment, H. W. Douty, real estate agent of the company, appeared before the commissioners, from time to time, and urged the reduction of the claims of the city for taxes against the property of the company; that after the adjustment had been completed, the taxes were paid by the railroad company, before interest on them began to accrue under the act by virtue of which the adjustment was made; that no warrant was issued or other step or proceeding

taken by or on the part of the city for the collection of the taxes prior to the time of payment, nor could any proceedings have been taken to enforce their payment for several months thereafter; and that no protest against the payment, or objection thereto, was made by the company, or any person acting on its behalf. It appeared that, during the progress of the readjustment, the commissioners committed an error by including therein certain taxes for the years 1884, 1885 and 1886. Douty requested them by letter to correct that error, saying, "If this is done I am satisfied the adjustment will be promptly paid after confirmation." The correction was made as requested, and the taxes thus readjusted and reduced — the same taxes here in dispute — were paid by the company, as above set forth.

As regards the costs of the proceedings in the court below, it seems they were paid under the following circumstances: After the judgment of the Court of Errors and Appeals had been rendered, an entry was made upon its record, reciting the fact that the judgment of the Supreme Court had been affirmed at the costs of the plaintiff in error, and further ordering that the record and proceedings be remitted to the Supreme Court of the State, to be proceeded with in accordance with law and the practice of the court. As the counsel for the plaintiff in error supposed that that form of the judgment would preclude the taking of a writ of error from this court, by an arrangement between counsel for both parties, the record was changed to its present form, and the costs in the case were then paid by the plaintiff in error.

Mr. Robert W. DeForest, (with whom were *Mr. George R. Koercher* and *Mr. Benjamin Williamson* on the brief,) for plaintiff in error, argued the case on the merits on the 30th of January, 1890.— On the 3d March, 1890, a motion to dismiss on the part of the defendant in error having been submitted, they submitted therewith their brief in opposition thereto, in which they contended:

I. The court will not entertain a motion to dismiss, made after argument, when a suit has been pending in this court for

more than three years to the knowledge of all parties and their counsel, and all the causes alleged for dismissal have existed for more than two years. No excuse is offered for these laches.

II. It is conceded that this court will dismiss a fraudulent or collusive case, in which there is no real controversy between the parties, as where the plaintiff and defendant were son and son-in-law having common interests, but interests adverse to third parties, which they sought to affect by a collusive judgment, *Lord* v. *Veazie*, 8 How. 251; or where the appellant purchased the interest of the appellee pending argument, and the appeal was conducted by counsel employed and paid by him with the view to affect adversely the interests of others not parties to the suit. *Cleveland* v. *Chamberlain*, 1 Black, 419. This is not such a suit. The controversy is real and substantial. This suit was deliberately selected as a test case for this controversy with the knowledge of defendants' attorney, *Mr. Bergen*, and with the knowledge of the Attorney General of the State of New Jersey, because it was the first suit in which this contract question was raised in the courts of New Jersey, the suit in which it was decided, and the suit which could be most rapidly brought before this court for a final decision.

III. It is conceded that when taxes have been voluntarily paid, actions cannot be maintained to recover them back, but that principle does not affect the taxes now in controversy, because these taxes were paid partly as a condition of appeal to the courts on the very ground raised by this suit, and partly after suits were commenced to test their legality on this ground, to avoid sale of lands under a summary act which vested the fee simple in the purchasers. They were made before suit brought, only when imposed by the court as a condition for being permitted to bring them, and after suit brought, only to save property from sale in the absence of any stay or possibility of getting one. The duress under which payments were made, and the intention of the railroad to contest the validity of the taxes and not to acquiesce in them, could not be more apparent. Payment under such circumstances cannot be deemed to abate this suit.

IV. This suit has never been settled. The judgment from which the Railroad Company appeals stands unsatisfied just as it did the day after this appeal was taken, and taxes have been paid in the absence of any stay, only to prevent a sale which would vest absolute title in its purchaser under the law. Had any settlement of this controversy been intended, surely this judgment would have been satisfied, and dismissal of this writ asked for and consented to. How could any protest against the validity of these taxes be more emphatic than the commencement and pendency of this litigation, and how could the claim of the Railroad Company for special taxation under its contract be more plainly asserted than in this proceeding? How is it possible that the city of Elizabeth, or its counsel, supposed that such involuntary payment settled this controversy unless at least they applied to the Railroad Company to discontinue this appeal, or at least moved to dismiss the writ, more than two years ago, when the occurrence took place? Certainly, the Railroad Company never supposed for a moment that it must permit judgment against it to be executed as a condition of maintaining its right to appeal. Payment of the taxes in controversy, as a condition of appealing from them, is like hanging a man before he has been tried, but to allege the hanging as a reason for denying him the poor satisfaction of a trial after execution is a depth of injustice hardly conceivable under lynch law.

Mr. Frank Bergen for defendant in error. No brief being filed at the hearing on the merits, the counsel was allowed one week in which to file one. On the 24th of February he filed the motion to dismiss and a brief in support of the same, both of which were submitted to the court on the 3d March.

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

As opposed to this motion, there is no denial of the fact that the taxes in dispute have been paid. It is insisted, however, that such payment was not voluntary, but was made under duress, as the only means of avoiding execution; and

that payments were made before suit brought only when imposed by the court as a condition for being permitted to bring suit, and after suit brought, only to save property from sale in the absence of any stay or possibility of getting one. But an examination of the affidavit of the principal attorney for the railroad company, filed here, discloses the fact that the taxes which are referred to in this connection are the taxes assessed for the years 1884 to 1887, inclusive. In the case of those taxes, the proceedings for their collection were regulated by an act of the New Jersey legislature passed in 1884, which, in its 16th section, provided that if any company should desire to contest the validity of any tax levied thereunder, such contest should be made by *certiorari*, which might be granted "on such terms as the justice or court granting the writ may impose."

But that act and the proceedings for the collection of taxes under it are in nowise before the court in this case. In the nature of things the proceedings which the attorney describes could not have applied to the collection of the taxes for the years 1876 to 1882 inclusive, for this suit which relates to them was disposed of by the Supreme Court of the State long before the act of 1884 was passed. There is nothing in the record to show that the payment of the taxes in dispute was imposed by the court as a condition precedent to the company's right to bring suit to test their legality. In fact, no such condition was imposed, or could have been imposed, when this suit was brought; for there was no statute of the State at that time giving any such power to the court.

In respect to the taxes here in dispute, it is claimed that they were also paid involuntarily, because, under the readjustment act of 1886, the readjustment made by the commissioners was "final and conclusive upon all persons, became immediately due, was collectible by the comptroller without interest, if paid within sixty days, and if not paid within six months, it was made the comptroller's mandatory duty to sell the lands assessed, at public auction, to the highest bidder, and the purchaser at such sale obtained title by fee-simple absolute."

We do not think the payment of the taxes, under the circumstances detailed in the affidavits before referred to, and admitted substantially by plaintiff in error, was an involuntary payment, or a payment under duress, within the meaning of the law. In *Wabaunsee County* v. *Walker*, 8 Kansas, 431, 436, cited with approval in *Lamborn* v. *County Commissioners*, 97 U. S. 181, and also in *Railroad Co.* v. *Commissioners*, 98 U. S. 541, 543, it was said: "Where a party pays an illegal demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest does not make the payment involuntary."

The case in 98 U. S. *supra*, was a suit by the Union Pacific Railroad Company to recover taxes it had paid upon certain of its lands granted to it by Act of Congress. The lands had been assessed by the county in which they lay for general and local taxes, and in due time the tax lists, with warrants attached for their collection, were delivered to the treasurer of the county. The warrants authorized the treasurer, if default should be made in the payment of any of the taxes charged upon the list, to seize and sell the personal property of the persons making the default, to enforce the collection. Under the law of Nebraska no demand of taxes was necessary, but it was the duty of every person subject to taxation to attend the treasurer's office and make payment. The company paid the taxes before any demand had been made for their collection, and before any special effort had been put forth by the treasurer to enforce their collection, at the same time filing with the treasurer a written protest against their payment, for the reason that they were illegally and wrongfully assessed, and were unauthorized by law, and gave notice that suit would be instituted to recover back the money paid. In delivering the opinion of the court, Mr. Chief Justice Waite said: "The real question in this case is, whether

there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made upon compulsion. The treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. This warrant was in the nature of an execution running against the property of the parties charged with taxes upon the lists it accompanied, and no opportunity had been afforded the parties of obtaining a judicial decision of the question of their liability. As to this class of cases Chief Justice Shaw states the rule, in *Preston* v. *Boston*, 12 Pick. 7, 14, as follows: 'Where, therefore, a party not liable to taxation is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received.' This, we think, is the true rule, but it falls far short of what is required in this case. No attempt has been made by the treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him. All that appears is, that the company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges, and a notice that suit would be commenced to recover back the full amount that was paid. No specification of alleged illegality was made, and no particular property designated as wrongfully included in the assessment of the taxes. The protest was in the most general terms, and evidently intended to cover every defect that might thereafter be discovered, either in the power to tax or

the manner of executing the power. . . . Under such circumstances we cannot hold that the payment was compulsory, in such a sense as to give a right to the present action." See, also, Dillon on Municipal Corporations, §§ 941–947, and cases there cited.

The reasoning of the court in that case applies equally to the facts of this. In no sense do we think the payment of the taxes in suit was made under duress. Their payment, under the circumstances above set forth, was in the nature of a compromise, by which the city agreed to take, and the company agreed to pay, a less sum than was originally assessed. The effect of this act was to extinguish the controversy between the parties to this suit.

This case is clearly distinguishable from *Robertson* v. *Bradbury*, 132 U. S. 491. In that case the jury, by returning a verdict in favor of the plaintiff, virtually found that he had been compelled to pay the illegal duties assessed against his goods by the collector of the port at New York in order to get possession of them from the collector. Here there is no question as to the seizure of goods at all. The lands which had been assessed were still in the possession and under the control of the railroad company. No warrant had been issued against them, and no active steps had been taken by the city to enforce the collection of the taxes assessed, nor could any such proceedings have been resorted to by the city for at least several months thereafter. Moreover, the question of the validity of the taxes was involved in pending litigation.

It is true that the judgment of the court below stands unsatisfied except so far as relates to the costs, which, as before stated, have been paid; but that is immaterial, inasmuch as the controversy upon which that judgment was rendered had been extinguished. That in effect satisfied the judgment. Neither the affirmance nor the reversal of that judgment would make any difference as regards the controversy brought here by this writ of error. It matters not that the taxes from 1884 to 1887, inclusive, were paid under duress. They are in nowise before the court; and according to the showing of the plaintiff in error they differ materially from the taxes in dispute in this case.

Opinion of the Court.

It is well settled, that when there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed. In *Lord* v. *Veazie*, 8 How. 251, a writ of error was dismissed by this court where it appeared from affidavits and other evidence by persons *not parties to the suit* that there was no real controversy between the plaintiff and defendant, but that the suit was instituted to procure the opinion of this court upon a question of law, in the decision of which they had a common interest opposed to that of other persons, who were not parties to the suit, and had no knowledge of its pendency in the Circuit Court. Chief Justice Taney in delivering the opinion of the court said: "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves — and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

In *Cleveland* v. *Chamberlain*, 1 Black, 419, the rule laid down in *Lord* v. *Veazie*, *supra*, was adhered to, and held applicable to a case in which it appeared that the appellant had purchased and taken an assignment of all the appellee's interest in the decree appealed from; and the appeal was dismissed.

In *Wood Paper Co.* v. *Heft*, 8 Wall. 333, an appeal upon a bill for the infringement of a patent was dismissed, it having been made to appear to the court that, after the appeal, the appellants had purchased a certain patent from the defendants under which the defendants sought to protect themselves; and that the defendants, as compensation, had taken stock in the company which was the appellant in the case. And it was further held that the fact that damages for the infringement alleged in the bill had not been compromised did not affect the propriety of the dismissal.

In *San Mateo County* v. *Southern Pacific Railroad Co.*, 116 U. S. 138, a writ of error was dismissed where it appeared that the taxes assessed against the company had been paid to the county after the suit had been commenced, the court resting its judgment upon the reason *that there was no longer an existing cause of action in favor of the county against the railroad company.* To the same effect see *Henkin* v. *Guerss*, 12 East, 247; *In re R. J. Elsam*, 3 B. & C. 597; *Smith* v. *Junction Railway Co.*, 29 Indiana, 546; *Freeholders of Essex* v. *Freeholders of Union*, 44 N. J. Law, 438.

A further defence urged against this motion is laches. It is urged that the facts upon which it is based were known to the defendants in error at least two years ago, and that any objection to the writ of error should have been made before the argument of the case upon its merits. It is also insisted, incidentally, that the motion was filed in violation of professional courtesy, inasmuch as it was through the intercession of the attorney for the plaintiff in error that an extension of time was allowed the defendants in error within which they could be heard on brief, after the argument on the merits.

We do not think, however, the question of laches has any bearing upon this question. The fact that there is no controversy between parties to the record ought, in the interest of a pure administration of justice, to be allowed to be shown at any time before the decision of the case. Any other rule would put it in the power of designing persons to bring up a feigned issue in order to obtain a decision of this court upon a question involving the rights of others who have had no opportunity to be heard.

If, as is contended on behalf of the plaintiff in error, the question involved in this case is one of great importance to the railroad company and to the State, and is identical with that in a number of other cases pending in the court below, so much the more important is it that it should not be decided in a case where there is nothing in dispute. Nor is it material that the case was selected by the plaintiff in error and agreed to by the defendant in error before the writ of error was prosecuted, as one in which the question of taxation under the

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New Jersey statutes could be fully considered and finally decided by this court; for it is well understood that consent does not confer jurisdiction.

For the reasons above stated

The motion to dismiss the writ of error is granted at the costs in this court of the plaintiff in error, and it is so ordered.

MENDENHALL *v.* HALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 158. Submitted by appellant, December 13, 1889; by appellee, March 24, 1890. — Decided April 7, 1890.

When one of two defendants in a suit in equity demurs to the bill and the demurrer is sustained, and the other defendant answers, and the bill is then dismissed, and the plaintiff appeals, and files an appeal-bond running to "the defendants," and the appeal is duly entered here within the prescribed time, this court has jurisdiction of the appeal; and, if the defendant as to whom the bill was dismissed on demurrer does not appear, he may be cited in, and the court may then proceed to hear and determine the cause.

When a mortgagee of real estate asserts in equity his rights as against a tax-sale of the estate, alleged by him to have been made collusively in conjunction with the mortgagor for the purpose of getting rid of the mortgage for the benefit of the mortgagor, he may either proceed against the purchaser alone, or against the purchaser and the mortgagor: and in any event it is not necessary for him to make tender of the payment of the amount of the tax for which the estate was sold.

The provision in the constitution of Louisiana declaring a tax-title to be *prima facie* valid is intended to be applied to cases in which the tax-title is attacked for alleged informalities in the proceedings; but not to cases in which it is attacked for fraud and collusion in effecting the sale.

Austin v. *Citizens' Bank*, 30 La. Ann. 689, approved and applied to this case.

In foreclosing a mortgage in Louisiana, the mortgagor is entitled, in making up the amount of the judgment, to be credited with judgments against the mortgagee in another State which have been acquired by the mortgagor.

By a deed executed December 24, 1875, John H. Mendenhall and wife, citizens of Ohio, conveyed to Clark N. Hall, a resi-

dent of Louisiana, an undivided one-fourth of certain lands in Carroll parish in that State, known as the Concord plantation. The price agreed to be paid was $5123, for which the vendee executed to the grantor his three promissory notes, the first one for $2000, payable January 1, 1877; the second for a like sum, payable January 1, 1878; and the third for $1123, payable January 1, 1879; each note bearing interest at the rate of eight per cent per annum from date until paid. In order to secure the payment of the principal and interest of those notes, the grantee, by the same instrument, mortgaged and hypothecated the property for the benefit of the vendor, or any future holder or holders of the notes, "binding and obligating himself not to sell, mortgage, or in anywise encumber said property to the prejudice of this act of mortgage."

The deed was duly filed for record in the proper office on the day of its date.

By an indenture executed February 10, 1876, the owners of the Concord plantation, William C. White, James Andrews and Clark N. Hall, made a partition thereof among themselves.

On the 5th of March, 1882 — no part of the principal sum having been paid and the interest only having been paid up to January 1, 1879 — Clark N. Hall wrote to Mendenhall, giving the reasons why he had not for some time made a payment. After stating that he and his brother had tried together to make arrangements to meet his notes and that they had been compelled, in order to run the plantation, to deposit what money they had as security for aid supplied by others, he said: "So we deposited the money we had and are going ahead, and I can assure you it has given me a heap more pain than it has you; and one more thing I can assure you, I am going to attend strictly to business, and am going to get as little as possible, and work to best advantage, and I know this fall will be able to make you a payment that will satisfy you. My aim is to pay you the $2500 this fall without a doubt; with what I have left out of the place, and what Charley will be able to raise then, we can do it like a flash, and to do it now will be a stop to all things. . . . So, under the cir

cumstances, I am not going to pay one dollar now, and if it don't suit you I cannot, for the life of me, help it. If you had rather resort to law, all right. If not, wait until fall with patience and I am sure everything will be made O. K. . . . Everybody predicts a good crop year. Has Mrs. M. received my package of photos? I mailed them and wrote her a letter some months ago. Hoping you will have compassion upon a poor soul, I will close, by subscribing myself," etc. By way of further assurance that the representations as to his financial condition were true, and that his request for time was made in good faith, he adds, by way of postscript, these words: "I want you to bear in mind that if W. B. Keene had not failed to comply with his contract I would surely have remitted the money. You may believe me or not, nevertheless it is the candid truth."

On the same day of the above letter, Charles F. Hall, a brother of Clark N. Hall, and the person described in that letter as "Charley," wrote to Mendenhall, saying: "I take the liberty to pen you a few lines in regard to Concord and the business pertaining thereto. Some time ago Clark took the trouble and expense upon himself to go up and see you to try and effect a settlement. At that time you could just as well as not have had $2500 in cash; but it appears you would not take that. Well, since then things have changed here, so that it is agoing to be impossible for us to do anything until, say, January 1, 1883, for the following reasons, viz., W. B. Keene, a merchant doing business close to Concord, had arranged to supply Clark this year, but about two weeks ago failed in a manner; anyway, his commission merchants in N. O. say they will not advance him supplies for more than enough to run his own place; therefore it will necessarily compel us to take our money to run the place. I presume Clark has written you about this ere now, and also that he had rented Andrew's portion of the place. You can certainly see that it would be of no use to pay you the amount agreed to and then have no way or means of running the place, for we could make no other payments, as the place would lay idle and would therefore bring in no revenue. The way everything is now fixed,

the place will bring it in rent. I am here working for $1000 a year and all my expenses paid, and by January 1, 1883, we can and will pay you $2500. I have been here for two years and have saved nearly all my salary — and for what? To try and help Clark pay you for the place. I am anxious to settle this matter up, and you have been very kind in waiting as long as you have, and you have my word and honor that you shall be paid this fall the $2500 if the levee does not break at or near Concord. You can satisfy yourself by writing to Mr. Benjamin Keene, or any one that knows anything about our affairs here, whether I have written how things are here or not. And I feel safe in here saying that you will look at this matter just as I have, and think we have done just the best that could have been done under the existing circumstances. Please let me hear from you on this subject and I shall take pleasure in keeping you posted about things here, and you can depend on my doing all I can to help pay up. Please remember me kindly to Mrs. M., and with best wishes and trusting to hear from you ere long, I remain yours resp."

On the 17th of January, 1883, the land was sold for state and parish taxes due from Clark N. Hall for the years 1877 and 1878, and was purchased at the sum of $211.47 by Charles F. Hall, who took a deed from the sheriff.

The present suit was brought on the 4th of September, 1883, by Mendenhall against Clark N. Hall and Charles F. Hall. After setting out the above facts in relation to the purchase by Clark N. Hall, the execution of the notes for the price, the partition of the plantation among the owners, and the payment of the interest up to January 1, 1879, the bill alleges that Clark N. Hall had indulgence from the plaintiff from year to year, and visited the latter at his home in Ohio about the first of the year 1882, promising, while there, that upon his return home he would make a payment of $1500 on the notes; that after his return he and his brother Charles entered into a scheme to defraud the plaintiff; that with knowledge that the sheriff would be compelled by the statute of the State, Act No. 38 of 1882, to sell the property for unpaid taxes within four months after the promulgation of that act,

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Clark N. Hall fraudulently failed to pay the taxes for 1877 and 1878, although he had agreed not to encumber the property to the prejudice of the plaintiff or the said act of mortgage, and although he represented to the plaintiff that he had paid the taxes on the land; that Clark N. Hall and Charles F. Hall agreed between themselves that, in order to defeat the plaintiff's rights, the latter would become the purchaser at the tax sale and take the title in his own name, intending thereby to procure the release of the property from the plaintiff's mortgage and privilege; and that although Charles F. Hall pretends to have bought the property and claims to be the owner thereof, his brother was living on the plantation and cultivating it as before the tax sale. The bill stated various grounds upon which the tax sale should be declared null and void, and prayed that the sale be set aside; that the plaintiff's mortgage and vendor's privilege to secure the balance due on the notes, together with the accruing interest, be recognized and rendered executory; that the land be sold, by due process of law, to pay and satisfy that balance; and that he might have such relief as was proper.

Charles F. Hall demurred to the bill for multifariousness, and filed a special plea to the effect that, by article 210 of the constitution of Louisiana, tax-titles are declared to be *prima facie* valid, and cannot be set aside without a previous tender to the purchaser of the price and ten per cent per annum interest thereon, having been made, which has not been done.

Clark N. Hall pleaded to so much of the bill as sought judgment against him for the amount of the notes, that equity was without jurisdiction *ratione materiæ* to try the issues presented on said obligations.

The court below sustained both the demurrer and the plea of Charles F. Hall, and by a decree entered May 12, 1885, dismissed the bill as to him, without prejudice to the plaintiff's right to file a new bill. It overruled the demurrer of Clark N. Hall, and the latter filed an answer, averring that he was no longer the owner of the premises, nor in possession thereof. He also averred that he was the lawful owner of two judgments against the plaintiff, one for $300 and $4.15 costs taxed,

and one for $240, with interest from April 4, 1876, and $4.70 costs taxed, both rendered May 12, 1876, by a justice of the peace in Delaware County, Ohio, in favor of the Elkart Wood Pulp Company, against John H. Mendenhall and others, partners doing business under the firm name of the Delaware Paper Company. He also averred that he was the legal holder and owner of a note for $1733.61, executed by the said Delaware Paper Company, through their secretary, J. L. Klein, and made payable to the order of Jacob A. Sharer, who endorsed it to James Andrews, the latter endorsing it in blank to the defendant in due course of trade and for a valuable consideration. He pleaded the said demands "in compensation of the notes sued upon."

To this answer a replication was filed, in which the plaintiff denied that he was bound for the payment of the obligations set up in the answer; denied that they were owned by the defendant; and averred, in respect to the note for $1733.61, that it was executed and obtained by fraud, was without consideration, was never negotiated or placed on the market until after its maturity, and was not a just debt against the Delaware Paper Company. A replication of this special character was not in accordance with correct chancery practice. But no objection was made on that ground, and it was treated as a proper replication.

Upon final hearing, on the 14th of April, 1886, the court gave judgment in favor of the plaintiff against Clark N. Hall for $5123, with interest at the rate of eight per cent per annum from December 24, 1875, until paid, and the costs, that amount to be credited with $1340.52 to date January 1, 1879, and also with $544.15 with eight per cent interest from April 4, 1876, to date and take effect from May 9, 1879. It also adjudged that the plaintiff's demand for recognition of the mortgage and vendor's privilege claimed in the bill be rejected as in case of non-suit without prejudice to his right to assert the same in a subsequent action.

[The plaintiff appealed from this decree and filed an appeal bond entitled in the cause, in which the obligors became "held and firmly bound unto the defendants therein;" but

the citation ran only to Clark N. Hall. The cause was duly docketed here, and when reached in its order on the docket, was submitted by the counsel for the appellant. On the 16th of December, leave was granted to make the representative of Charles F. Hall, (who had meanwhile died,) a party, with the right to file briefs on or before the first Monday in January then next. On the 9th of January, 1890, the counsel for the administratrix of Clark N. Hall appeared solely for the purpose of pleading to the jurisdiction, and represented that there had never been an appeal taken from the order dismissing the bill as to him. On the 18th of January, a citation issued to Charles F. Hall, or, if deceased, to his representatives, to appear on the 4th Monday of March then next, to show cause why the decree rendered against the appellant should not be corrected. This was served on his administratrix, and return thereof made into court. An appearance was entered for Charles F. Hall, and a brief filed.]

Mr. John Johns and *Mr. D. A. McKnight* for appellant.

Mr. John T. Ludeling, for the administratrix of Clark N. Hall, appeared solely for the purpose of questioning the jurisdiction of the court; and, as counsel for Charles F. Hall, appellee, submitted on his brief.

I. Charles F. Hall, though in possession, was not a necessary party. In Louisiana a third possessor is not a necessary party, in a suit against the maker of mortgage notes, to obtain judgment against him. Code of Practice, Arts. 63, 68.

II. The sheriff's deed to Charles F. Hall for the land sold at a tax sale is perfect in form and on its face valid. Article 210 of the constitution declares that "all deeds of sale made, or that may be made, by the collector of taxes, shall be received by the courts in evidence as *prima facie* valid sales."

The same article of the constitution declares, that "no sale of property for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent interest, be tendered to the purchaser."

In accordance with the provisions of the Civil Code, the Supreme Court of Louisiana, in a long line of decisions, has held that it was a prerequisite to the institution of a suit to rescind a sale, that the purchaser should be paid the price given by him, or he should be tendered the price. Art. 1906 of the Civil Code declares: "The effects of being put in default are not only that in contracts to give the thing, which is the object of the stipulation, is at the risk of the person in default; but in the cases hereinafter provided for, is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract."

A review of the decisions on this point was made in the case of *Lola Blanton* v. *Ludeling et al.*, in 30 La. Ann. 1232. A peremptory exception was filed to this suit, as in this case, that no offer or tender had been made to defendant of the amount paid by him at the tax sales at which it was alleged, in the petition, he acquired title, and which sums were applied to the payments of taxes and costs due. The court said: "We prefer to place our decision upon the exception alone, which is no longer an open question."

In *Miller* v. *Montagne and Husband*, 32 La. Ann. 1290, the Supreme Court said: "Proceeding to consider what judgment should have been rendered, we admit the general principle, that a party seeking to annul a tax title, *prima facie* valid, must first tender to the purchaser reimbursement of the sums paid by him in discharge of his bid, and which enured to the benefit of the attacking party, and this principle would, perhaps, extend to proper taxes on the property paid by the purchaser while in possession." *Blanton* v. *Ludeling*, *supra*, and *Barrow* v. *Lapine*, 30 La. Ann. 310. In the last-mentioned case it is further said: "And if this want of tender is pleaded *in limine*, and the amount is apparent or made to appear, plaintiff should not be allowed to sue until it is tendered."

In this case, the complainant has never offered to return the price paid by Charles F. Hall, nor has he alleged that he had done so, or was willing to do so. He had the right, under the law, to redeem the land within a year after the sale. This suit was filed within the year succeeding the sale.

Opinion of the Court.

It is respectfully submitted that the record, as well as the admission made in appellant's brief already referred to, show that there has been no appeal taken as to Charles F. Hall, and that the judgment in his favor has become *res judicata* by the expiration of the time within which an appeal might have been taken, and that this court is without jurisdiction over the case as to Charles F. Hall.

But, if this be not correct, then it is submitted that the evidence in this record shows that at a public sale for taxes Charles F. Hall bought the lands mortgaged and paid the taxes then due and the costs and penalties, and that he has been in the actual possession of said lands and paid the taxes thereon since January, 1883, the date of the sale. The title is *prima facie* valid. Constitution, Art. 210.

Mr. Justice Harlan, after stating the facts as above reported, delivered the opinion of the court.

It is suggested that no appeal has been taken as to Charles F. Hall, and that this court is without jurisdiction over the cause as to him. In this view we do not concur. The cause was not finally disposed of as to Clark N. Hall, the remaining defendant, until the 14th of April, 1886, and on the 30th day of the same month the plaintiff was allowed an appeal "in the cause." His appeal bond was executed September 9, 1886, and ran "to the defendants." The record was filed here on the 12th of October, 1886. It appearing, when the case was reached on our docket, that Charles F. Hall had not been served with notice of the appeal, a citation was directed to be served upon him, or, if he was dead, upon his representative. The citation was executed January 13, 1890, upon his widow, who is also administratrix of his estate. There is no ground to question the jurisdiction of this court to proceed to a hearing of the appeal. The record was filed in this court on the day to which the appeal was returnable. Our jurisdiction did not depend upon a citation being issued, *Evans* v. *State Bank*, *ante*, 330, although we could not properly proceed to hear the case until Charles F. Hall, as to whom the suit was dismissed

in 1885, or his representative, was brought into court by citation. Rev. Civil Code La. Articles 1041, 1049, 1155; *McCalop* v. *Fluker's Heirs*, 12 La. Ann. 345. And the appeal brings before us not only the final decree of 1886, but that of 1885 sustaining the demurrer and plea of Charles F. Hall, and dismissing the suit as to him. It was not necessary to take an appeal from the latter order until after the whole case was determined in the court below. For these reasons the objections to our jurisdiction are overruled.

The first question, upon the merits, to be considered, relates to the demurrer and plea of Charles F. Hall. It is contended that he was not a necessary party to the suit to fix the amount of the indebtedness of Clark N. Hall, and that the demurrer, for that reason, was properly sustained. If that had been the sole object of the suit the plaintiff could undoubtedly have proceeded at law against Clark N. Hall alone. But such a suit would not have given the relief required. The plaintiff claimed a lien on the mortgaged property to secure the payment of the notes given by the mortgagor. The property was claimed by Charles F. Hall in virtue of a tax sale. While the latter might have been proceeded against alone for the purpose of determining whether his right to the land was not subordinate to the mortgage lien, it was competent, under the practice in equity prevailing in the courts of the United States, and in order that full and adequate relief might be had, to unite in the same suit both the mortgagor and the party claiming the property adversely to the lien of the mortgage, by virtue of proceedings had subsequently to its execution. If the plaintiff was entitled to have the property sold in satisfaction of the debt secured by the mortgage, it was his right to have it sold freed from any apparent claim thereon wrongly asserted by the holder of the tax title. Such relief could not be had without making the latter a party to the suit.

In respect to the plea of Charles F. Hall, we are of opinion that it ought not to have been sustained. The constitutional provisions that "all deeds of sale made, or that may be made, by the collector of taxes, shall be received by the courts in evidence as *prima facie* valid sales," and that "no sale of prop-

erty for taxes shall be annulled for any informality in the proceedings until the price paid, with ten per cent interest, be tendered to the purchaser," have no application to cases like the present one. If Clark N. Hall had attempted to have the tax sale set aside for mere informality, it would have been a good plea in bar to any suit by him against the purchaser, that he had not tendered the amount paid by him, with interest thereon —the plea showing distinctly the amount so paid. *Barrow* v. *Lapene*, 30 La. Ann. 310; *Blanton* v. *Ludeling*, 30 La. Ann. 1232. It is to suits of that character that the authorities cited apply. The case before us is altogether different. It proceeds upon the ground that a mortgagor who had agreed "not to sell, mortgage or in anywise encumber the property," to the prejudice of the mortgage, had fraudulently combined with his brother to defeat the mortgage lien by means of a sale for taxes due from the mortgagor, at which sale the brother was to bid in the property, in his own name, and for the protection of the mortgagor, assert his absolute ownership of it. It certainly was not intended that the mortgagee, in order to maintain a suit to enforce his lien, should tender to the mortgagor, or to his agent, the amount of the taxes, with interest thereon, the non-payment of which by the mortgagor had caused the sale to the prejudice of the mortgagee.

The case, in many respects, is like *Austin* v. *Citizens' Bank and Sheriff*, 30 La. Ann. 689, in which it appeared that a mortgage creditor proceeded directly against the mortgaged property which had been sold for taxes, and the title taken in the name of a third person. The holder of the tax title brought a suit to enjoin such proceeding. The court said: "The plaintiff [the holder of tax title] entrenches himself behind our ruling in *Lannes* v. *Workingmen's Bank*, 29 La. Ann. 112, and insists that his title must be held good until it is annulled in a direct action. But that principle holds good only as to those titles that are *bona fide*, and are acquired without fraud, or that are real and not simulated. Unquestionably a purchaser at a tax sale may acquire a good title to a valuable property for a small price, if the requisite formalities have preceded and attended the sale. . . . But no government will

permit its machinery, constructed to enforce the payment of public dues to the fisc, to be used to manipulate a fraud, and if the purchaser is a party to the fraud he must share its punishment. It might be very different if he were wholly disconnected and unacquainted with it. The purchase by Moss was nothing more or less than a purchase by Mrs. Austin, the debtor and mortgagor, through her son, the plaintiff. The money paid as the price at the tax sale was only what she, as the owner of the property, owed the State, and what she honestly and in good conscience ought to have paid without, and before, and to prevent a sale. If she could not pay it, the debt being *exigeant* and of so high a rank, she should have acquainted her creditor and mortgagee with its imminence, instead of observing the suspicious reticence which characterized her conduct. The creditor's rights, as mortgagee and vendor, cannot be imperilled by the mortgagor's collusive combination with others to interpose an apparent but fraudulent obstacle in his way in enforcing those rights."

All that was said in that case is pertinent to the one before us. The mortgagor had obtained liberal indulgence as to time from the mortgagee. He made such representations of his embarrassed financial condition as induced the mortgagee to forbear taking steps to enforce his lien upon the property. He gave positive assurances that he would make a payment of twenty-five hundred dollars on the mortgage debt by the fall of 1882. He knew that there were taxes upon the property which it was his duty to pay, and that their non-payment endangered the security upon which his generous creditor depended for the payment of the notes given for the property. And his brother, with many expressions of friendship for the mortgagee and his family, joined in the appeals for time, assuring the mortgagee that he would himself assist in meeting the mortgagor's engagements to pay, if the mortgagee would wait until January 1, 1883. He voluntarily promised that he would keep the mortgagee "posted about things." But neither the mortgagor nor his brother informed the mortgagee that the land was advertised to be sold for the taxes which the mortgagor was under a duty to pay. The way in

which Charles F. Hall complied with his promise to keep the plaintiff posted was to withhold information as to the tax sale, buy the land for the amount of the taxes, and take the title in his own name. The evidence leaves no doubt that the non-payment of taxes by the mortgagor, and the purchase of the property by his brother, was in execution of a scheme upon their part to defeat the mortgagor's lien upon the land.

In respect to the credits allowed by the decree below upon his notes to the mortgagor, no error was committed. The credit of $1340.52, as of January 1, 1879, was a trifling amount in excess of the aggregate interest that had been paid by the mortgagor up to that date. The credit of $544.15 was for the amount of the two judgments rendered against Mendenhall by a justice of the peace in Ohio, of which Clark N. Hall became the owner on the 9th of May, 1879. The plaintiff being a non-resident of Louisiana, it was proper to allow that amount as a set off against the notes. *Spinney* v. *Hyde*, 16 La. Ann. 250; *Woolfolk* v. *Ship Graham's Polly*, 18 La. Ann. 693. As to the note for $1733.61, dated June 1, 1875, and executed by the Delaware Paper Company, the court below properly disallowed it as a set off. The evidence clearly showed that it was not an enforceable obligation against that company. The attempt to use it against Mendenhall is only additional evidence of the purpose to defraud him. But, for the reasons stated, the court below erred in rejecting the plaintiff's demand for recognition of the mortgage lien upon the property.

To the extent indicated the decree is reversed, with directions to enter a decree recognizing and establishing the mortgage of December 24, 1875, as against Clark N. Hall, and the succession of Charles F. Hall, and as giving a lien in behalf of the plaintiff superior and paramount to any right which the succession of Charles F. Hall has in the mortgaged property by virtue of the sale for taxes and the sheriff's deed to him, and ordering a sale of the mortgaged property to satisfy the above balance due the plaintiff upon the notes given by Clark N. Hall.

LEE *v.* SIMPSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 1418. Submitted March 17, 1890, with leave to appellant to file reply-brief in ten days. — Decided April 7, 1890.

A testatrix, residing in South Carolina, who died in July, 1866, left a will made by her in 1863, by a codicil to which, made in January, 1866, she bequeathed to her daughter, then married to C., three-fourths of her interest in a bond and mortgage debt, to be vested in a trustee, who was appointed, and to be enjoyed by the daughter during her life, power being given to the daughter, to dispose of such "bequest" as she pleased, "by a last will and testament duly executed by her." In September, 1875, the daughter died, leaving a will executed in September, 1871, which recited that she was "entitled to legacies" under the will of her mother, and to a distributive share in the estates of a sister and a brother, "and notwithstanding my coverture, have full testamentary power to dispose of the same," and then bequeathed to her husband, C., "the entire property and estate to which I am now in any wise entitled and which I may hereafter acquire, of whatever the same may consist," "absolutely and in fee simple;" *Held*,

(1) The court is authorized to put itself in the position occupied by the daughter when she made her will, in order to discover from that standpoint, in view of the circumstances then existing, what she intended;

(2) The will of the daughter was intended by her to be, and was, a full execution of the power, because it referred expressly to the subject matter of the power;

(3) The statement in it as to "full testamentary power" referred to the fact that, although she was a married woman, she had power to "dispose of the same" by a will, such power being given to her by the will of her mother, and did not refer to the provision of the constitution of 1868 of South Carolina, and the legislation consequent thereon, enabling married women to dispose of their own property by will;

(4) Outside of her interest in the bond and mortgage, she had practically no property.

IN EQUITY. Decree dismissing the bill. The plaintiff appealed. The case is stated in the opinion.

Mr. Le Roy F. Youmans, *Mr. J. P. Carey*, and *Mr. Alexander C. King*, for appellant, cited: *Sewall* v. *Wilmer*, 132

Citations for Appellee.

Mass. 131; *Jackson* v. *Chew*, 12 Wheat. 153; *Henderson* v. *Griffin*, 5 Pet. 151; *Carroll* v. *Safford*, 3 How. 441; *Lane* v. *Vick*, 3 How. 464; *Denn* v. *Rocke*, 5 B. &. C. 720; *S. C.* (House of Lords), 4 Bligh, N. S. 1; *Williman* v. *Holmes*, 4 Rich. Eq. 475; *Scott* v. *Burt*, 9 Rich. Eq. 358; *Aaron* v. *Beck*, 9 Rich. Eq. 411; *Wilson* v. *Gaines*, 9 Rich. Eq. 420; *Pulliam* v. *Byrd*, 2 Strob. Eq. 134; *Bradley* v. *Westcott*, 13 Ves. 445; *Chittenden* v. *Brewster*, 2 Wall. 191; *Bunce* v. *Gallagher*, 5 Blatchford, 481; *Plant* v. *Barclay*, 56 Alabama, 561; *Blomfield* v. *Eyre*, 8 Beavan, 250; *Dormer* v. *Fortescue*, 2 Atk. 282; *Bennet* v. *Whitehead*, 2 P. Wms. 643; *Morgan* v. *Morgan*, 1 Atk. 489; *Roberdeau* v. *Rous*, 1 Atk. 543; *Curtis* v. *Curtis*, 2 Bro. Ch. 620; *Doe* v. *Keen*, 7 T. R. 386; *Mansell* v. *Mansell*, 2 P. Wms. 678; *Bilderback* v. *Boyce*, 14 So. Car. 528; *Standen* v. *Standen*, 2 Ves. Jr. 589; *Ellison* v. *Ellison*, 6 Ves. 656; *Andrews* v. *Emmot*, 2 Bro. Ch. 297; *Bennett* v. *Aburrow*, 8 Ves. 609; *Langham* v. *Nenny*, 3 Ves. Jr. 467; *Mory* v. *Michael*, 18 Maryland, 227; *Lovell* v. *Knight*, 3 Sim. 275; *Weatherhead* v. *Baskerville*, 11 How. 329; *Fay* v. *Fay*, 1 Cush. 93; *Hatfield* v. *Sohier*, 114 Mass. 48; *Doe* v. *Considine*, 6 Wall. 458; *In re Clinton's Trust*, L. R. 13 Eq. 295; *Pratt* v. *McGhee*, 17 So. Car. 428; *Jones* v. *Curry*, 1 Swanston, 66; *Evans* v. *Evans*, 23 Beavan, 1; *Osgood* v. *Bliss*, 141 Mass. 474; *Sewall* v. *Wilmer*, 132 Mass. 131, and cases cited; *White* v. *Hicks*, 33 N. Y. 383; *Funk* v. *Eggleston*, 92 Illinois, 515; *Andrews* v. *Brumfield*, 32 Mississippi, 107; *Webb* v. *Honnor*, 1 Jac. & Walk. 352; *Bingham's Appeal*, 64 Penn. St. 345; *Wetherill v. Wetherill*, 18 Penn. St. 265; *Patterson* v. *Wilson*, 64 Maryland, 193; *Pease* v. *Pilot Knob Iron Co.*, 49 Missouri, 124; *Blake* v. *Hawkins*, 98 U. S. 315.

Mr. Joseph H. Earle, *Mr. Augustine T. Smythe* and *Mr. A. M. Lee*, for appellee, cited: *Watts* v. *Lindsay's Heirs*, 7 Wheat. 158; *Fenn* v. *Holme*, 21 How. 481; *Fussell* v. *Gregg*, 113 U. S. 550; *Blake* v. *Hawkins*, 98 U. S. 315; *Postlethwaite's Appeal*, 68 Penn. St. 477; *Clark* v. *Clark*, 19 So. Car. 345; *Scaife* v. *Thomson*, 15 So. Car. 337; *Ladd* v. *Ladd*, 8 How. 10; *Crane* v. *Morris*, 6 Pet. 598; *Kelly* v. *Jackson*, 6

Pet. 622; *Blagge* v. *Miles*, 1 Story, 426; *Warner* v. *Connecticut Mut. Ins. Co.*, 109 U. S. 357; *Carnagy* v. *Woodcock*, 2 Munford, 234; *S. C.* 5 Am. Dec. 470; *Reck's Appeal*, 78 Penn. St. 432; *Still* v. *Spear*, 45 Penn. St. 168; *Finlay* v. *King*, 3 Pet. 346; *Maundrell* v. *Maundrell*, 10 Ves. 246; *Canedy* v. *Jones*, 19 So. Car. 297; *Boyd* v. *Satterwhite*, 10 So. Car. 45; *Bilderback* v. *Boyce*, 14 So. Car. 528; *Moody* v. *Tedder*, 16 So. Car. 557; *Roach* v. *Haynes*, 8 Ves. 584; *Curteis* v. *Kenrick*, 9 Sim. 443; *Munson* v. *Berdan*, 8 Stewart, (35 N. J. Eq.) 376; *White* v. *Hicks*, 33 N. Y. 383.

Mr. Justice Blatchford delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the District of South Carolina, dismissing the bill of complaint of Isabella Lee, an infant, by her next friend, Gideon Lee, against Richard W. Simpson.

The following are the material facts involved in the case:

On May 13, 1854, Mrs. Floride Calhoun was seized and possessed of the tract of land situate in that part of Pickens district which is now Oconee County, in the State of South Carolina, on the east side of the Seneca River, known as the Fort Hill place, containing eleven hundred and ten acres, more or less, and on that day she and her daughter, Cornelia M. Calhoun, sold and conveyed that tract of land, together with certain personal property, to Andrew P. Calhoun, for the sum of $49,000, Cornelia M. Calhoun having no interest in the real estate. Andrew P. Calhoun executed his bond under seal to Mrs. Calhoun and Cornelia, conditioned for the payment of $40,200 to Mrs. Floride Calhoun, and the remaining $8800 to Cornelia, and, to secure the payment of the bond representing the purchase money, and as a part of the same transaction, at the same time executed and delivered to Mrs. Calhoun and Cornelia separate mortgages of the same tract of land and of the personal property, to secure the payment of the sums of money mentioned in the bond.

On the 27th of June, 1863, Mrs. Calhoun made her last will and testament, whereby, among other things, she devised and bequeathed as follows:

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"2. To my daughter Anna Maria, wife of Thomas G. Clemson, of Maryland, I give, devise and bequeath during her life, and for her sole and separate use, the following property: My house and lot in Pendleton and the land attached and belonging thereto, purchased by me from Mrs. William Adger, together with the furniture and everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereinafter specifically give to others; also all my jewelry and the silver cross and prayer-book presented to me by the church at Newport, Rhode Island. At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons', John's and William's, children then living, equally among them, or, if they be dead, to their issue then living."

"19. I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew for the purchase of Fort Hill, amounting to about forty thousand two hundred dollars, secured to me by bond and mortgage. I have also an unsecured interest in a gold mine in Dahlonega, Georgia, belonging to the estate of my late husband, and also an interest in the estate of my second son, Patrick, and second daughter, Cornelia, besides other property. Whatever real or personal property I may possess at my death and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable. I direct my executors to collect, as fast as possible, the above-mentioned residue of my estate, and, after paying off my debts and the legacy to Calhoun Clemson, the remainder I wish divided into four parts, which I dispose of as follows:

"20. One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life and for her sole and separate use; and at her death I will and bequeath it to her daughter Floride, and at Floride's death, if she dies without issue, I will and bequeath it to the children of my deceased sons, John and William, then living, equally among them, or to their issue if they be dead; issue to represent the parent. The better to effect my intentions in regard

to the property in this and the second clause given to Anna, I appoint Edward Noble, of Abbeville, trustee for it and vest in him the legal title. Should Anna at any time wish to sell the house and lands in Pendleton or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter, upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and required to invest the proceeds, and also the fourth part of the residue herein given to her, in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any other cause there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have the power so to do and to appoint another by any instrument in writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.

"21. One-fourth part of said residue of my said estate I give and bequeath to my granddaughter, Floride Elizabeth Clemson, but if Floride should die without leaving issue I give and bequeath it at her death to the children of my sons John and William, or the issue of them if they be dead, the issue to take by representation.

"22. The remaining two-fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one-half of the one-fourth of said residue of my estate, to be enjoyed by her during widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children — being my grandchildren — as may then be alive; but should either of my said grandchildren die

under twenty-one years of age, leaving no child or children, the share of such deceasing grandchild shall go to the survivors or survivor of them or their issue, the issue representing the parent. If Kate should die before me, what I have given her in this will is not to revert to my estate, but is to go to her children — my grandchildren — living at my death, subject to the conditions and limitations above expressed.

"23. The remaining fourth and half of a fourth of the aforesaid residue of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased son John, and William Lowndes Calhoun, child of my second son William, equally among them; and should either of them die under twenty-one years of age, leaving no issue, the share of such deceased child shall go to the survivor or survivors."

On the 22d of January, 1866, Mrs. Calhoun duly made a codicil to her last will and testament, wherein, among other things, she revoked the devise of the real property in Pendleton made to Anna Clemson in the second paragraph of her will, and devised the same to other persons, and provided as follows:

"2. By the nineteenth clause of the will I directed the said bond debt on my deceased son Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me and not before disposed of, to be collected by my executors and the proceeds to be divided into four parts. One part I gave to Anna, one part to her daughter Floride, and the two other parts to Kate and her children, as will appear by clauses 20, 21, 22 and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three-fourths of my interest in said bond and mortgage debt, amounting to about forty thousand two hundred dollars, I hereby give and bequeath to my daughter, Anna M. Clemson, to be enjoyed by her under clause twenty of the will, and according to the provisions of that clause to vest in the same trustee and to be subject to all the powers, trusts, conditions and limitations of that clause precisely as the bequests therein made were sub-

ject to them, with this exception and alteration, that my daughter Anna is hereby authorized and empowered by a last will and testament duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death, I give and bequeath it, the said three-fourths, to her daughter, Floride, and should the said Floride die without leaving issue I give and bequeath it at her death to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases, by a last will and testament duly executed by her. By clause second of the will I gave the furniture and every article of the property in my house in Pendleton and upon the premises, with certain reservations, and also my jewelry and some other small articles, to my said daughter Anna. I now confirm to her the bequests of aforesaid furniture and all other personal property embraced in said second clause, which it is my will that she shall enjoy for life as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter Floride absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause fifth of my will I gave to my daughter-in-law Kate.

"3. The remaining one-fourth part of my interest in said bond and mortgage debt against the estate of my deceased son Andrew I give and bequeath to Floride Elizabeth Clemson, my granddaughter, but if she dies without leaving issue I give and bequeath it to her brother, John Calhoun Clemson. She, nevertheless, is hereby authorized and empowered to dispose of said fourth part, as she pleases, by her last will and testament duly executed.

"4. Should my granddaughter Floride's death occur before mine, what I have given her in the will and codicil shall not fall into the residuum of my estate, but I give and bequeath it to her mother, my daughter Anna, who shall take it subject to all the trusts, powers and limitations imposed upon the direct bequest to her; and should my daughter Anna's death occur before mine, what I have given her in the several clauses of the will and codicil shall not fall into the residuum of my

estate, but I give and bequeath the same to her daughter Floride, who shall take and enjoy it as her mother would have done if living, subject to the same trusts, powers, limitations and conditions; and should both Anna and Floride die before me, what has been given them in the several clauses of the will and codicil shall not fall into the said residuum, but I give and bequeath the whole to my grandson, John Calhoun Clemson.

"5. Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand, the property thus purchased, the property thus obtained by investment, and the money thus retained shall be considered and held to be in the place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage — that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them."

On the 12th of March, 1866, Mrs. Floride Calhoun, and Thomas G. Clemson, (to whom letters of administration had been granted in February, 1866, on the personal estate of Cornelia M. Calhoun, who had departed this life intestate and unmarried in that year,) as administrator of the personal estate of Cornelia, exhibited their bill in the court of equity for the district of Pickens, State of South Carolina, against Andrew P. Calhoun and others, for the foreclosure of the mortgage on the tract of land known as the Fort Hill place, executed to secure payment of the bond aforesaid, and for the sale of the land for that purpose, and at the July term, 1866, of the court a decree was made, whereby it was adjudged that the mortgage be foreclosed and the land sold, which decree, on appeal, was affirmed by the Supreme Court of the State of South Carolina, and the cause remanded to the Circuit Court for further proceedings in accordance therewith.

During the pendency of that suit, and on the 25th of July, 1866, Mrs. Floride Calhoun departed this life, leaving in full force her last will and testament, as modified by the codicil

aforesaid; and thereafter, on the 7th of August, 1866, her last will and testament and the codicil thereto were duly admitted to probate, and Edward Noble, one of the persons mentioned as executors therein, duly qualified as such on the same day.

In August, 1869, Floride E. Clemson intermarried with Gideon Lee, of the State of New York, and the plaintiff, Isabella Lee, is the only child of such marriage, and, on the 27th of August, 1871, the said Floride E. Lee, formerly Clemson, died intestate, leaving surviving her, as her sole heirs-at-law and distributees, her husband, Gideon Lee, and her daughter, Isabella Lee, the plaintiff.

On the 29th of September, 1871, Mrs. Anna C. Clemson made her last will and testament, as follows:

"In the name of God, Amen.

"Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same:

"Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the county of Anderson and State aforesaid, being of sound and disposing mind, memory, and understanding, do make this my last will and testament in manner following:

"I will, devise, and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee-simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will."

The proceedings for foreclosure against Andrew P. Calhoun duly went to decree, Noble, executor, having been substituted as one of the complainants, under which the Fort Hill property was sold and purchased by Thomas G. Clemson, as trustee of his wife, on January 1, 1872; and on June 10, 1875, title was made for the same, in pursuance of an order of the court, to Thomas G. Clemson, as trustee of Anna M. Clemson, under the will of Mrs. Floride Calhoun, he having been duly appointed such trustee on the 13th of December, 1871. The consideration for said purchase and conveyance appears to have been the mortgage debt of Andrew P. Calhoun, and Mr. Clemson, it is alleged, also discharged legacies and demands to the amount of $6964.93 in the purchase and redemption of said property.

On the 5th of November, 1873, a partition in kind was made of the Fort Hill property between Anna M. Clemson and Thomas G. Clemson, as her trustee, on the one part, and the plaintiff and Gideon Lee, as her guardian, on the other part, by which one-fourth part thereof, amounting to about 288 acres, was allotted and set off to the plaintiff, and the remainder, amounting to about 814 acres, was allotted and set off to said Anna M. Clemson and Thomas G. Clemson; and the plaintiff thereupon entered into possession of the parcel so allotted to her, and has ever since remained in possession thereof.

On the 12th of September, 1875, Anna M. Clemson, otherwise known as Anna C. Clemson, died, leaving in full force and unrevoked her said last will and testament, bearing date September 29, 1871, which was duly admitted to probate; and from September, 1875, to the time of his death Thomas G. Clemson remained in quiet, open and continuous possession of the property, claiming to hold the same as his individual property in fee-simple.

On April 6, 1888, Thomas G. Clemson died, leaving in full force and unrevoked his last will and testament, bearing date the 6th of November, 1886, together with a codicil thereto, bearing date the 26th of March, 1887, which will and codicil were duly admitted to probate on the 20th of April, 1888.

In and by the codicil the defendant Simpson was named and constituted the sole executor of the will, and the Fort Hill property was devised to him on certain trusts, fully set out therein, in virtue whereof the defendant entered into and now remains in possession of the Fort Hill property.

The bill in this case was filed on the 26th of November, 1888. After setting forth the contents of the will and codicil of Mrs. Floride Calhoun, the foreclosure of the mortgage given by Andrew P. Calhoun, the death of Mrs. Floride Calhoun, the probate of her will and codicil, the marriage of her granddaughter, Floride Elizabeth Clemson, to Gideon Lee, the status of the plaintiff as their daughter, the death of Mrs. Lee, leaving her husband Gideon Lee, and the plaintiff as her sole heirs at law and distributees, it alleged that the property so devised by Mrs. Floride Calhoun for the use of Mrs. Clemson passed to the plaintiff under the provisions of the will of Mrs. Calhoun; that, after the death of Mrs. Calhoun, a decree was made in the foreclosure suit for the sale of the property; that under that decree it was sold, in January, 1872, to Thomas G. Clemson, as trustee for his wife, the said Anna M. Clemson, under the last will of Mrs. Calhoun and the codicil thereto, Clemson having been substituted as trustee in the place of Edward Noble; that the sale was confirmed and the title to the property conveyed to Clemson, trustee as aforesaid, in consideration of the premises, which were a recital of the proceedings in the case and the nominal consideration of three dollars, no money having been paid, and no cash paid into court or into the hands of its officers, except the costs; that the deed to Clemson was duly recorded, and the property thus taken in part payment of the debt of Andrew P. Calhoun was held continuously by Clemson as trustee, up to the time of his death, under the trusts created by the will and codicil of Mrs. Calhoun; that thereafter, the plaintiff being then entitled to one-fourth of the property in fee-simple absolute under the will and codicil of Mrs. Calhoun, and Mrs. Clemson being entitled to a life estate in three-fourths thereof for her sole and separate use, with remainder to the plaintiff on the death of Mrs. Clemson, in case the latter did not exercise the power of

appointment by her last will and testament, as provided by the will and codicil of Mrs. Calhoun, the plaintiff's father, acting for her, and Clemson, as trustee under the will and codicil of Mrs. Calhoun, made an informal partition of the property, and since that time the plaintiff had been in possession of about 300 acres of it, and the remainder of it, consisting of about 814 acres, had been in possession of Clemson up to the time of his death, and since that time in the possession of the defendant, claiming under Clemson, as trustee under the will and codicil of Mrs. Calhoun; that Mrs. Clemson died in September, 1875, without having exercised the power of appointment conferred upon her by the will and codicil of Mrs. Calhoun; that thereupon the plaintiff became entitled, in fee-simple absolute, to the three-fourths of the property then in the possession of Clemson, as trustee, and to the rents and profits of that part of the property from that time; that Clemson remained in possession of that part of the property subject to the trusts of the will and codicil of Mrs. Calhoun, from the time of the death of Mrs. Clemson until he died, in April, 1888, leaving the plaintiff his sole heir at law, during the whole of which time he collected the rents and profits of the property, amounting in all to over $31,000, without including interest; that since the death of Clemson the defendant had in some manner, claiming under Clemson, acquired possession of the 814 acres, and of the rents and profits thereof, without having been appointed trustee under the will and codicil of Mrs. Calhoun; and that the defendant was about to make a deed of the 814 acres, and of such accumulated rents and profits, to uses and purposes which would wholly defeat such rights of the plaintiff.

The bill waived an answer on oath, and prayed for an accounting by the defendant of the rents and profits of the 814 acres; that the trusts on which Clemson held the property be declared; that the cloud upon the plaintiff's title to it be removed; that she be adjudged to hold the property in fee-simple absolute; that the defendant account for the personal property in which Mrs. Clemson had a life estate, and in which the plaintiff has an estate in remainder or otherwise,

which came into his possession; and that he be enjoined from conveying any part of the property, or any of the property of which Clemson died possessed, to any use or trust which would tend in any manner to cloud the title of the plaintiff or defeat her rights in the premises; and for general relief.

The answer set up that Mrs. Clemson, by her last will and testament, duly executed and duly admitted to probate, disposed of the property held under the trusts of the will and codicil of Mrs. Calhoun, in favor of her husband, Thomas G. Clemson; that from and immediately after her death the property vested in him in fee-simple; and that his continuous and undisturbed possession thereof from that time was in his own right, and not as trustee.

After a replication, proofs were taken, and the case was heard by the Circuit Court, with the result before stated.

The opinion of that court is reported in 39 Fed. Rep. 235. It passed upon what is the only material question in the case, namely, as to whether Mrs. Clemson, by her will, exercised the power given to her by the will and codicil of Mrs. Calhoun, to dispose of the bequest of three-fourths of the interest of Mrs. Calhoun in the bond and mortgage debt of Andrew P. Calhoun, amounting to about $40,200. The conclusion of the court was, that the will of Mrs. Clemson referred to the property which was the subject of the power and also to the power itself; that it was her intention to dispose of the property in question by her will; and that such intention was carried out in due execution of the power.

The recital in the will of Mrs. Clemson is as follows: "Whereas I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same." It then proceeds as follows: "I will, devise and bequeath the entire property and estate to which I am now in any wise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee-simple; but should my husband,

Thomas G. Clemson, depart this life, leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise, and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the State of New York, absolutely and in fee-simple."

As Mrs. Clemson died before her husband, and as he did not die intestate, this last devise and bequest to the plaintiff did not become operative, and the clause containing it is of no effect, except as its language may bear upon the proper construction of the entire instrument.

The view taken by the Circuit Court was that, as Mrs. Clemson had the right, for her life, to the enjoyment of the property held in trust for her under the will and codicil of Mrs. Calhoun, and the absolute power of disposing of it by will, she treated it by her will as being as much hers as the distributive share, referred to in her will, in the several estates of her sister and brother; that it would be too narrow and technical a construction of the will, under the circumstances, so to limit the language of the devise and bequest as to exclude the exercise of the power; that the mention of the distributive share in the estates of her sister and her brother allowed it to be said that the language of the devise and bequest might have some effect by means of her interest in such distributive share, but that would not be all the effect which the words imported; that, if the intention to pass the property held in trust could be discovered, such intention ought to prevail; that the intent to dispose of such property was apparent on the face of the will; that, as it plainly referred to the property covered by the power, its language could not be satisfied unless the instrument should operate as an execution of the power; that the recital in the will that, notwithstanding her coverture, she had "full testamentary power to dispose of the same," (referring to the legacies under the will of her mother and to a distributive share in the estate of her sister and brother,) could not be regarded as merely a reference to the fact that, shortly before that time, married women in South

Carolina had, by the constitution of 1868, and the legislation consequent thereon, been enabled to dispose of their property by will, because, in that view, such statement would have been wholly uncalled for, as she could alienate her own property in any way she chose, while the property held in trust for her for her life could be disposed of by her only by will; and that, therefore, the more reasonable inference was that she referred, by the words "full testamentary power," to the will of her mother, rather than to her own recently acquired legal capacity, though a married woman, to make a will, as to the property in which she did not have merely a life estate, with a power of appointment.

By the will and codicil of Mrs. Calhoun, the following bequests or legacies were left to Mrs. Clemson: (1) A bequest for life of three-fourths of the bond and mortgage debt due by Andrew P. Calhoun; (2) A devise and bequest for life of certain real estate, furniture and other personal property mentioned in the second clause of the will and in the second clause of the codicil; (3) A share for life in a part of the residuary estate left after the payment of debts; (4) A share for life in the remainder of such residuary estate, if her grandsons should die under age and without issue; (5) Her grandmother's portrait. All of these legacies, except such portrait, were made to Mrs. Clemson for her life. In regard to the portrait, as Mrs. Calhoun died in July, 1866, and Mr. and Mrs. Clemson were then both of them living the rights of Mr. Clemson under the common law rule immediately attached to the portrait, and it became at once his personal property. The legacies to Mrs. Clemson or for her benefit were all personal property at the time of her death. The fifth clause of the codicil to the will of Mrs. Calhoun directs that if Fort Hill, the property in question, should be purchased with the bond and mortgage debt, the property so purchased should "be considered and held to be in the place of and the same as the aforesaid bond and mortgage," and should "pass under this codicil as if the same were still in the form of said bond and mortgage," that is to say, should pass to Mrs. Clemson and her daughter Floride, as the "aforesaid bond and mortgage debt is directed to

be divided between them." In her will and codicil, Mrs. Calhoun speaks of the provisions made for Mrs. Clemson as "bequests," and also as the "property' given to her.

At the time Mrs. Clemson's will was made, the court had ordered, in July, 1871, the sale of the Fort Hill property to satisfy the mortgage debt, which then amounted to over $65,000. It was manifest that the property would have to be purchased by the mortgagees; but as, in fact, it had not been purchased when the will was made, the mortgage debt was still, under the will of Mrs. Calhoun, a legacy of personal property, and would be spoken of properly, in the will of Mrs. Clemson, as a legacy to which she was entitled under the will of her mother. Moreover, by the terms of that will, the investment in the Fort Hill property was still to be considered as personal property.

Mrs. Clemson's distributive share in her sister's estate was, at the time Mrs. Clemson made her will, of small value, as she ultimately received from it, at most, only $601.94. Her share in her brother's estate was at that time also small, amounting only to $120.49, although, in fact, she received $150. This was all the property which she had, or supposed she had, when she made her will, and all that she intended to dispose of.

The rents which had accumulated on the Fort Hill property before it was sold under the decree of foreclosure did not belong to Mrs. Clemson, but belonged to the estate of Andrew P. Calhoun, the mortgage debtor; and when they were received by Mr. Clemson in part payment of the debt they were to be held by him as trustee of Mrs. Clemson under the will and codicil of Mrs. Calhoun.

Putting ourselves in the position occupied by Mrs. Clemson when she made her will, as we are authorized to do, in view of the circumstances then existing, in order to discover from that standpoint what she intended, *Blake* v. *Hawkins*, 98 U. S. 315, 324; *Postlethwaite's Appeal*, 68 Penn. St. 477, 480; *McCall* v. *McCall*, 4 Richardson Eq. 448, 455; *Scaife* v. *Thompson*, 15 So. Car. 337, 357; *Clark* v. *Clark*, 19 So. Car. 345, 348, 349, we are of opinion that the will of Mrs. Clemson was intended by her to be, and was, a full execution of the

power. She was entitled to bequests and legacies under the will and codicil of Mrs. Calhoun, which they spoke of as "property," and which Mrs. Clemson was authorized to dispose of as she pleased. It was lawful for her to execute such power in favor of her husband. The interest to which the power applied was at the time personal property, and was a legacy or bequest. Her will refers to the fact that she is entitled to legacies under the will of her mother, and to a distributive share in the estates of her sister and brother. This is the property which she believed she had; this is what she really had; and this is what she intended to dispose of by her will. The will, therefore, in referring to the legacies to which she is entitled under the will of her mother, refers expressly to the subject matter of the power. The second article of the codicil to the mother's will, after bequeathing to Mrs. Clemson, for life, the three-fourths interest in the bond and mortgage debt, gives her the power "to dispose of this bequest," thus applying that word to the remainder which the daughter took no interest in, but merely a power to dispose of; and Mrs. Clemson, in using the word "legacies," must have intended to include the interest in remainder, which her mother had called a "bequest."

As to the legacy of the three-fourths interest for life in the bond and mortgage debt, she had only a power of appointment. Her property in it had only that extent; but it had that extent; and to that extent she regarded it as her property, which consisted of the right to the use of it for her life and of the power of disposing of it by her will. The statement that, notwithstanding her coverture, she had "full testamentary power to dispose of the same," refers to the fact that, although she was a married woman, she had power to dispose of the same by a will, such power being given to her by the will of her mother. The expression has the same meaning as if it had read "full power to dispose of the same by will."

This power so to dispose of the subject of the power created by the will of her mother she possessed fully, without the aid of the provision of the constitution and legislation of South Carolina enabling married women to dispose of their own

property by will, because without a statute of that kind married women could always execute powers of appointment. The provision of the constitution and statute might have been necessary to authorize her to dispose by will of her distributive shares of the estates of her sister and her brother; but with her power to dispose of such shares by her will we are not here concerned. By the constitution, adopted in 1868, and the legislation in pursuance thereof, Mrs. Clemson had as full legal capacity to make a will as if she were a *feme sole*, and she needed no other power to enable her to do so. Her mother died in 1866, and the power conferred by that will and codicil upon Mrs. Clemson was conferred upon her as a married woman, and was afterwards exercised by her as a married woman.

We then come to the following language in the will: "I will, devise and bequeath the entire property and estate to which I am now in anywise entitled and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee-simple." Outside of her interest in the bond and mortgage on the property in question, to which she was entitled as a legacy under the will of her mother, she had practically no property, her interest in her brother's and sister's estates being of such small value. Unless, therefore, by referring to legacies under the will of her mother, she refers to the interest in the bond and mortgage, all that she could refer to as having come to her under the will of her mother would be, at most, the oil portrait of her grandmother. It cannot be reasonably supposed that that is the proper construction of the will. As for the interest or income she had derived during her life from the bond and mortgage property, the moment it was received it became her property; and it could not properly be regarded as covered by the expression of legacies to which she was entitled under the will of her mother.

The question of the execution of a power is very fully discussed by Mr. Justice Story in *Blagge* v. *Miles*, 1 Story, 426. The rule laid down in that case is, that if the donee of the power intends to execute it, and the mode be in other respects

unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative; that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, but if it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power; and that it is not necessary, however, that the intention to execute the power should appear by express terms or recitals in the instrument, but it is sufficient that it appears by words, acts or deeds demonstrating the intention. Judge Story states, as the result of the English authorities, that three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) Or a reference to the property, which is the subject on which it is to be executed; (3) Or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power. The rule thus stated was referred to with approval by this court in *Blake* v. *Hawkins*, 98 U. S. 315, 326; and in *Warner* v. *Connecticut Mutual Life Ins. Co.*, 109 U. S. 357, 366; by the Court of Appeals of New York, in *White* v. *Hicks*, 33 N. Y. 383, 392; and by the Supreme Court of Illinois, in *Funk* v. *Eggleston*, 92 Illinois, 515, 538, 539, 547. See, also, *Meeker* v. *Breintnall*, 38 N. J. Eq. 345.

Nor is the rule different under the decisions of the courts of South Carolina. *Hopkins' Executors* v. *Mazyck*, Rich. Eq. Cas. 263; *Porcher* v. *Daniel*, 12 Rich. Eq. 349; *Boyd* v. *Satterwhite*, 10 So. Car. 45; *Bilderback* v. *Boyce*, 14 So. Car. 528; *Moody* v. *Tedder*, 16 So. Car. 557.

The counsel for the appellant relies with great confidence on the case of *Bilderback* v. *Boyce*, *supra*, where real estate was devised by a father to trustees, to permit his son to take the income for life, with remainder to such persons as the son by his will might appoint, and, in default of appointment, to the children of the son. The son by his will gave, devised and

bequeathed "all the rest and residue of my estate, whatever and wherever," to persons named, but did not mention the power or the trust property. He had real estate in his own right. The court held that there was no execution of the power, on the ground that the will disposed in general terms of the whole estate of the donee of the power, without any reference in terms to the power or the property, and that the donee's own property satisfied the terms of the will. The land to which the power related was not mentioned in the will, nor was the power referred to, and the terms of the will were satisfied by the property which the son left, without including that as to which the power existed. But the court cites with approval the case of *Blagge* v. *Miles*, *supra*, and quotes the passage from it before referred to, and takes as its guide, as the result of all the American authorities, the principle, that "the intention to execute must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation."

In the subsequent case of *Moody* v. *Tedder*, *supra*, one Griggs, by his will, devised and bequeathed to his wife, for life, all his property, both real and personal, empowering her to use and dispose of so much of it as might be necessary for her comfortable support and maintenance, in such style and manner as she might see fit, and gave whatever portion might be remaining of the property after the death of his wife to the wife of one Tedder. The widow of Griggs, for a consideration, conveyed to Tedder all her "interest and life estate" in the "property left to me for life" by the will of Griggs. It was held, that the widow of Griggs, as life tenant, had an absolute power of disposing of the property, and that the conveyance to Tedder carried not only the life estate but also the power of disposal, and must be referred to the power which the widow possessed, whether it purported to be an execution of the power or not. The view of the court was that, as the words of the conveyance were "all my interest and life estate," and as Mrs. Griggs had, besides the life estate, no other interest in the property, and as express reference was made to the property as to which the power existed, by

describing it as "property left to me for life" by the will of Griggs, her deed must be considered as conveying all her rights in the estate, including her power of disposal, although the conveyance made no reference in terms to such power. The court said, that while it was true that the word "interest" was not the technical term to express the idea of a power, it was broad enough, in its ordinary acceptation, to cover it, and that the conveyance was intended to include such power. The opinion added that the question of the execution of a power was one of intention, and it then cited the case of *Bilderback* v. *Boyce*, *supra*, as establishing the principle, that "if the devisee of the power intends to execute it, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative," although "the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation."

In the present case, the will of Mrs. Clemson recites that she is entitled to legacies under the will of her mother. It refers to bequests left to her for life, with the power of disposition. It thus refers to the power and also to the property which is the subject of the power, namely, the legacies left to her in her mother's will. Furthermore, the statement in the will of Mrs. Clemson that she has full testamentary power to dispose of those legacies is, in view of the fact that the will of her mother does give her the power to dispose of those legacies as she pleases, an express and direct reference to such power, because under the constitution and statute of South Carolina, in force at the time Mrs. Clemson made her will, she could have disposed by will of any other property which she had, without the aid of any special power to do so. Her will then states that she wills, devises and bequeaths to her husband, absolutely and in fee-simple, "the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist." She does not here say "my property and estate," but the language she uses is adequate to include not only what was her own in fee-simple and in full right, but also all that in which she was in-

terested, or over which she had any control. The words "in anywise entitled" are sufficient to cover not only property which she held in her own full right, but also property which she held in a limited right under her mother's will. The word "property" was the very word used by her mother in describing, in her will and codicil, the estate and interest which she had given to Mrs. Clemson. Thus, in clause 20 of the will of Mrs. Calhoun, which gives to Mrs. Clemson for life a share in the residue of the estate, she speaks of "the property" given to Mrs. Clemson in that clause and in the second clause of the will, the latter clause containing only a devise and bequest to Mrs. Clemson for life of certain real estate and personal property. Therefore, Mrs. Clemson, in using the words "the entire property and estate to which I am now in anywise entitled," must be regarded as referring to that in respect to which she had the power of disposition by the will of her mother. Otherwise, we have the case of a reference to legacies left to Mrs. Clemson under her mother's will, and to her power of disposing of them, which is meaningless unless the language of the devise and bequest which follows covers the property in regard to which she had such power of disposition. At the time of her death, in September, 1875, she had received all that she was entitled to receive from the estates of her sister and her brother, and there was nothing then left except the property which had come to her under her mother's will, namely, the interest in the bond and mortgage and the portrait of her grandmother.

The decree of the Circuit Court was right, and it is

Affirmed.

HOME INSURANCE COMPANY *v.* NEW YORK STATE.

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

No. 1. Argued March 18, 19, 1890. — Decided April 7, 1890.

A tax which is imposed by a state statute upon "the corporate franchise or business" of all corporations incorporated under any law of the State or of any other State or country, and doing business within the State, and which is measured by the extent of the dividends of the corporation in the current year, is a tax upon the right or privilege to be a corporation and to do business within the State in a corporate capacity, and is not a tax upon the privilege or franchise which, when incorporated, the company may exercise; and, being thus construed, its imposition upon the dividends of the company does not violate the provisions of the statute exempting bonds of the United States from taxation, 12 Stat. 346, c. 33, § 2, although a portion of the dividends may be derived from interest on capital invested in such bonds.

Such a tax is not in conflict with the last clause of the first section of the Fourteenth Amendment to the Constitution of the United States declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws.

The validity of a state tax upon corporations created under its laws, or doing business within its territory, can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise.

McCulloch v. *Maryland*, 4 Wheat. 316, 436; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Henderson* v. *Mayor of New York*, 92 U. S. 259; and *Brown* v. *Maryland*, 12 Wheat. 419, in nowise conflict with the points decided in this case; and the court fully assents to those cases, and has no doubt of their correctness in any particular.

This case was first heard at October term, 1886. On the 15th of November, 1886, it was affirmed by a divided court, and was reported in 119 U. S. 129, to which reference is made for the reporter's statement of the case at that hearing, including the text of the New York statute and the agreed case. On the 7th of February, 1887, on motion of the counsel for the plaintiff in error, that judgment was rescinded and annulled, and the cause restored to its place on the docket, to be heard by a full bench. 122 U. S. 636. With its present opinion the

court handed down a statement of the case now made, which is as follows:

The plaintiff in error, The Home Insurance Company of New York, is a corporation created under the laws of that State. Its capital stock during the year 1881 was three millions of dollars, divided into thirty thousand shares of the par value of one hundred dollars each, all fully paid. In the months of January and July of that year a dividend of $150,000 was declared by the company, making together ten per cent upon the par value of its capital stock. A portion of that capital stock was invested in bonds of the United States, amounting, when the dividend was declared in July, 1881, and also on the first of November of that year, to $1,940,000.

By an act of the legislature of New York, passed May 26, 1881, c. 361, amending a previous act providing for the taxation of certain corporations, joint stock companies and associations, it was declared that every corporation, joint stock company or association, then or thereafter incorporated under any law of the State, or of any other State or country, and doing business in the State, with certain designated exceptions not material in this case, should be subject to a tax upon "its corporate franchise or business," to be computed as follows: if its dividend or dividends made or declared during the year ending the first day of November amount to six per cent or more upon the par value of its capital stock, then the tax to be at the rate of one-quarter mill upon the capital stock for each one per cent of the dividends. A less rate is provided where there is no dividend, or a dividend less than six per cent and also where the corporation, company or association has more than one kind of capital stock — as, for instance, common and preferred stock — and upon one of them there is a dividend amounting to six or more per cent and upon the other there is no dividend or a dividend of less than six per cent. The purpose of the act is to fix the amount of the tax each year upon the franchise or business of the corporation by the extent of dividends upon its capital stock, or, where there are no dividends, according to the actual value of the capital stock during

the year. We are concerned in this case, however, only with the tax where the amount is computed by the extent of the dividends.

The tax payable by the Home Insurance Company, estimated according to its dividends, under the above law of the State, aggregated $7500. The company resisted its payment, assuming that the tax was in fact levied upon the capital stock of the company, and contending that there should be deducted from it a sum bearing the same ratio thereto that the amount invested in bonds of the United States bears to its capital stock, and that the law requiring a tax without such reduction is unconstitutional and void. An agreed case was accordingly made up embodying a statement of the facts, between the company and the attorney general of New York representing the State, and submitted to the Supreme Court of the State. That court gave judgment in favor of the State against the company, which on appeal to the Court of Appeals of the State was affirmed. 92 N. Y. 328. The judgment of the latter court, having been remitted to the Supreme Court and entered there, the case is brought to this court for review on writ of error.

Mr. Benjamin H. Bristow, for plaintiff in error, argued the case on his former brief, which is reported at length in 119 U. S. 133–143.

Mr. Charles F. Tabor, Attorney General of the State of New York, for defendant in error, argued the case on a brief which embodied the substance of the brief of his predecessor, *Mr. O'Brien*. 119 U. S. 143–147.

In addition to the cases cited under Point I in that brief, *Mr. Tabor* cited: *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Webber* v. *Virginia*, 103 U. S. 344, 350; *Mercantile Bank* v. *New York*, 121 U. S. 138, 158; *Kittanning Coal Co.* v. *Commonwealth*, 79 Penn. St. 100; *Philadelphia Contributionship* v. *Commonwealth*, 98 Penn. St. 48; and, in addition to those cited under Point II: *Commonwealth* v. *Delaware Division Canal Co.*, 123 Penn. St. 494.

Opinion of the Court.

Under the first point in his brief (not in the former brief) — that the decision of the Court of Appeals on the construction of the constitution and statutes of New York will be followed by this court — *Mr. Tabor* cited: *Elmwood* v. *Marcy*, 92 U. S. 289; *Fairfield* v. *Gallatin County*, 100 U. S. 47; *Louisville, New Orleans & Texas Railway* v. *Mississippi*, 133 U. S. 587; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Detroit City Railway* v. *Guthard*, 114 U. S. 133; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110.

Under the fourth point in his brief (also not in the former brief) — that this court has in many cases indicated the restrictions, limitations and qualifications which are to be applied to the words: "nor shall any State deny to any person within its jurisdiction the equal protection of the laws," showing clearly that they cannot be given the broad construction sought for them under the decision in *San Mateo* v. *Southern Pacific Railroad*, 13 Fed. Rep. 722 — *Mr. Tabor* cited: *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398; *Barbier* v. *Connolly*, 113 U. S. 27, 32; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri Pacific Railroad* v. *Humes*, 115 U. S. 512; *Davenport Bank* v. *Davenport*, 123 U. S. 83; *Missouri Railway Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26; *Bank of Redemption* v. *Boston*, 125 U. S. 60.

On the rules governing the construction of statutes, he cited: *Amy* v. *Watertown* (*No. 1*), 130 U. S. 301; *Parsons* v. *Bedford*, 3 Pet. 433; *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261; *Presser* v. *Illinois*, 116 U. S. 252, 269; *Ogden* v. *Saunders*, 12 Wheat. 213, 270.

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

The contention of the plaintiff in error is that the tax in question was levied upon its capital stock, and therefore invalid so far as the bonds of the United States constitute a part of that stock. If that contention were well founded there would be no question as to the invalidity of the tax.

That the bonds or obligations of the United States for the payment of money cannot be the subject of taxation by a State is familiar law settled by numerous adjudications of this court. It is a tax upon the exercise of the power of Congress to borrow money: a tax which, if permitted, could be limited in amount only by the discretion of the State, and might therefore be carried to an extent impairing, if not destructive of, the efficiency of the power, to the serious detriment of the general government. As held in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, the States have no power by taxation to impede, burden or in any manner control the operation of the Constitution and laws enacted by Congress to carry into execution the powers vested in the general government; a doctrine which, applied in *Weston* v. *City Council of Charleston*, 2 Pet. 449, annulled a tax levied by the authority of a law of South Carolina on stock issued for loans to the United States.

Nor can this inhibition upon the States be evaded by any change in the mode or form of the taxation, provided the same result is effected — that is, an impediment is thereby interposed to the exercise of a power of the United States. That which cannot be accomplished directly cannot be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained. Thus in *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268, a statute of New York provided that the master or owner of any vessel bringing passengers from foreign ports into the port of New York should give a bond in the sum of $300 for each passenger landed, against his becoming a public charge for four years thereafter, or pay within twenty-four hours thereafter $150 for each passenger, and that, if neither bond was given nor payment made, a penalty of $500 for such failure would be incurred, which should be a lien upon the vessel. It was contended that the object of the requirement was not taxation but protection against pauperism, and therefore valid as within the police power. But the court said that in whatever language

the statute may be framed its purpose must be determined by its reasonable and natural effect, and judged by that criterion the tax was either on the owners of the vessel for the right of landing passengers or upon the passengers themselves; and that, therefore, the statute was a regulation of commerce and void.

To the same purport is the familiar case of *Brown* v. *Maryland*, 12 Wheat. 419, so often cited in this court, where it was contended that a license tax required of an importer to sell his goods, while held in bulk as imported, was a tax only upon his occupation. But the court observed that this was only changing the form without varying the substance of the tax, adding that "it is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Looking now at the tax in this case upon the plaintiff in error, we are unable to perceive that it falls within the doctrines of any of the cases cited, to which we fully assent, not doubting their correctness in any particular. It is not a tax in terms upon the capital stock of the company, nor upon any bonds of the United States composing a part of that stock. The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.

By the term "corporate franchise or business," as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under

a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a federal tribunal. As was said in *Delaware Railroad Tax Case*, 18 Wall. 206, 231: "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." It is true, as said by this court in *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41, that the taxation of a corporate franchise has no limitation but the discretion of the taxing power, and its

value is not measured like that of property, but may be fixed at any sum that the legislature may choose; it may be arbitrarily laid, without any valuation put upon the franchise. If any hardship or oppression is created by the amount exacted, the remedy must be sought by appeal to the legislature of the State; it cannot be furnished by the federal tribunals.

The tax in the present case would not be affected if the nature of the property in which the whole capital stock is invested were changed and put into real property or bonds of New York, or of other States. From the very nature of the tax, being laid upon a franchise given by the State, and revocable at pleasure, it cannot be affected in any way by the character of the property in which its capital stock is invested. The power of the State over the corporate franchise and the conditions upon which it shall be exercised, is as ample and plenary in the one case as in the other.

In some States the franchises and privileges of a corporation are declared to be personal property. Such was the case in New York with reference to the privileges and franchises of savings banks. They were so declared by a law passed in 1866, and made liable to taxation to an amount not exceeding the gross sum of the surplus earned and in the possession of the banks. The law was sustained by the Court of Appeals of the State in *Monroe Savings Bank* v. *City of Rochester*, 37 N. Y. 365, 369, 370, although the bank had a portion of its property invested in United States bonds. In its opinion the court observed that in declaring the privileges and franchises of a bank to be personal property the legislature adopted no novel principle of taxation; that the powers and privileges which constitute the franchises of a corporation were in a just sense property, quite distinct and separate from the property which, by the use of such franchises, the corporation might acquire; that they might be subjected to taxation if the legislature saw fit so to enact; that such taxation being within the power of the legislature, it might prescribe a rule or test of their value; that all franchises were not of equal value, their value depending, in some instances, upon the nature of the business authorized, and the extent to which permis-

sion was given to multiply capital for its prosecution; and that the tax being upon the franchises and privileges, it was unimportant in what manner the property of the corporation was invested. And the court added: "It is true that where a state tax is laid upon the property of an individual or a corporation, so much of their property as is invested in United States bonds is to be treated, for the purposes of assessment, as if it did not exist, but this rule can have no application to an assessment upon a franchise, where a reference to property is made only to ascertain the value of the thing assessed." And again: "It must be regarded as a sound doctrine to hold that the State, in granting a franchise to a corporation, may limit the powers to be exercised under it and annex conditions to its enjoyment, and make it contribute to the revenues of the State. If the grantee accepts the boon it must bear the burden."

This doctrine of the taxability of the franchises of a corporation without reference to the character of the property in which its capital stock or its deposits are invested is sustained by the judgments in *Society for Savings* v. *Coite*, 6 Wall. 594, and *Provident Institution* v. *Massachusetts*, 6 Wall. 611, which were before this court at December Term, 1867. In the first of these cases it appeared that a law of Connecticut of 1863 provided that savings banks in that State should make an annual return to the controller of public accounts "of the total amounts of all deposits in them, respectively, on the first day of July in each successive year," and should pay to the treasurer of the State a sum equal to three-fourths of one per cent on the total amount of deposits in such banks on those days, and that the tax should be in lieu of all other taxes upon the banks or their deposits. On the first day of July, 1863, the Society for Savings, one of the banks, had invested over $500,000 of its deposits in securities of the United States, which were declared by Congress to be exempted from taxation by state authority, whether held by individuals, corporations, or associations. 12 Stat. 346, c. 33, § 2. Upon the amount of its deposits thus invested the society refused to pay the sum equal to the prescribed percentage. In a suit brought by the treas-

urer of the State to recover the tax, the payment of which was thus refused, the Supreme Court of Connecticut held that the tax was not on property but on the corporation as such. The case being brought here, the judgment was affirmed, this court holding that the tax was on the franchise of the corporation and not upon its property, and the fact that a part of the deposits was invested in securities of the United States did not exempt the society from the tax. Said the court: "Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities." pp. 606–607.

It was contended in that case that the deposits in the bank were subjected to taxation from the fact that the extent of the tax was determined by their amount. But the court said: "Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens. Views of the defendants are, that the sums required to be paid to the treasury of the State is a tax on the assets of the institution, but there is not a word in the provision which gives any satisfactory support to that proposition. Different modes of taxation are adopted in different States, and even in the same State at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. Experience shows that the latter mode is better calculated to effect justice among the corpora-

tions required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained." p. 608.

In the second case mentioned, *Provident Institution* v. *Massachusetts*, it appeared that the statute of Massachusetts, passed in 1862, levying taxes on certain insurance companies and depositors in savings banks, provided that every institution for savings incorporated under its laws should pay to the commonwealth a tax of one-half of one per cent per annum on the amount of its deposits, to be assessed one-half of said annual tax on the average amount of its deposits for the six months preceding the 1st day of May, and the other half on the average amount of its deposits for the six months preceding the 1st day of November. The Provident Institution for Savings in that State was authorized to invest its deposits in securities of the United States. Its average amount of deposits for the six months preceding the 1st day of May, 1865, was over eight millions, of which over one million was invested in such securities. It paid all the taxes demanded except on the portion which was thus invested. Upon that it declined to pay the tax. In a suit brought by the commonwealth to recover the same, the Supreme Judicial Court of the State held that the tax was one on the franchise of the company and not on property, and therefore gave judgment for the commonwealth. The case being brought here, the judgment was affirmed. In deciding the case, this court said, referring to a section of the statute under which the tax was levied: "Deposits, as the word is employed in that section, are the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments, as the word is there used, which simply means the sums received wholly irrespective of the disposition made of the same, or their market value." And speaking of the difference existing be-

tween taxes upon franchises and taxes upon property it said: "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes as levied for state and municipal purposes in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection;" and again, "Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter." pp. 631, 632.

The court also referred to a decision made by the Supreme Court of the State to the effect that the assessment imposed was to be regarded as an excise or duty on the privilege or franchise of the corporation, not as a tax on the moneys in its hands belonging to the depositors. It was the corporation, it said, that was to make the payment, and if it failed to do so it was liable not only to an action for the amount of the tax, but might also be enjoined from the future exercise of its franchise until all taxes should be fully paid. *Commonwealth* v. *People's Savings Bank*, 5 Allen, 428, 431.

And the court held that the valuation of the property had nothing to do with determining the amount of the tax, but that the amount depended on the average amount of deposits for the six months preceding the respective days named, and that there was no necessary relation between the average amount of the deposits and the amount of property owned by the institution; and, not being a property tax, it was to be considered as a franchise tax laid upon the corporation for the privileges conferred by its charter, which by all the authorities it was competent for the State to tax irrespective of what disposition the institution had made of its funds, or in what manner they had been invested.

In *Hamilton Company* v. *Massachusetts*, 6 Wall. 632, a statute of Massachusetts which required corporations having a capital stock divided into shares, to pay a tax of a certain per-

centage upon the excess of the market value of such stock over the value of its real estate and machinery, was sustained as a statute imposing a franchise tax, notwithstanding a portion of the property which went to make the excess of the market value consisted of securities of the United States; this court, however, placing its decision upon the fact that under the provisions of the state constitution and the practice under it the tax had been so considered by the highest tribunal of the State. This decision goes much farther than is necessary to sustain the judgment of the Court of Appeals of New York in the present case.

In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is not a tax on the capital stock or property of the company, but upon its corporate franchise, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States.

Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are persons within the meaning of this Amendment. It has been so decided by this court. *Pembina Cons. Silver Co.* v. *Pennsylvania*, 125 U. S. 181. But the amendment does not prevent the classification of property for taxation — subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabili-

ties to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See *Barbier* v. *Connolly*, 113 U. S. 29, 32; *Soon Hing* v. *Crowley*, 113 U. S. 703, 709; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 523; *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205, 209; *Minneapolis Railway Co.* v. *Beckwith*, 129 U. S. 26, 32.

Mr. Justice Miller (with whom concurred Mr. Justice Harlan) dissenting.

Mr. Justice Harlan and myself dissent from the judgment in this case, because we think that, notwithstanding the peculiar language of the statute of New York, the tax in controversy is, in effect, a tax upon bonds of the United States held by the insurance company.

BLOUNT *v.* WALKER.

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

No. 1399. Submitted March 24, 1890. — Decided April 7, 1890.

A judgment by a state court of South Carolina that the will of a resident in North Carolina, who was the donee of a power to appoint by will to receive the fee of real estate in South Carolina, after the expiration of a life estate, was properly admitted to probate in North Carolina, as executed according to the laws of that State, and was properly admitted to probate in South Carolina by proof of an exemplified copy, though not executed according to the laws of that State, but that the donor of the power intended that the appointment should be made by a will valid under the laws of South Carolina, which this will was not, does not refuse to give full faith and credit to the judgment of the court of North Carolina, admitting the will to probate.

To give this court 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.

MOTION TO DISMISS. The court stated the case as follows:

Sarah J. Harris, a citizen of the State of South Carolina, died at her residence in that State in December, 1885, leaving a last will and testament bearing date September 11, 1885, and, her surviving, an only child, Mrs. Mary D. Blount, whose domicil was that of her husband, William H. Blount, in Wilson County, in the State of North Carolina. Mrs. Harris' next nearest of kin was her sister, Caroline S. Walker, mother of Julius H. Walker. By her will Mrs. Harris gave, bequeathed, and devised her estate, real and personal, which was all situated in South Carolina, to her nephew, Julius H. Walker, (who was appointed executor,) in trust for Mary D. Blount "for and during the term of her natural life," unless the trust were sooner executed, as provided in an item of the will not material to be considered here, and upon the death of Mrs. Blount the estate was "bequeathed and devised to the issue of the said Mrs. Blount, to them and their heirs forever, *per stirpes* and not *per capita;* and if the said Mrs. Blount die without issue surviving her at the time of her death, then the same is devised and bequeathed to such person or persons and in such proportions as the said Mrs. Mary Delia Blount may appoint by her last will and testament duly executed, to the said appointees and their heirs forever." Mrs. Blount died at her home in North Carolina, without issue, in April, 1886. She left a will dated March 16, 1886, providing that "all my estate, both real and personal, whether legal or equitable, I devise, bequeath and absolutely give unto my beloved husband, to his only use and behoof, and hereby direct the trustee appointed by the last will and testament of my deceased mother, Mrs. S. J. Harris, of Columbia, in the State of South Carolina, to execute all such needful conveyances and releases as may effectually divest his title as such trustee, and convey the property and effects, to him devised by said last will of Mrs. S. J. Harris, to my said husband, W. H. Blount, to him

and his heirs absolutely." This will was duly admitted to probate in the Probate Court of Wilson County, North Carolina, on the 26th day of April, 1886, the order of that court finding from the evidence of the subscribing witnesses that the paper writing propounded "is the last will and testament of M. Delia Blount, and that the same was duly executed by said M. Delia Blount." Letters testamentary issued June 3, and an exemplification of the probate proceedings was duly filed and admitted to probate in the proper Probate Court in South Carolina, in accordance with the statute in that behalf, which provided: "If a will be regularly proved in any foreign court, an exemplification of such will may be admitted to probate in this State upon the exemplification and certificate of the judge of the court of probate; and the exemplification shall also be evidence of the devise of land in this State where the title of lands comes in question." Gen. Stats. So. Car. 1882, p. 549, § 1875.

William H. Blount instituted an action on the equity side of the Court of Common Pleas in Richland County, South Carolina, against Julius H. Walker, who had qualified as executor and was in possession as trustee, and Mrs. Caroline S. Walker, setting forth the deaths of Mrs. Harris and Mrs. Blount and the wills, and claiming the entire estate of Mrs. Harris as the appointee by Mrs. Blount's will; alleging demand upon the trustee and executor, and refusal; and demanding judgment that he be adjudged to be the owner of said estate; that Walker be required to account; and for general relief. Walker answered, submitting, under the advice of counsel, the question to the court "whether the will of M. Delia Blount is a valid execution of the power conferred upon her by the will of Sarah J. Harris, and whether said will of Mrs. Blount has been duly executed so as to pass the property of said Sarah J. Harris in the hands of this defendant." Mrs. Walker also answered, claiming to be entitled to the whole estate of Mrs. Harris as her sole heir after the death of Mrs. Blount, and alleging that Mrs. Blount's will was not executed as required by the laws of South Carolina, and was not, therefore, a valid execution of the power.

Statement of the Case.

The cause was heard by the judge of the Court of Common Pleas, who found, among other things, "that Mrs. Blount's will was duly proved in the Probate Court of North Carolina, in the county in which she resided, and a proper exemplification under the laws of South Carolina was admitted to probate in Richland County on the 19th May, 1886. The Court of Probate of North Carolina is, under the laws of North Carolina, a court of general jurisdiction in all matters testamentary. The exemplification of the judgment of that court, establishing this will, was properly proved according to the acts of Congress. Mrs. Blount's will is not executed according to the laws of South Carolina. The question to be determined is whether Mrs. Blount's will is a valid execution of the power contained in Mrs. Harris' will. It is conceded in the argument, and is undoubtedly sound, that the appointee, under a power like the one under consideration, takes under the instrument creating the power, and not under the instrument of appointment. And in this case Mrs. Harris' will expressly conveys the property to the appointee under the power. The only requisite required by Mrs. Harris' will for the execution of this power, is that the same shall be by 'will duly executed;' and in this case that formality has been complied with, and is shown by the judgment of the court of her domicil." And it was "ordered, adjudged and decreed, that the power is well executed, and the plaintiff is entitled to the property set out in the complaint and in the hands of the defendant Julius H. Walker."

Defendants appealed from this decree to the Supreme Court of South Carolina, which on the 23d day of April, 1888, reversed the judgment of the Circuit Court. The court held that the power was not well executed, for the reason that Mrs. Harris had by her will conferred a power which the donee could only exercise "by her last will and testament duly executed," which meant a will duly executed according to the laws of South Carolina, which this will was not; and the court said: "This paper was doubtless a valid will in North Carolina, sufficient to pass any property which Mrs. Blount was entitled to in her own right in that State, and any

personal property which she owned anywhere, and was, therefore, no doubt, properly admitted to probate there, as well as here, upon the exemplification under the statute. But the question here is, not whether Mrs. Blount has made a will disposing of her own property, but whether the paper propounded as such is a valid execution of the power conferred by the will of Mrs. Harris; and for the reasons above stated we do not think it is." *Blount* v. *Walker*, 28 So. Car. 545. The cause was remanded, and subsequent proceedings taken in the Court of Common Pleas, and another judgment rendered by the Supreme Court upon the question of who was or were entitled to take upon the failure of Mrs. Blount to make a valid appointment; but it is not claimed here that any federal question arose thereon.

To the judgment of the Supreme Court a writ of error was sued out from this court.

Mr. Joseph Daniel Pope and *Mr. Robert W. Shand* for the motion to dismiss.

Mr. Samuel Field Phillips opposing.

Under Rev. Stat. § 906, it was held by this court that the "faith and credit" spoken of are not limited to the form of the record and are not satisfied by its admission as a record, but that the same effect must be given to the record in the courts of the State where produced as in the courts of the State from which it is taken. *Mills* v. *Duryee*, 7 Cranch, 481; *Leland* v. *Wilkinson*, 6 Pet. 317; *Crapo* v. *Kelly*, 16 Wall. 610.

The true test of jurisdiction over state courts is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided and decided adversely to the federal right. The form and mode in which it was decided are of minor importance. *Murray* v. *Charleston*, 96 U. S. 432.

In brief, our position is: (1) That the decision of the state court necessarily involved the question whether the will of Mrs. Blount was her "last will and testament duly executed;"

(2) That the judgment of the probate court of North Carolina is conclusive of this, and that whether in the decision of the state court it has given this judgment the same force and effect as it has in North Carolina is the federal question.

And that it is immaterial whether the state court has decided the judgment void, or evades a decision on the ground of construction.

The jurisdiction having attached, each party is entitled to be heard on the merits. As said by this court in *Baltimore & Ohio Railroad* v. *Maryland*, 20 Wall. 643: "Where the federal question has been raised and has been decided against plaintiff in error in a state court, jurisdiction of this court attaches and the case must be heard on the merits," although the state court placed its decision on another ground that does not present a federal question. Both parties are entitled to be heard in this court on the soundness of the decision of the federal question, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided.

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

The federal question relied on to sustain our jurisdiction is, that the Supreme Court of South Carolina did not give full faith and credit to the judgment of the Probate Court of Wilson County, North Carolina, admitting Mrs. Blount's will to probate.

We cannot see that any such question is presented by this record. The Probate Court of Wilson County, North Carolina, had no jurisdiction to declare the will duly executed "according to the laws of South Carolina," or that it was a good execution of the power of appointment, and did not undertake to adjudge to that effect, and it is not denied that Mrs. Blount's will was not executed according to those laws. The Supreme Court of South Carolina did not refuse to the judgment of the Probate Court of North Carolina full faith

and credit. It assumed that the will was properly admitted to probate in North Carolina, as well as in South Carolina, by an exemplification thereof, under the statute to that effect in the latter State, but it held that when Mrs. Harris prescribed the mode in which the power of appointment should be exercised, by the use of the words "by her last will and testament duly executed," she intended a will duly executed according to the laws of South Carolina, and not a will duly executed according to the laws of any State or country in which the donee of the power, Mrs. Blount, might happen to be domiciled at the time of her death. The probate of Mrs. Blount's will in North Carolina established that the will was executed according to the law of the State where she was domiciled, but it did not establish that the will was executed according to the law of South Carolina, as it is conceded it was not. When, therefore, the Supreme Court of South Carolina, in construing Mrs. Harris' will, arrived at the conclusion that the estate of the latter would only pass to such person as might receive an appointment by a will duly executed according to the laws of South Carolina, that was an end of the case, and whether that conclusion was right or wrong is a matter with which we are not concerned. If we were of a different opinion, and, entertaining jurisdiction, were to reverse the judgment of the Supreme Court of South Carolina, we should do it upon the ground that that court erred in the construction of Mrs. Harris' will, and not upon any ground connected with the judgment of the Probate Court of North Carolina, which could not and did not determine that question. Counsel says that the position of the plaintiff in error is, "that the decision of the state court necessarily involved the question whether the will of Mrs. Blount was her 'last will and testament duly executed;' that the judgment of the Probate Court of North Carolina is conclusive of this; and whether in the decision the state court has given this judgment the same force and effect as it has in North Carolina, is the federal question." But the state court conceded that the judgment of the Probate Court of North Carolina established that the will of Mrs. Blount was her last will and testament duly executed, and its decision

did not in the slightest degree proceed upon the denial of that fact, but gave the judgment the same force and effect that it had in North Carolina, for in neither of the States would the will, as such, dispose of property that did not belong to the testatrix.

To give this court 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. *New Orleans Water Works Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 29; *Klinger* v. *Missouri*, 13 Wall. 257, 263; *DeSaussure* v. *Gaillard*, 127 U. S. 216; *Hopkins* v. *McLure*, 133 U. S. 380.

The motion to dismiss the writ of error must be sustained.

Writ of error dismissed.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY *v.* WOODSON.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 1182. Submitted March 24, 1890. — Decided April 7, 1890.

The statute of Tennessee which provides that "not more than two new trials shall be granted to any party in any action at law; or upon the trial by a jury of an issue of fact in equity," Code of 1884, 735, § 3835, having been construed by the courts of that State to refer to a state of case where, in the opinion of the court, the verdict should have been otherwise than as rendered, because of the insufficiency of the evidence to sustain it — and not to a case where there is no evidence at all to sustain it — is not in conflict with the Fourteenth Amendment to the Constitution; while the Fifth Amendment has no application to it.

It is settled law in this court that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if re-

turned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant; while, on the other hand, the case should be left to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish.

MOTIONS TO DISMISS OR TO AFFIRM. The case is stated in the opinion.

Mr. A. A. Freeman for the motions.

Mr. Edward Baxter opposing.

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

Woodson sued the Louisville and Nashville Railroad Company to recover damages for injuries sustained by him through its negligence. The defendant pleaded not guilty. Upon the trial in the Circuit Court of Haywood County, Tennessee, the jury returned a verdict in favor of the plaintiff, assessing his damages at $3000, which on motion was set aside, and a new trial granted upon the ground that the verdict was not sustained by the evidence. A second trial was then had which resulted in a verdict for the plaintiff of $5000, which was again set aside on motion, upon the same ground. A third trial was then had resulting in a verdict of $3000, upon which judgment was entered. And the record then states: "In this cause, on this the 31st day of August, 1888, the defendant moved the court to grant it a new trial herein and to arrest the judgment herein because the verdict of the jury, returned herein August 30, 1888, was not supported by the law and the evidence submitted, and because of error in His Honor the trial judge in allowing plaintiff to make proof of others than the plaintiff swinging on to trains at other times prior to the day of the accident, and of the habit of plaintiff and other boys in swinging to moving trains prior to the day of the accident; which motions are by the court seen and understood, and the same are by the court overruled and disallowed. Thereupon the defendant presented its bill of exceptions to the ruling of

the court in overruling its motions aforesaid and in overruling its objection to the admission of the testimony aforesaid in the progress of the trial; which bill of exceptions is signed by the court and ordered to be made a part of the record herein." Defendant prayed an appeal to the Supreme Court of Tennessee, which was granted, and an appeal bond given accordingly.

The bill of exceptions sets forth all the evidence adduced upon the trial, and the charge of the court in full. This charge is of considerable length, and presented the case to the jury with apparent care. It is nowhere therein stated that there was no evidence upon which the plaintiff would be entitled to recover; on the contrary, it assumes that there was some evidence which would justify a verdict for the plaintiff.

It was said by the trial judge, among other things: "On the other hand, if you find the injury was the direct and proximate result of the defendant's negligence or misconduct, you will return your verdict for the plaintiff; or if you find the plaintiff was a child of tender years when injured, and that his conduct and wrong did not contribute to the injury, but that he was not possessed of such discretion and judgment on account of his infancy as would reasonably be calculated to cause him to avoid such danger, and you further find that the defendant might have prevented and avoided the accident by the exercise of ordinary and reasonable prudence and caution, then in that event you should return your verdict for the plaintiff. The plaintiff would be a trespasser if he was on the defendant's freight trains or swinging to one of them, or in the defendant's yard or on its grounds trying to seize on to one of its cars. He would have no right to complain of a clearance post or staub being located on the defendant's track or roadbed if he was such trespasser, and defendant had put up or caused to be put up such clearance staub in its regular business.

"If you find that the defendant is a corporation running freight trains on its line of railroad through Brownsville, Tennessee, and that plaintiff, in December, 1881, was a small boy, about six years old, and that he and other small boys had been, prior to that date, for a long while in the habit daily of jumping

on and off of the freight and passenger trains of defendant while they were in motion, and riding thereon in and about the yards of defendant in said city, and that the conductors, brakesmen and trainmen and agent of defendant at its depot in Brownsville had knowledge of such practices and habit of the plaintiff and other boys, and that the said conductors, agents or brakesmen, or other employés of the defendant willingly permitted and encouraged the plaintiff to so ride on and jump on and off of such moving trains, and that the agent or assistant agent of defendant and the conductor of the freight train by which plaintiff was hurt knew that plaintiff was at the depot or in the yards of defendant or near the train, ready and likely to try to jump on said train when it might be put in motion, and that said train was so put in motion, and moved off, and that plaintiff was hurt by being thrown under the wheels thereof while swinging to one of the freight cars or while running along by one of said cars endeavoring to swing on the same, and that no effort or precaution was taken by said conductor or said assistant agent of defendant possessing such knowledge as aforesaid, then in that event I charge you the plaintiff would be entitled to a verdict for some damages against the defendant, and if you find such to be the facts you should return a verdict for the plaintiff."

It is stated that the bill of exceptions is to the judgment of the court in overruling the objections to the admission of testimony, and also in overruling the motion for new trial and in arrest of judgment. It does not appear that the court was asked to instruct the jury, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish; and it is evident from the extracts above given from the charge of the court that the trial judge must have been of opinion that a verdict for the plaintiff could be sustained upon some view that might be properly taken.

The railroad company assigned thirteen errors in the Supreme Court of the State as grounds for the reversal of the judgment of the Circuit Court. Nearly all of these questioned the rulings of the court in relation to the admission of testi-

mony and in different parts of the charge. The first error assigned was in permitting, under the pleadings, the plaintiff below to make proof of boys besides himself, "at other times prior to the one when plaintiff below was injured, swinging to trains of defendant below other than the freight train which ran over and injured him." The second error was as follows: "Because the proof introduced in accordance with the pleadings wholly fails to show that defendant below was guilty of any negligence whatever in running its freight train as alleged, at the time and place alleged, over the plaintiff below, but, on the contrary, shows that plaintiff's injury was the result of his own gross negligence." This second error, therefore, rested on essentially the same ground as the first, in that it claimed there was a failure of proof, if the evidence were confined to that contended to be alone admissible under the pleadings. The thirteenth error reads thus: "Because, from the uncontroverted facts in the record, the verdict should have been for defendant."

The assignment nowhere specifically alleged that the Circuit Court erred as matter of law, in the entry of judgment, because there was no evidence to go to the jury, nor is there any allusion to the statute hereafter referred to.

The Supreme Court of Tennessee affirmed the judgment in these words: "This cause was heard upon the transcript of the record from the Circuit Court of Haywood County, and the court adjudges that there is no evidence to support the verdict of the jury, but the defendant having obtained three verdicts of separate juries upon different trials, two of which have been heretofore set aside by the circuit judge; and now, alone upon this ground, the statute of Tennessee forbidding the granting of more than two new trials in the same cause on the facts, which statute is not in conflict with the Constitution of the United States, Fifth and Fourteenth Amendments, it is considered by this court that said judgment be affirmed, and that defendant in error, Eddie Woodson, by W. H. Lea, as next friend, recover of the plaintiff in error, The Louisville and Nashville Railroad Company, the sum of three thousand dollars ($3000), amount of judgment of court below and the costs of said court, etc."

Opinion of the Court.

A writ of error was sued out from this court upon the ground that the validity of a statute of the State of Tennessee was drawn in question, as being repugnant to the Fourteenth Amendment to the Constitution of the United States, and that the decision was in favor of its validity. A motion is now made to dismiss the writ of error and with it is united a motion to affirm the judgment.

In each of the constitutions of the State of Tennessee of 1796, 1834 and 1870, it is declared that "the right of trial by jury shall remain inviolate," and also that "judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law." Const. 1796, Art. 11, sec. 6; Art. 5, sec. 5; 1834, Art. 1, sec. 6; Art. 6, sec. 9; 1870, Art. 1, sec. 6; Art. 6, sec. 9. The purpose of this latter provision was stated in *Ivey* v. *Hodges*, 4 Humphrey, 155, to be to put a stop to the practice in summing up, of "telling the jury not what was deposed to, but what was proved."

In *Claxton* v. *State*, 2 Humphrey, 181, it was held that where the court charged the jury that if they should find a special verdict which presented the testimony of one of the witnesses as the facts of the case, he should declare it a case of manslaughter, "this charge announced a conclusion of law upon a hypothetical state of facts, and did not trench upon the constitutional rights of the defendant."

And so in *Williams* v. *Norwood*, 2 Yerger, 329, the court decided that "a party has a right to the opinion of the court, distinctly as to the law, whether certain facts constitute probable cause or not, if the jury believe the facts as stated were proved."

Since 1801 there has been upon the statute book of the State of Tennessee the following provision: "Not more than two new trials shall be granted to the same party in any action at law; or upon the trial by jury of an issue of fact in equity." Acts 1801, c. 6, sec. 59; Laws Tenn. 1831, p. 229; Code 1858, sec. 3122, p. 590; Code Tennessee, 1884, sec. 3835, p. 735.

In *Trott* v. *West*, 10 Yerger, 499, 500 (1837), the Supreme Court of Tennessee says that this statute "means that where

the facts of the case have been fairly left to the jury upon a proper charge of the court, and they have twice found a verdict for the same party, each of which having been set aside by the court, if the same party obtain another verdict in like manner, it shall not be disturbed. But this act did not intend to prevent the court granting new trials for error in the charge of the court to the jury, for error in the admission of, or rejection of testimony, for misconduct of the jury, and the like." *Turner* v. *Ross*, 1 Humphrey, 16 (1839); *East Tennessee &c. Railroad Co.* v. *Hackney*, 1 Head, 169 (1858).

In *Knoxville Iron Co.* v. *Dobson*, 15 Lea, 409, 416 (1885), it is said that "this court has uniformly held that the statute was intended to limit the power of the courts over the findings of fact by the jury upon regular proceedings and a correct charge. If the court in the same case has set aside, upon the motion of the same party, the verdicts of two juries, upon the ground that the evidence is not sufficient to sustain them, the power of the court is at an end to grant another new trial to the same party upon the facts or merits. . . . The statute does not prevent the granting of new trials for errors committed by the court, or for improper conduct which may vitiate the verdict." *Wilson* v. *Greer*, 7 Humphrey, 513.

In *Tate* v. *Gray*, 4 Sneed, 591, 594, it was held that it is the duty of the circuit judge "to grant a new trial in all cases where he believes the preponderance of the proof is decidedly against the finding;" and that "although by the theory of our system the jury are the proper and exclusive triers of the facts, yet the law requires the circuit judge, who is presumed to have more practice and skill in the investigation of truth, to set aside their verdicts, whenever in his opinion they have disregarded or misconceived the force of proof, that a new trial may be had."

From these decisions it is clear that in Tennessee, as elsewhere, although the jury are the judges of the facts, yet the judge has power to set aside the verdict when, in his judgment, it is against the weight of the evidence, but that that supervisory power cannot be exercised under the statute when the triers of the facts have three times determined them

the same way. This manifestly refers to a state of case where, in the opinion of the judge, the verdict should have been otherwise than as rendered, because of the insufficiency of the evidence to sustain it, but not to a case where there is no evidence at all. It is the settled law of this court that "when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant;" *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478, 482; *Gunther* v. *Liverpool &c. Ins. Co.*, *ante*, 110; while, on the other hand, the case should be left to the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Dunlap* v. *Northeastern Railroad Co.*, 130 U. S. 649, 652. In such case the practice of a demurrer to the evidence can be resorted to, or a motion to exclude the evidence from the jury, or to instruct them that the plaintiff cannot recover, which motions are in the nature of demurrers to evidence, though less technical, and have in many of the States superseded the ancient practice of a demurrer to evidence. *Parks* v. *Ross*, 11 How. 362; *Schuchardt* v. *Allens*, 1 Wall. 359. Such a motion, like the demurrer to evidence, admits not only what the testimony proves, but what it tends to prove. The ultimate facts, in other words, are admitted. In *Bacon* v. *Parker*, 2 Overton, 55, 57, it was decided that an involuntary non-suit could not be ordered, but a demurrer to evidence was allowed in *Bedford* v. *Ingram*, 5 Haywood (Tenn.) 155; and it must be that as the duty devolves upon the judge "to declare the law," he may be requested, in some form, to advise the jury that the plaintiff cannot recover when that is the conclusion of law arising upon the record, and should do so though not specifically directed. It is true that it was held in *Kirtland* v. *Montgomery*, 1 Swan (Tenn.) 452, that it was error for the trial judge to assume to answer both the questions of law and the questions of fact involved in that case, which was one, however, in which there was evidence

raising questions of fact to be determined; and in *Ayres* v. *Moulton*, 5 Coldwell, 154, it was held error in the circuit judge to charge the jury that from the facts as proven the plaintiffs were "entitled to recover of the defendant the sum sued for," because "the facts to be deduced from the evidence must be left exclusively to the jury." But that also was a case where it evidently did not follow from the ultimate facts that the plaintiffs were entitled as matter of law to recover as stated. To the same effect is *Case* v. *Williams*, 2 Coldwell, 239, where it was ruled that if the charge of the trial judge "be equivalent to a determination of the facts involved, a new trial will be granted." This is and must be so, whenever there are deductions of fact to be drawn by the jury, but where that is not the case, although a direct instruction to return a verdict for the defendant may not be in accordance with the practice in Tennessee, yet the decisions show that the question whether a recovery can be had at all or not, can be presented in some appropriate form in that State.

Thus, in *Whirley* v. *Whiteman*, 1 Head, 616, it is said: "In trials by jury, the court is to decide the questions of law; and the jury, questions of fact; what are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, etc., required by law in particular cases, are to be submitted to the jury, under proper instructions from the court, as to the rules and principles of law by which they are to be governed in their determination of the case. The truth of the facts and circumstances offered in evidence, in support of the allegations on the record, must be determined by the jury. But it is for the court to decide, whether or not those facts and circumstances, if found by the jury to be true, are sufficient in point of law, to maintain the allegations in the pleadings. And this must be done in one of two modes; either the court must inform the jury hypothetically whether or not the facts which the evidence tends to prove, will, if established in the opinion of the jury, satisfy the allegations; or, the jury must find the facts specially, and then the court will apply the law and pronounce whether or not the facts so found are sufficient to support the averments

of the parties. 1 Starkie's Ev. 447. The principle of law, by which the jury must be governed in finding a verdict, cannot be left to their arbitrary determination. The rights of parties must be decided according to the established law of the land, as declared by the legislature or expounded by the courts, and not according to what the jury in their own opinion may suppose the law is, or ought to be. Otherwise the law would be as fluctuating and uncertain as the diverse views and opinions of different juries in regard to it." *Memphis Gayoso Gas Co.* v. *Williamson*, 9 Heiskell, 314, 341; *Gregory* v. *Underhill*, 6 Lea, 207, 211.

Tested by this rule, whenever the statute is applied, it must be upon the assumption that although the court would have found a different verdict, because of the weakness of the evidence, yet there was some evidence tending to establish the cause of action. Courts rarely grant a new trial after two verdicts upon the facts in favor of the same party, except for error of law, and the statute, in the interest of the termination of litigation, makes that imperative which would otherwise be discretionary. For, decisions under similar statutory provisions see *Silsbe* v. *Lucas*, 53 Illinois, 479; *Ill. Cent. Railroad Co.* v. *Patterson*, 93 Illinois, 290; *Carmichael* v. *Geary*, 27 Indiana, 362; *Boyce* v. *Smith*, 16 Missouri, 317; *Wildy* v. *Bonney's Lessee*, 35 Mississippi, 77; *Rains* v. *Hood*, 23 Texas, 555; *Watterson* v. *Moore*, 23 W. Va. 404.

We can perceive nothing in the statute thus applied which amounts to an arbitrary deprivation of the rights of the citizen, and concur with the Supreme Court of Tennessee that this act, which had been in force for more than sixty years before the adoption of the Fourteenth Amendment, was not invalidated by it, while the Fifth Amendment had no application whatever.

The statement in the judgment of affirmance is that "the court adjudges that there is no evidence to support the verdict of the jury;" and if this were taken literally, it would follow that no recovery could be had, as matter of law; and we therefore suppose that the language used indicates simply the opinion of the court that the jury ought not to have found

Counsel for Parties.

the verdict that they did, and that the judgment of the court below, refusing to grant a new trial upon the facts, would have been reversed, but for the existence of the statute, which made it error to award it. *Knoxville Iron Co.* v. *Dobson*, 15 Lea, 409, 418.

Assuming that the validity of the statute was drawn in question, yet there was clearly color for the motion to dismiss, and the case may be disposed of upon the motion to affirm. That motion is sustained, and the judgment is accordingly

Affirmed.

UNITED STATES *v.* LACHER.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 654. Submitted March 28, 1890. — Decided April 14, 1890.

Section 5467 of the Revised Statutes creates two distinct classes of offences: the one relating to the embezzlement of letters, etc.; the other relating to stealing their contents.

Sections 3891 and 5467 of the Revised Statutes are to be construed together — the offences of secreting, embezzling or destroying mail matter which contains articles of value being punishable under the one, and like offences as to mail matter which does not contain such articles being punishable under the other.

When there is an ambiguity in a section of the Revised Statutes, resort may be had to the original statute from which the section was taken, to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law.

Penal statutes, like all others, are to be fairly construed according to the legislative intent, as expressed in the act.

The court again declines to answer a certified question which contains no clear and distinct proposition of law.

THE case is stated in the opinion.

Mr. Assistant Attorney General Maury for the plaintiff.

Mr. Benjamin Barker, Jr., for the defendant.

Opinion of the Court.

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

The defendant, an employé in the post-office at New York, was found guilty of embezzling a letter containing an article of value on an indictment under section 5467 of the Revised Statutes. A hearing on motions for new trial and in arrest of judgment before the circuit judge of the Second Circuit and the district judge, holding the court, resulted in a division of opinion upon the following questions, which were certified to this court:

"1. Whether an offence against the United States under section 5467, Revised Statutes, is charged in either the first or the third count of the indictment?

"2. Whether the embezzlement by a person employed in a department of the postal service of a letter intended to be conveyed by mail and containing an article of value, which shall have come into the possession of such person, is made an offence against the United States by § 5467 of the Revised Statutes of the United States, and whether any penalty is prescribed for such embezzlement by said section?"

Section 5467 is as follows:

"Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter-carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank-note, bank post-bill, bill of exchange, or note of assignment of stock in the funds; any letter of attorney for receiving annuities or

dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant, or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

It is argued that no indictment can be sustained under this section against a post-office employé for secreting, embezzling, or destroying any letter, packet, bag, or mail of letters intended to be conveyed by mail, etc., containing any of the articles named, or any other article of value, and that the only offence punishable under the section is that of stealing or taking any of the things aforesaid "out of any letter, packet, bag, or mail of letters." As secreting, embezzling or destroying letters, etc., containing articles of value, are plainly grave offences, and are described in the section with particularity, the intention to impose a penalty on their commission cannot reasonably be denied, and although the apparent grammatical construction might be otherwise, the true meaning, if clearly ascertained, ought to prevail. If there be any ambiguity in section 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is and whether such change should be construed as

changing the law. *United States* v. *Bowen*, 100 U. S. 508, 513; *United States* v. *Hirsch*, 100 U. S. 33; *Myer* v. *Car Co.*, 102 U. S. 1, 11. And it is said that this is especially so where the act authorizing the revision directs marginal references, as is the case here. 19 Stat. c. 82, § 2, p. 268; Endlich on Int. Statutes, § 51. Accordingly, we find that this section took the place of section 279 of the act of June 8, 1872 (17 Stat. 318), which reads as follows:

"That any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office, established by authority of the Postmaster General, and which shall contain any note, bond, draft, check, warrant, revenue-stamp, postage-stamp, stamped envelope, postal-card, money-order, certificate of stock, or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank-note, bank post-bill, bill of exchange, or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement, whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant, or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery, or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties, or

in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, every such person shall, on conviction thereof, for every such offence, be imprisoned at hard labor not less than one nor more than five years."

The words at the close of the section, "every such person shall, on conviction thereof, for every such offence, be imprisoned," are omitted in the revised section, and the question is whether that change works the change in the law contended for. It will be perceived that if the word "or," or the word "and," were supplied before the words "any such person who shall steal," etc., as having been omitted by way of ellipsis, a course often pursued, the objection would have nothing to rest on. But we do not think the supplying of any word is necessary. If the comma after the word "directed," in the third line from the close of the section as it appears in the Revised Statutes, be treated as a semicolon, the result is the same, and obviates any uncertainty in the matter. For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required. *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84; *United States* v. *Isham*, 17 Wall. 496.

As contended on behalf of the defendant, there can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Morris*, 14 Pet. 464; *Am. Fur Co.* v. *United States*, 2 Pet. 358, 367.

"It appears to me," said Mr. Justice Story, in *United States* v. *Winn*, 3 Sumner, 209, 211, "that the proper course, in all these cases, is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."

To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law, 2d ed. 282: "The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

This passage is quoted by Baron Bramwell in *Attorney General* v. *Sillem*, 2 H. & C. 532, as one "in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites." *Foley* v. *Fletcher*, 28 L. J. (N. S.) Ex. 100, 106; *Nicholson* v. *Fields*, 31 L. J. (N. S.) Ex. 233; Hardcastle on Statutory Law, p. 251.

And the reason for the less rigorous application of the rule is well given in Maxwell on the Interpretation of Statutes, 2d ed. p. 318, thus:

"The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offences was one hundred and sixty or more; when it was still punishable with death to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gipsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It was founded, however, on the tenderness of the law for the rights of individuals, and on the sound principle that it is for the legislature, not the court, to define a crime and ordain its punishment."

We entertain no doubt that two classes of offences were intended to be created by section 5467, one relating to the

embezzlement of letters, etc., and the other to stealing the contents, and that this conclusion is not reached in violation of any rule of construction applicable to penal statutes.

But it is said that the offence of embezzling a letter is covered by section 3891 of the Revised Statutes, and that of abstracting its valuable contents by section 5467, and hence the latter was intended to be confined to stealing the contents and should not be held to embrace secreting, embezzling or destroying the letter, which might contain nothing of value.

Section 3891 is as follows:

"Any person employed in any department of the postal service, who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters intrusted to him, or which has come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster General; or who shall secrete, embezzle, or destroy any such letter, packet, bag, or mail of letters, although it does not contain any security for or assurance relating to money or other thing of value, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both."

This section is based on section 146 of the act of June 8, 1872 (17 Stat. 302), which reads thus:

"That any person employed in any department of the postal service, who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters intrusted to him, or which shall have come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail-carrier, mail-messenger, route-agent, letter-carrier, or other person employed in any department of the postal service or forwarded through or delivered from any post-office or branch post-office established by authority of the Postmaster General; any such person who shall secrete, embezzle, or destroy any such letter, packet, bag, or mail of letters, as aforesaid, which

shall not contain any security for or assurance relating to money or other thing of value, every such person shall, on conviction thereof, for every such offence, forfeit and pay a penalty of not exceeding five hundred dollars, or be imprisoned not more than one year, or both, at the discretion of the court."

The contention is that the embezzlement of a letter is punishable only under section 3891, whether it does or does not contain a thing of value; that if it does the offender is not liable under section 5467, unless he steals it; and that this is a reasonable and just construction, as the letter may have been taken without intention to abstract the article, and indeed without suspicion of the contents until the interior is explored. And it is urged that as section 146 of the act of June 8, 1872, expressly provided a penalty for the embezzlement of a letter, "which shall not contain" anything of value, and its substitute, section 3891, uses the language, "although it does not contain" anything of value, the latter section has been thereby broadened so as to punish the offence whether the letter contains an article of value or not. This view would require us to hold that the intention was to do away with the long-observed distinction between embezzling letters containing valuable matter and those which do not, and to absolve the culprit from liability for all the consequences of his unlawful act, notwithstanding the offences of secreting, embezzling, or destroying letters of the first class are carefully defined. If section 3891 covers the embezzlement of all letters and mail matter, no reason for the larger part of section 5467 can be perceived. The construction contended for is inadmissible.

We concur with counsel for the government, that as sections 146 and 279 of the act of June 8, 1872, are to be considered together, so are sections 3891 and 5467, and that the offences of secreting, embezzling, or destroying mail matter, not containing articles of value, are punishable under the one, and containing such articles under the other. We are unable to find any sound reason for the conclusion that Congress intended to substitute for "imprisonment at hard labor for

not less than one year nor more than five years," the penalty denounced by section 279 and carried into section 5467, in respect to the embezzlement of mail matter containing articles of value, "a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both," the punishment for embezzling mail matter not containing such articles.

Similar views as to section 5467 were expressed by Judge Benedict in *United States* v. *Pelletreau*, 14 Blatchford, 126, and *United States* v. *Jenther*, 13 Blatchford, 335, and by Judge Brewer as to section 5469, in *United States* v. *Falkenhainer*, 21 Fed. Rep. 625. Contra, *United States* v. *Long*, 10 Fed. Rep. 879.

The first question certified is in a form frequently disapproved of. *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510, 514; *United States* v. *Northway*, 120 U. S. 327; *United States* v. *Hall*, 131 U. S. 50. The second question is answered in the affirmative and it will be

So certified.

RICH *v.* MENTZ TOWNSHIP.

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

No. 229. Argued March 25, 1890. — Decided April 14, 1890.

Where a majority of the taxpayers of a town are authorized by statute to encumber the property of all, in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued.

The statute of New York of May 18, 1869, 2 Sess. Laws of 1869, 2303, authorized a county judge, on the petition of a "majority of the taxpayers of any municipal corporation," verified by the oath of one of the petitioners, for the issue of bonds of the corporation in aid of a railroad, to take jurisdiction and to proceed, as provided under the act, to determine whether the bonds should be issued. In 1871 this statute was amended, 2 Sess. Laws 1871, 2115, so as to confer that jurisdiction only when the application was made by "a majority of the taxpayers" of the municipal corporation, "not including those taxed for dogs or highway tax only."

Statement of the Case.

The town of Mentz issued its bonds for such a purpose on an application made after the act of 1871 took effect, but which in language complied with the act of 1869 only. The Court of Appeals of the State of New York held these bonds to be void for non-compliance with the provisions of the act of 1871; and, following the decisions of that court it is now *Held*, that the bonds sued upon by the plaintiff in error are void.

Upon questions similar to the issues in this suit the decisions of the highest judicial tribunal of a state are entitled to great, and ordinarily decisive weight.

There being on the face of the bonds sued upon an entire want of power to issue them, no reference need be made to the doctrine of estoppel.

THIS was an action brought by George L. Rich in the Circuit Court of the United States for the Northern District of New York, against the town of Mentz, to recover the amount of sixty interest coupons attached to certain bonds held by him, and alleged to have been issued by the town on July 15, 1872, in aid of the Cayuga Northern Railroad Company.

The cause was tried by the circuit and district judges, a jury being duly waived, and the court made its special findings as follows:

"I. On the 18th day of July, 1872, there was filed in the clerk's office of the county of Cayuga, N. Y., the judgment of the county judge of said county, with the petition of certain taxpayers, of which the following are copies:

"'County of Cayuga, N. Y.

"'In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y. } Petition.

"'To the Honorable the County Judge of the County of Cayuga, N. Y.

"'The petition of the subscribers hereto respectfully shows: That they are a majority of the taxpayers of the town of Mentz, in the county of Cayuga, and State of New York, whose names appear upon the last preceding assessment-roll or tax-list of said town of Mentz, as owning or representing a majority of the taxable property in the corporate limits of the said town of Mentz; that they are such a majority of taxpayers, and are taxed or assessed for, or represent, such a majority of taxable property; that they desire that said town shall

create and issue its bonds to the amount of thirty thousand dollars, ($30,000,) which said amount does not exceed twenty per centum of the whole amount of taxable property, as shown by said assessment-roll or list, and invest the same, or the proceeds thereof, in the stock of the Cayuga Northern Railroad Company, which is a railroad company in the State of New York.

"'And your petitioners pray your honor to cause to be published the proper notice, to take proof of the facts set forth in this petition; and that such proceedings may be had thereon as are authorized and prescribed by the statutes of the State of New York, in such case made and provided.

"'Dated April 20, A.D. 1872.

"'(Signed by) A. M. GREEN,
and 224 other names, and verified by Green on the 28th day of May, 1872.

"'County of Cayuga, N. Y.

"'In the matter of the application of the taxpayers of the Town of Mentz, Cayuga County, N. Y. } Order of County Judge.

"'On the petition herein bearing date the 20th day of April, A.D. 1872, and on motion of H. V. Howland, attorney for said petitioners, it is ordered that a notice be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said county of Cayuga, directed to whom it may concern, and setting forth that on the 8th day of June, A.D. 1872, at 10 o'clock in the forenoon of that day, I, William E. Hughitt, county judge of the county of Cayuga, in the State of New York, will proceed to take proof of the facts set forth in said petition, as to the number of taxpayers joining in said petition, and as to the amount of taxable property represented by them; and that such proof will be taken at the grand jury room, in the court-house in the city of Auburn, in said county of Cayuga, N. Y.

"'Dated this 28th day of May, in the year of our Lord 1872

"'W. E. HUGHITT,
"'*Cayuga County Judge.*'

Statement of the Case.

"(Endorsed : 'Filed May 28, 1872.')

"(Then follows the usual affidavit of the printers of said newspaper, showing due publication of the notice of hearing.)

"'County of Cayuga.

"'In the matter of the application of the taxpayers of the town of Mentz. } Judgment.

"'Upon the filing the petition herein and order made thereon, with a copy of the notice to take proof of the facts set forth in said petition, and the affidavit of publication of the said notice in the manner required by law, and by the order made in this proceeding as aforesaid, together with the testimony taken therein; and it appearing to the satisfaction of the court that the whole number of taxpayers in the town of Mentz, Cayuga County and State of New York, whose names appear upon the last assessment-roll or tax-list for the year 1871, is 434, and that of this number 225 have signed the said petition, being more than one-half of said taxpayers; and it further appearing that the total valuation of the taxable property of the said town of Mentz upon the said assessment-roll or tax-list, is five hundred and forty thousand six hundred and forty-five dollars, and that the valuation of the property of the petitioners as represented upon the said roll or tax-list is $312,350, being thirty-one thousand and twenty-eight dollars in excess of one-half of the total valuation of the taxable property of said town of Mentz.

"'Now on motion of H. V. Howland, attorney for said petitioners, it is adjudged, decreed and determined that the said petitioners do represent a majority of the taxpayers of said town of Mentz as shown by the last preceding tax-list or assessment-roll, that is to say, the said tax-list or assessment-roll for the year 1871, and do represent a majority of the taxable property upon said tax-list or assessment-roll.

"'And it is hereby ordered, that William A. Halsey, E. B. Somers and J. H. Wethey, three freeholders, residents and taxpayers within the corporate limits of the said town of Mentz be, and they hereby are appointed commissioners for

the period of five years next ensuing, and until others are appointed by a county judge of this county, or other competent authority, to cause or execute in due form of law, with all reasonable dispatch, bonds of the said town of Mentz, of the amount of $100 each, to the amount of thirty thousand dollars, and to issue or sell the same, or dispose of the same and invest the same or the proceeds thereof in, and to subscribe in the name of the said town of Mentz to, the stock of "the Cayuga Northern Railroad Company" to the amount of $30,000; and that the said commissioners and each of them shall have all the powers and be subject to the same duties and liabilities, imposed and prescribed in and by the act of the legislature of the State of New York entitled "An act to amend an act to authorize the formation of railroad companies and to regulate the same," passed April 2, 1850, (and all other acts pertaining to that subject,) "so as to permit municipal corporations to aid in the construction of railroads," passed May 18, 1869, and the several acts amendatory thereof and supplementary thereto.

"'And it is further adjudged and ordered, that notice of the final determination herein as aforesaid, be forthwith published in the Auburn Daily Advertiser, a newspaper published in the said county of Cayuga, once in each week for three weeks.

"'Dated July 17, 1872.

"'W. E. Hughitt,

"'*Cayuga County Judge.*'

"(Endorsed: 'Filed July 17, 1872.')

"(Due proofs were made of publication of the foregoing determination.)

"II. The Cayuga Northern Railroad Company was duly incorporated under the general statutes of the State, on the 22d of April, 1872.

"III. The persons named in said adjudication of the county judge aforesaid, qualified as commissioners under the statute and subscribed, in behalf of said town of Mentz, for 300 shares of the capital stock of said company, of the par value of $100 per share, and paid therefor by the issue to said

company of thirty town of Mentz bonds of $1000 each, in form as set out in the complaint, with coupons attached in the usual form, providing for the payment of interest semi-annually, January and July; principal payable July 15, 1902.

"The coupons were all in the following form:

"'$35.00.

"'The town of Mentz, county of Cayuga, will pay the bearer hereof at the Fourth National Bank of New York, in the city of New York, on the 15th day of July, 1876, the sum of thirty-five dollars, for six months' interest then due on bond No. 7.

"'$35.00. W. A. Halsey, *Commissioner.*'

"IV. Prior to the commencement of this action the plaintiff became a purchaser of the five bonds and attached coupons which are described in the declaration in this action, from one Deming, who had theretofore purchased the same for cash, and without notice of any infirmity; the plaintiff being a resident citizen of the State of Iowa.

"V. Plaintiff produced said five bonds, with twelve coupons, each $35, cut from each, in all sixty coupons, which with the interest to the day of trial amounted to $2836.25.

"VI. That no part of said railroad has ever been built; but the town of Mentz raised the money by tax, according to said statute, and has paid the coupons of the entire issue, which fell due January 15, 1873; the town has never paid any other coupons, and said commissioners have retained, and now hold, the usual certificates of stock in the said railroad company, 300 shares, received by them at the time of the delivery of said bonds to the railroad company.

"VII. All the proofs were taken subject to defendant's objection, that the county judge acquired no jurisdiction under the original petition; and also that the judgment of the county judge was insufficient.

"And defendant insisted upon the aforesaid objection, and prayed for a dismissal of the complaint with costs."

The form of bonds, of which plaintiff held five, numbered 21, 22, 23, 24 and 25, with their coupons, was thus set out in the complaint:

"No. 21. United States of America, $1000.

"State of New York, Town of Mentz,

"County of Cayuga.

"Issued by virtue of an act of the legislature of the State of New York, entitled, 'An act to amend an act entitled an act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, so as to permit municipal corporations to aid in the construction of railroads, passed May 18, 1869.'

"This act authorizes the town of Mentz, in the county of Cayuga, to subscribe to the stock of 'The Cayuga, Northern Railroad Co.,' and to issue town bonds in payment therefor. The whole amount of the bonds to be issued in pursuance of said act is $30,000.

"Know all men by these presents, that we, the undersigned commissioners under the above-entitled acts, for the town of Mentz, in the county of Cayuga and State of New York, upon the faith and credit and in behalf of said town, for value received promise to pay to the bearer the sum of one thousand dollars on the 1st day of July in the year one thousand nine hundred and two (1902) at the Fourth National Bank of New York, in the city of New York, with interest at seven per cent per annum, from and after the 15th day of July, 1872, payable semi-annually upon the 15th days of July and January in each year at the same place, on the presentation and surrender of the coupons for such interest hereto annexed.

"In witness whereof we have hereunto set our hands and seals and have caused the coupons hereto annexed to be signed by W. A. Halsey, one of our number, this 15th day of July in the year one thousand eight hundred and seventy-two.

"E. B. Somers, [L. S.]
"W. A. Halsey, [L. S.]
"J. H. Wethey. [L. S.]"

Statement of the Case.

The judges of the court being divided in opinion as to the sufficiency of the petition, and of the adjudication and judgment of the county judge, judgment was ordered for the defendant in accordance with the opinion of the circuit judge, and the following questions, upon which the division of opinion arose, were certified to this court:

"First. Was the petition of certain taxpayers of the town of Mentz, which was presented to the county judge of Cayuga County, in the State of New York, on the 28th day of May, 1872, and a copy of which is set forth in the finding and decision of the court, sufficient in the form and substance of its recital, to authorize the said county judge to take jurisdiction and proceed to render an adjudication pursuant to chapter 907 of the laws of New York of 1869, as amended by chapter 925 of the laws of New York of 1871?

"Second. Was it essential in order to confer jurisdiction upon said county judge, to adjudicate pursuant to section 2 of chapter 907 of the laws of 1869, as amended by section 2 of chapter 925 of the laws of 1871, that the petition should state, among other things, in substance, that the taxpayers petitioning were a majority of taxpayers of the town of Mentz, who were taxed or assessed for property, not including those taxed for dogs or highway tax only?

"Third. Was the adjudication of the county judge of Cayuga County, made on the 17th day of July, 1872, a copy of which is set forth in the findings and decision of the court, sufficient to authorize the defendant to create and issue its bonds pursuant to chapter 907 of the laws of New York of 1869, as amended by chapter 925 of the laws of New York of 1871?

"Fourth. Was it essential in order to confer authority upon the defendant to create and issue its bonds under said laws of 1869 and 1871, that the adjudication or judgment of the county judge should declare, in substance, that the quorum of taxpayers who desired that the defendant should create and issue its bonds, was one exclusive of taxpayers who were assessed or taxed for dogs or highway tax only?"

The opinion of the circuit judge is reported in 19 Fed. Rep. 725, and of the district judge in 18 Fed. Rep. 52.

Mr. James R. Cox for plaintiff in error.

Mr. F. D. Wright for defendant in error.

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

Where a majority of the taxpayers of a town are authorized by statute to encumber the property of all, in aid of a railroad or other corporation, the record must show that the statutory authority has been pursued. *Cowdrey* v. *Canadea*, 16 Fed. Rep. 532, and cases cited.

Section 1 of chapter 907 of the laws of New York of 1869, 2 Sess. Laws 1869, p. 2303, was as follows: "Whenever a majority of the taxpayers of any municipal corporation in this State, whose names appear upon the last preceding tax-list or assessment-roll of said corporation as owning or representing a majority of the taxable property in the corporate limits of such corporation, shall make application to the county judge of the county in which such corporation is situated, by petition verified by one of the petitioners, setting forth that they are such a majority of taxpayers and represent such a majority of taxable property, and that they desire that such municipal corporation shall create and issue its bonds to an amount named in such petition," etc.

That section was so amended by § 1, c. 925 of the laws of New York of 1871, 2 Sess. Laws 1871, 2115, as to read: "Whenever a majority of the taxpayers of any municipal corporation in this State who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment-roll or tax-list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property, upon said last assessment-roll or tax-list, shall make application to the county judge of the county in which such municipal corporation is situate, by petition, verified by one of the petitioners, setting forth that they are such majority of taxpayers, and are taxed or assessed for or represent such majority of taxable property, and

that they desire etc., etc. . . . The words 'municipal corporation' when used in this act shall be construed to mean any city, town or incorporated village in this State, and the word 'taxpayer' shall mean any corporation or person assessed or taxed for property, either individually or as agent, trustee, guardian, executor or administrator, or who shall have been intended to have been thus taxed, and shall have paid or are liable to pay the tax as hereinbefore provided, or the owner of any non-resident lands taxed as such, not including those taxed for dogs or highway tax only; and the words 'tax-list or assessment-roll' when used in this act shall mean the tax-list or assessment-roll of said municipal corporation last completed before the first presentation of such petition to the judge."

The bonds in controversy expressly recite that they are issued under the act of 1869, and the petition and adjudication almost literally followed the language of that act, although section 1 of chapter 925 of the laws of 1871 had been substituted for section 1 of chapter 907 of the act of 1869, before the proceeding was had. The result is that the petition did not sufficiently conform to the statute of 1871 to call for the exercise of judicial judgment on the part of the county judge, and the adjudication was equally defective. The act of 1871 defined the class of persons who were authorized to petition, as a majority of the taxpayers, "who are taxed or assessed for property, not including those taxed for dogs or highway tax only, upon the last preceding assessment-roll or tax-list of said corporation, and who are assessed or taxed, or represent a majority of the taxable property, upon said last assessment-roll or tax-list." The statement of the jurisdictional facts in the petition required the averment that the petitioners were a majority of such taxpayers as were defined in the act. This must appear affirmatively on the face of the petition. The act expressly provides that the petition shall set forth that the petitioners are "*such* majority of taxpayers, and are taxed or assessed for or represent *such* majority of taxable property." The word "taxpayers" would not exclude those "taxed for dogs or highway tax only," and the petition must show that

the petitioners are a majority, exclusive of the latter class. And this the petition here does not do, nor does the judgment of the county judge. It is provided by the act of 1871, as it had been by that of 1869, that it shall be the duty of the county judge, at the time and place named in the notice given as prescribed, to proceed and take proof as to the allegations in said petition, and if it shall appear satisfactorily to him that the petitioners, and such other taxpayers as may then join in the application, do represent a majority of the taxpayers and a majority of the taxable property, he shall render judgment accordingly, which being entered of record in the office of the clerk of the county, shall have the same force and effect as other judgments in courts of record in the State, subject to review by *certiorari;* and it is forcibly argued that the judgment of the county judge is not open to collateral attack. But this assumes that the jurisdiction of the county judge has been properly invoked, and has no application where that is not the case. Proof as to the allegations of this petition may have been taken, but such proof did not necessarily involve an inquiry into whether a part of the petitioning taxpayers were such because of the payment of highway taxes or taxes on dogs, and, as we have said, the judgment does not in terms show that such were not included. So that if the county judge had been charged with the ascertainment of the jurisdictional facts, the proceedings do not show that those facts were ascertained.

The fourth section of the act of 1871 contains, among other things, this provision: "On review, persons taxed for dogs or highway tax only shall not be counted as taxpayers, unless that claim was made before the county judge." If this means, as counsel for plaintiff in error insists, that the objection when urged on review shall not prevail unless it had been taken before the county judge, it does not weaken but confirms the view that the verified petition must state that those who sign it are not taxpayers on dogs and for highways merely. The circuit judge, in his opinion in this case, correctly observes:

"It is insisted that, because the amended act of 1871

defines the term 'taxpayer,' 'when used in this act,' to mean such taxpayers as are not assessed for dogs or highway tax only, it is not necessary to comply with the explicit language of the act as to the form and substance of the petition. The petition is the basis and groundwork of the whole bonding proceeding. When the amended act was passed many of these proceedings had been set aside by the courts of this State because of defects of form in the petition; and it was the well-settled law of the state courts that any such defect was jurisdictional, and rendered the whole proceeding futile. Speaking of the act of 1869, the Court of Appeals said in *People* v. *Smith*, 45 N. Y. 772: 'The authority conferred by the act must be exercised in strict conformity to, and by a rigid compliance with, the letter and spirit of the statute.' The first section of the amended act provides, in language as explicit as could be employed, that the petition, verified by one of the petitioners, shall set forth that the petitioners are a majority of taxpayers of the town who are taxed or assessed for property, 'not including those taxed for dogs or highway tax only.' It subsequently provides that the word 'taxpayer,' 'when used in this act,' shall mean 'any corporation or person assessed or taxed for property, . . . not including those taxed for dogs or highway tax only.' Section 2 makes it the duty of the county judge 'to proceed and take proof as to the said allegations in the petition;' and if he finds that the requisite majority of taxpayers have consented, he shall so adjudge. If there were no express provision requiring it to appear in the petition that the taxpayers who apply are a majority of the designated class, the petition would doubtless be sufficient if it alleged that they were a majority of the taxpayers of the town; and in this view, there was no need of amending the act of 1869 in this behalf. If the argument for the plaintiff is sound this explicit provision is meaningless. It is not to be assumed that the legislature did not mean anything by the language which they so carefully employed. It is not difficult to apprehend what the legislature meant by defining the word 'taxpayer.' It occurs several times in the act. It was defined for convenience, in order to

avoid repetition of description whenever the word was used in the act, and in order that there should be no room for doubt what kind of a taxpayer was meant whenever the word was used."

These views are in accordance with repeated adjudications of the Court of Appeals of the State of New York in construing this statute; and upon questions of this character, when arising as here, the decisions of the highest judicial tribunal of a State are entitled to great and ordinarily decisive weight. *Meriwether* v. *Muhlenberg County Court*, 120 U. S. 354, 357; *Claiborne County* v. *Brooks*, 111 U. S. 400, 410. In *Town of Mentz* v. *Cook*, 108 N. Y. 504, 509, the court says: "The petition was presented after the amendment of 1871 to the act of 1869, and was defective in not averring that the petitioners were a majority of the taxpayers of the town of Mentz, excluding those taxed for dogs or highway tax only. The fatal character of the defect has been so adjudged in this court as to end further discussion. *Green* v. *Smith*, 55 N. Y. 135; *Town of Wellsboro* v. *N. Y. Central &c. Railroad Co.*, 76 N. Y. 182; *Metzger* v. *Attica & Arcade Railroad*, 79 N. Y. 171. Our attention has heretofore been drawn (*Hills* v. *Peekskill Savings Bank*, 101 N. Y. 490) to the definition of the word 'taxpayers,' given in section 1 of the act of 1871, and to the fact that such definition and its effect had never been directly passed upon by this court. The argument advanced is that the word 'taxpayers,' as used in the act, is declared to mean taxpayers exclusive of those taxed for dogs or highway tax only, and that it is illogical to deny to the word, when used in a petition under the act, the meaning ascribed to it by the act itself. The suggestion is by no means conclusive, and admits of a satisfactory answer. The definition was given to avoid useless repetition, and is confined to its use in the act itself. The petition is required to be verified, and to show on its face the consent of the requisite majority, and is not satisfied by an ambiguous oath, true in one sense and not true in another."

As on the face of these proceedings there was an entire want of power to issue the bonds, no reference to the doctrine of estoppel need be made. We answer the first and third

questions in the negative, and the second and fourth in the affirmative.

The judgment is *Affirmed.*

GILES *v.* LITTLE.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 1384. Argued March 17, 1890. — Decided April 7, 1890.

The disregard by the highest court of a State of an opinion of this court in another case, in which no judgment has been entered, gives this court no jurisdiction on error.

The refusal of the highest court of a State, in a suit to quiet title, to give effect to a judgment of the Circuit Court of the United States against the present plaintiff and in favor of a grantee of the present defendant, gives this court no jurisdiction on error.

This was a petition to quiet title, filed January 27, 1882, in the district court for Lancaster County in the State of Nebraska, by Little and more than seventy others against Giles, Burr and Wheeler, and the children of Jacob Dawson.

The petition alleged that Jacob Dawson on June 15, 1869, being seized of certain described real estate in that county, made his last will as follows:

"After all my lawful debts are paid and discharged, the residue of my real and personal property I bequeath and dispose of as follows, to wit: To my beloved wife, Edith J. Dawson, I give and bequeath all my real estate and personal of which I may die seized, the same to remain and to be hers, with full power, right and authority to dispose of same as to her shall seem meet and proper, so long as she remains my widow, upon the express condition that if she shall marry again then it is my will that all of the estate here bequeathed, or whatever may remain, shall go to my surviving children, share and share alike; and in case any of my children shall have deceased, leaving issue, then the issue so left shall receive the share to which said child would be entitled. I likewise constitute and appoint my said wife, Edith J., to be executrix of my last will and testament."

Statement of the Case.

The petition further alleged that Jacob Dawson died a week afterwards, and his will was duly admitted to probate, and letters testamentary were issued to Mrs. Dawson; that in order to pay his debts and maintain herself and children, and to make advances to the oldest son, she was obliged to sell a large portion of the real estate, and accordingly, under the power conferred on her by the will, executed warranty deeds thereof, under which the plaintiffs severally became seized of certain lots described; that on November 15, 1879, she married again; that the defendants conspired together to cloud the plaintiffs' title and to extort money from them, and, in pursuance of the conspiracy, procured deeds of the whole land to be executed by Dawson's children to Burr and Wheeler, and by them to Giles, a citizen of Iowa, for nominal considerations, and to enable suits to be brought in the courts of the United States; and pretended that Mrs. Dawson took by the will an estate for life only, terminable by her marriage; and commenced vexatious suits, and threatened to commence others, against the plaintiffs.

The petition prayed for an injunction, a cancelling of the deeds to Burr and Wheeler and to Giles, a decree quieting the plaintiffs' title and establishing it against all the defendants, and for further relief.

Burr and Wheeler and some of Dawson's children disclaimed all interest in the property; the other children and Giles filed an answer, denying the allegations of the petition, and alleging that the title had vested in Giles; and Giles filed a petition for the removal of the case into the Circuit Court of the United States, upon the ground that he was a citizen of Iowa and the plaintiffs citizens of Nebraska and other States, and that the controversies between him and each of the plaintiffs were severable.

The case was thereupon removed into the Circuit Court of the United States; and that court denied a motion to remand it to the state court, and, afterwards, upon a hearing on pleadings and proofs, entered a decree for the defendants. On appeal to this court that decree was reversed, and the case ordered to be remanded to the state court, upon the ground

that the controversies between Giles and the plaintiffs were not severable, and that the deed to Giles was collusively made for the purpose of giving jurisdiction to the courts of the United States. 118 U. S. 596. On February 28, 1887, pursuant to the mandate of this court, the Circuit Court ordered the case to be remanded to the state court.

The defendants then, by leave of that court, filed an amended and supplemental answer, alleging, among other things, the following:

First. A decision of this court on appeal in an action brought in the Circuit Court of the United States by Giles against Little, holding that by the terms of the will Mrs. Dawson took only an estate for life, determinable upon her marriage, and no power to convey any greater estate than she had herself.

Second. Judgments recovered in the Circuit Court of the United States on July 3, 1887, against some of these plaintiffs in actions of ejectment brought January 5, 1887, against them by one Miles, to whom Giles in December, 1886, had executed a warranty deed of some of the lots.

A general replication was filed, and a trial was had before the court without a jury, at which, among other things, the defendants put in evidence records of the judgments recovered by Miles against some of these plaintiffs in the Circuit Court of the United States; and also a record of the proceedings in the action brought in that court by Giles against Little, by which that action appeared to have been an action of ejectment brought August 23, 1880, for the lot now claimed by Little, in which the Circuit Court sustained a demurrer to the petition and rendered judgment for the defendant, according to the opinion of the Circuit Judge, reported in 2 McCrary, 371; its judgment was reversed by this court on writ of error on December 12, 1881, and the case remanded for further proceedings; and after further proceedings the petition, on December 9, 1885, was dismissed, on motion of Giles, without prejudice to a subsequent action.

The report of that case in this court in 104 U. S. 291, was also offered in evidence by the defendants at the trial of the present case, and excluded.

The state court held that by the will of Jacob Dawson Mrs. Dawson took a title in fee simple so long as she should remain his widow, with full power to sell and convey the same in fee during widowhood; and entered judgment for the plaintiffs in accordance with the prayer of their petition. That judgment was affirmed by the Supreme Court of Nebraska. 25 Nebraska, 313.

The defendants sued out this writ of error, and assigned for error that the state courts did not give full faith and credit to the judgments recovered by Miles against some of the plaintiffs in the Circuit Court, and disregarded the decision of this court in 104 U. S. 291.

Mr. J. M. Woolworth (with whom was *Mr. D. C. Burr* on the brief) for plaintiffs in error.

Mr. T. M. Marquett (with whom were *Mr. N. S. Harwood* and *Mr. John H. Ames* on the brief) for defendants in error.

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

The real question in controversy between the parties is of the extent of the estate and power which Mrs. Dawson took under the will of her husband. In *Giles* v. *Little*, 104 U. S. 291, this court held that she took only an estate for life, determinable by her marrying again, and no power to convey a greater estate than she had herself. In the case at bar, the Supreme Court of Nebraska, declining to follow that decision, and basing its judgment largely upon the statutes of the State, held that she took an estate in fee determinable upon her marriage, with power during her widowhood at her discretion to convey in fee any part of the land, and that the devise over in case of her marrying again passed to the children only what remained unconveyed. *Little* v. *Giles*, 25 Nebraska, 313.

The question of the true construction of the will in this respect depends wholly upon general rules of law and upon the local statutes, and in no degree upon the Constitution, laws or treaties of the United States; and the disregard by the

state court of the opinion of this court upon the question in a former suit does not give this court jurisdiction to review the judgment of the state court in this case. *Leather Manufacturers' Bank* v. *Cooper*, 120 U. S. 778; *San Francisco* v. *Scott*, 111 U. S. 768; *San Francisco* v. *Itsell*, 133 U. S. 65.

If the state court had refused to give due effect to a final judgment of any court of the United States in a case between the same parties, a federal question would have been presented, which might have been brought to this court for review. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Crescent City Co.* v. *Butchers' Union Co.*, 120 U. S. 141. But this record presents no such state of things.

The case of *Giles* v. *Little*, 104 U. S. 291, was indeed between one of the present defendants and one of the present plaintiffs, and concerned the title to a lot of land now claimed by the latter; but the judgment of this court only reversed a judgment of the Circuit Court of the United States sustaining a demurrer to the petition, and remanded the case to that court for further proceedings, and (as appears by the record given in evidence at the trial of the case at bar) the petition was afterwards, and before final judgment, dismissed on the motion of the plaintiff, without prejudice to a new action; so that nothing was finally adjudged in that case, even as between the parties to it. *Bucher* v. *Cheshire Railroad*, 125 U. S. 555, 578, 579.

The ground most relied on in favor of a reversal of the judgment of the state court is its refusal to give effect to the judgments obtained in the Circuit Court of the United States against some of the present plaintiffs by Miles, a grantee of the present defendants. It is argued that the judgments in favor of Miles conclusively showed that some of these plaintiffs had no title, and that, as all these plaintiffs claimed under one title in the present suit, the judgment below in their favor must be reversed as to all of them.

As the present defendants did not claim under Miles, and were not parties to his suits, it is difficult to see how judgments in those suits could have any effect as evidence for or against them, by way of estoppel or otherwise.

Syllabus.

But it is certain that they neither had nor claimed any interest in the title acquired by Miles under those judgments. It is well settled that, in order to give this court jurisdiction to review a judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be one of the plaintiff in error, and not of a third person only. *Owings* v. *Norwood*, 5 Cranch, 344; *Montgomery* v. *Hernandez*, 12 Wheat. 129, 132; *Henderson* v. *Tennessee*, 10 How. 311; *Hale* v. *Gaines*, 22 How. 144, 160; *Long* v. *Converse*, 91 U. S. 105. The title set up by the defendants being that of a third person, in which they have no interest, the writ of error is

Dismissed for want of jurisdiction.

KINGSBURY *v.* BUCKNER.

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

No. 176. Argued January 8, 9, 1890. — Decided April 7, 1890.

In Illinois, a decree against a minor is subject to attack, by an original bill, for error apparent on the record, for want of jurisdiction, or for fraud.

In Illinois, the rule is that a decree against an infant is absolute in the first instance, subject to the right to attack it by original bill, but until so attacked, and set aside or reversed, on error or appeal, it is binding to the same extent as any other decree or judgment. The right to so attack it may be exercised at any time before the infant attains his majority, or at any time afterwards within the period in which he may prosecute a writ of error for the reversal of such decree.

A decree is subject to attack by original bill for fraud, even after judgment in the appellate court; but a party, whether an infant or adult, against whom a decree is rendered by direction of the appellate court, cannot impeach it, by bill filed in the court of first instance, merely for errors apparent on the record, that do not involve the jurisdiction of either court.

An infant, by his *prochein amy*, having elected to prosecute an appeal to the Supreme Court of Illinois from the decree rendered in the original suit brought by him, and having appeared by guardian *ad litem* to the appeal of the cross-plaintiffs in the same suit, is as much bound by the action

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of that court in respect to mere errors of law, not involving jurisdiction, as if he had been an adult when the appeal was taken.

In Illinois, a cross-bill is regarded as an adjunct or part of the original suit, the whole together constituting one case; and process against the plaintiff is not necessary upon a cross-bill, even where he is an infant.

The plaintiff, by his bill, claimed to own certain real estate, by inheritance from his father, to whom the defendants had conveyed it by deed, absolute in form, and prayed for a decree confirming and establishing his title. The defendants, by cross-bill, alleged that the deed was made and accepted for the purpose of placing the title in trust for the benefit of one of the defendants, and asked a decree to that effect: *Held*, That the subject matter of the cross-bill was germane to that of the original bill.

The statutes of Illinois, relating to suits by infants, are not to be interpreted to mean that no suit in the name of an infant, by next friend, can be entertained, unless such next friend is selected by the infant. Nor does the right to bring such a suit depend upon the execution by the next friend of a bond for costs; though he may be required to give such bond before the suit proceeds to final judgment and execution.

While a guardian *ad litem* or *prochein amy* of an infant cannot, by admissions or stipulations in a suit in equity, surrender substantial rights of the infant, he may, by stipulation, assent to arrangements which will facilitate the trial and determination of the cause in which such rights are involved, and the infant will be bound thereby.

Appeals and writs of error may be taken to the Supreme Court of Illinois held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division. A guardian *ad litem* or next friend of an infant may consent that the case, in which the infant is a party, be heard in some other grand division than the one in which it was decided, or at a term of the Supreme Court earlier than such appeal or writ of error would be ordinarily heard, and may waive the execution of an appeal bond by the opposite party.

An appeal bond is not essential to the jurisdiction of the Supreme Court of Illinois, any more than in this court, where the appeal is allowed and a transcript of the record is filed in due time; although the appeal may be dismissed, if such bond is not executed in accordance with the rules or the order of the court.

Case stated in which a husband is held not to be an incompetent witness, under the statutes of Illinois, in support of his wife's claim to property.

Various charges of fraud and collusion upon the part of a guardian *ad litem* examined and held not to be sustained.

Mr. Justice Harlan, on behalf of the court, stated the case as follows:

This suit involves the title to real estate of considerable value in the city of Chicago, of the possession of which the

appellant, who was the plaintiff below, claims to have been deprived by certain proceedings in the courts of Illinois, to which Simon B. Buckner, his wife and others were parties. The relief sought is a decree declaring those proceedings to have been erroneous, fraudulent, and void as to the plaintiff, and adjudging not only that such estate be restored to him, but that Buckner and wife be held as trustees *ex maleficio*, with liability to account for the income of the property.

The history of the plaintiff's claim to the property, as well as of the proceedings in the state courts, the integrity and legal effect of which are assailed in the present suit, must be given before examining the grounds on which he seeks a reversal of the decree.

Major Julius J. B. Kingsbury, of the United States army, died, intestate, on or about the 25th of June, 1856, seized of lots designated five and six in block thirty-five on the original map of the town of Chicago, and also of that part of the east half of the northwest quarter of section nine in township thirty-nine north, of range fourteen east of the third principal meridian, which lies east of the North Branch of the Chicago River and south of the centre of Ontario Street, in Cook County, excepting, however, a small portion of the last-named tract, previously conveyed by him to Buckner.

The intestate left surviving him his widow, Jane C. Kingsbury, and two children, Mrs. Buckner and Henry W. Kingsbury, the father of the appellant. These children were his only heirs at law.

By deed duly executed and acknowledged on the 15th of May, 1861, Buckner and wife, "in consideration of the sum of one dollar, and of the natural love and affection" of the grantors for the grantee, conveyed to Henry W. Kingsbury, the brother of Mrs. Buckner, and, at that time, a lieutenant in the United States army, one undivided half of the above lots five and six, and all their right, title and interest in the "Kingsbury tract," containing thirty-five acres, more or less, being the south half of what then remained of the northwest quarter of section nine, township thirty-nine, range fourteen, in Cook County, after deducting therefrom the town of Wabansia,

to have and to hold the same to the grantee, his heirs and assigns forever, the grantors covenanting that they would warrant the property conveyed. The deed recited that the other undivided half of the land and tenements formerly owned by Major Kingsbury belonged to the grantee as one of his heirs, and that the entire property was subject to the dower rights of his widow.

On the 25th of March, 1862, the plaintiff's father executed an instrument which, upon proof that it was wholly in his handwriting and signed by him, was ordered by the Corporation Court of the City of Alexandria, Virginia, to be recorded as his last will and testament. And under an order of that court, passed May 10, 1870, Ambrose E. Burnside qualified as his executor. On the 11th of July, 1870, that writing, with the proof thereof, was presented by Burnside, as executor, to the County Court of Cook County, Illinois, for record; and by the latter court it was ordered "that the said will and proof thereof, certified as aforesaid, be recorded, and that the same be treated and considered as good and available in law in like manner as wills executed in this State."

The writing referred to is as follows:

"Expecting soon to start upon a military expedition where death may overtake me, I leave this as a record of my wishes respecting the disposition of my property:

"To my mother, Jane C. Kingsbury, I leave twenty thousand dollars, or so much of my Chicago property as upon fair appraisal may be valued at that amount.

"To my sister, Mary J. Buckner, I leave as much of the Chicago property held in my name as shall amount to one-third of the property in the city of Chicago, Illinois, held by my father, Julius J. B. Kingsbury, deceased.

"To my cousin, John J. D. Kingsbury, I leave my property at Waterbury, Conn., and in addition thereto five thousand dollars. I trust he will expend it in completing his education.

"The remainder of my property of every description I leave to my devoted wife, Eva. I desire, moreover, that the

provisions of this will be so carried out that the yearly income of my wife for her own personal support shall never be less than two thousand dollars.

"As executors I name Ambrose E. Burnside, of Rhode Island, and Capt. John Taylor, Commissary Department, U. S. Army.

"Signed at Fortress Monroe, Va., March 25, 1862.

"HENRY W. KINGSBURY,

"*First Lieutenant 5th Regiment Artillery, U. S. Army.*"

Lieutenant Kingsbury was killed at the battle of Antietam on the 17th of September, 1862.

On the 18th of July, 1870, the plaintiff herein, suing by Corydon Beckwith, his next friend, instituted an action in the Circuit Court of Cook County, sitting in equity, against Simon B. Buckner, Mrs. Buckner, Ambrose E. Burnside, Jane C. Kingsbury, John J. D. Kingsbury, Albert G. Lawrence and Eva Lawrence. The last-named defendant, as Eva Taylor, intermarried with Lieutenant Kingsbury on the 4th of December, 1861. The only child of that marriage was the plaintiff, who was born December 16, 1862, after the death of his father. His mother, subsequently, September 26, 1865, intermarried with Albert G. Lawrence.

It was alleged in that bill that the plaintiff's father died intestate, seized in fee-simple of the estate conveyed by the above deed of May 15, 1861, and that upon his death it passed to the plaintiff, subject only to the dower rights of his mother and grandmother, and to certain incumbrances outstanding against the property or some portions of it; and that by a decree rendered in a suit instituted in 1868 by Jane C. Kingsbury in the same court against Eva Lawrence, Albert G. Lawrence, himself, and one David J. Lake, (who assumed to act as the plaintiff's guardian,) John Woodbridge was appointed receiver of the entire income of the premises, accruing and to accrue, with power to lease and manage the property under the orders of the court, and with direction to pay out of such income to his grandmother, Jane C. Kingsbury, and to his mother, the sums to which they were respectively en-

titled; to provide for the maintenance and support of the plaintiff; and to pay the interest upon certain mortgages upon the property, as well as other expenses incident to its care and management.

Referring to the writing executed at Fortress Monroe, Virginia, on the 25th of March, 1862, the bill alleged that it was delivered to John McLean Taylor for safe-keeping; that neither at the time of his death, nor at any time thereafter, was his father an inhabitant or resident of Virginia, nor did he have any property in that State; that the Corporation Court of the city of Alexandria had no jurisdiction to admit said will to probate or record; that neither of the proceedings in that court, nor of those in the County Court of Cook County, Illinois, had Jane C. Kingsbury, Eva Lawrence, John McLean Taylor or himself any notice; that the plaintiff's father did not sign said paper in the presence of any attesting witness, nor was the same attested by any witness in his presence; that it was not executed with the requisite forms and solemnities to make the same available for the granting and conveying of the property therein mentioned, according to the laws of Connecticut, the place of his domicil, or of Maryland, where he died, or of the State in which any of his property was situated; that it was not entitled to probate in Illinois; that, nevertheless, Burnside, combining with the other defendants in that suit, alleged and pretended that it was a valid will for passing the title to property in Illinois, and said Jane C. Kingsbury, Mary J. Buckner, John J. D. Kingsbury and Eva Lawrence, named in said pretended will as devisees or legatees, claim under it, but without right, some interest in the said estate of the plaintiff.

The prayer for relief was that said instrument be declared invalid and of no legal force and effect as a last will and testament; that the proceedings relating to it in the County Court of Cook County be reversed and set aside, or declared to be null and void, as constituting a cloud upon plaintiff's title to the real estate hereinbefore described; that his right and title by inheritance to that estate as the posthumous son and only heir at law of the said Henry W. Kingsbury, deceased, be

confirmed and established; that in the meantime Burnside, Buckner and wife, and John J. D. Kingsbury be enjoined and restrained from intermeddling with the said estate, or with the rents, issues or profits thereof, and from attempting in any way to obstruct or interfere with Woodbridge in the performance of his duties as receiver; and that on the final hearing of the cause the injunction be made perpetual.

On the 31st of October, 1870, Buckner and wife filed their joint and several answer to the bill. Answers were also filed by Jane C. Kingsbury, Burnside and John J. D. Kingsbury, which put in issue all the material allegations of the bill.

Buckner and wife also filed October 31, 1870, a cross-bill against the plaintiff and their co-defendants Eva Lawrence, Albert G. Lawrence and Jane C. Kingsbury, which, after setting out all the material averments both of the bill and of their answer, alleged that the real estate of which Major Kingsbury died seized included all the lands described in the original bill; that while the legal title to the strip along the east branch of the North Branch of the Chicago River, seventy feet in width for the full length of the tract, was vested in Simon B. Buckner by deed of January 22, 1855, he had no beneficial interest therein, and Major Kingsbury was at his death its real owner; that the title to the real estate of which the latter died seized descended to and vested in Mrs. Buckner and her brother, subject to the widow's right of dower and to the incumbrances thereon; that the defendants were married when Major Kingsbury died, and in 1858 had issue to their marriage, a daughter, who was then living, by reason whereof defendant Simon B. Buckner became vested with a life estate as tenant by the curtesy initiate in the property vested in his wife; and that at the death of her father he, the defendant Buckner, had the full control and management of the real estate left by him, and retained such control until it was placed under the management of Ambrose E. Burnside some time in December, 1860.

In respect to the deed of May 15, 1861, by Buckner and wife to Lieutenant Kingsbury, the cross-bill showed that the value of the property covered by it was five hundred thousand dollars, and, except an undivided half of certain real estate of

small value in Connecticut, was the only property held by Mrs. Buckner, her brother being the owner of the other undivided half of the property described in that deed; that said deed was executed without the knowledge of the grantee, who was ignorant of its existence until several weeks after its execution, when he was informed of the facts in the premises; that it was sent by Buckner to his agent in Chicago with directions to file it for record, which was done on the 17th of May, 1861, and that constituted the only delivery of it ever made to the grantee; and that it was made without any consideration, contract, arrangement, bargain or promise whatever, and was not acknowledged in accordance with the laws of Illinois.

The cross-bill also alleged that the sole purpose of the deed of 1861 was to vest the title of the property thereby conveyed in the grantee, as naked trustee, and not to make to him a gift; that it was the intention of the cross-plaintiff Simon B. Buckner to waive all claim to it, to allow his wife the sole use and enjoyment thereof, and to place the control of it in her own family, but he claimed all his legal and equitable rights in the premises, and asked that the trust be enforced so as to enable him to carry his intention into effect, to which end he would assent to any decree conferring the sole control and benefit of the property upon his wife, her heirs and assigns; that in the month of December, 1860, the deceased and Simon B. Buckner for themselves, Jane C. Kingsbury and Mrs. Buckner, made an arrangement with Ambrose E. Burnside, then residing in Chicago, to take charge of and manage the property for all the parties; and that Lieutenant Kingsbury never exercised any acts of ownership over, or asserted any interest in, the property inconsistent with said trust, and, if he had lived, would have recognized the equitable and just claim of the cross-plaintiffs, and reconveyed the same upon request.

The cross-bill then referred to the will of March 25, 1862, and alleged that the only property in Chicago vested in the testator at that date was the real estate left by his father, which descended to him and his sister, Mrs. Buckner, and that the only conveyance ever made to him of property in

that city, and the only property there held in his name for the use of any person, was that described in the deed of Buckner and wife of May 15, 1861; that prior to the making of that will the Chicago property had been used solely to receive the rents and profits, the testator, his mother and sister being treated as if each had been entitled to one-third; that the testator, who was only twenty-three years of age, recently from West Point, without business experience, and unacquainted with the rules of law, and acting under the impression that Mrs. Buckner was the owner of only one-third, made the provision in his will for Mrs. Buckner, with the purpose to declare said trust, and to restore to the control of his sister all the property described in the above deed; that, therefore, the will is a sufficient declaration in writing of the trust to take it out of the statute of frauds, if it was a trust within its provisions; and that said will was legally admitted to probate by the laws of Virginia, by a court having jurisdiction in such matters, and was certified and admitted to record in Illinois in conformity with its laws.

It further alleged: "And your orators further show that the said Henry W. Kingsbury, on the 23d day of October, 1861, wrote with his own hand a letter to his mother, Jane C. Kingsbury, and signed the same by his signature 'Henry,' in which, among other things, he wrote: 'I spent all the morning with Burnside, yesterday. He stated, as I told you, that Simon had made over all the Chicago property that was held in his name to me. A new power of attorney is therefore necessary from you and myself. We made one out. I signed it. Burnside will send it to you.' And they aver that the reference in said letter by the words 'as I told you' was to a conversation between the said Henry W. Kingsbury and his mother, had in their last personal interview before the date of said letter, in which the said Henry W. Kingsbury expressly admitted that he held all the property of your orator, Mary K. Buckner, inherited from her father, in trust for a short time, and said that he would restore it all to her whenever she desired. And your orators show that the only delivery of said deed bearing date May 15, 1861, ever made, was

the filing of the same for record by the said Simon B. Buckner, as hereinbefore set forth."

The relief asked in the cross-bill was: That the deed of May 15, 1861, be declared null and void as to Mrs. Buckner; that it be declared a deed of trust to the father of the plaintiff for the use and benefit of the grantors or one of them; that the plaintiff be adjudged to hold the property described in it as a trustee in like manner, and required to reconvey to the cross-plaintiffs or to one of them, as may be determined by the court; that an account be taken of the receipts and disbursements from and about the property by the defendants; that the dower rights of Jane C. Kingsbury and Eva Lawrence be ascertained and fixed, and partition made of said real estate, and the property owned by the cross-plaintiffs restored to them as they might be severally entitled thereto; and that they have such other and further relief as was just and equitable.

By an order made November 25, 1870, Corydon Beckwith —no service of process having been made upon the infant— was appointed guardian *ad litem* for Henry W. Kingsbury on the cross-bill. The infant, by him, filed an answer, which distinctly put in issue the material allegations of the cross-bill, and restated substantially all that was set out in the original bill. Answers to the cross-bill were also filed by Lawrence and wife. To these answers replications were filed by Buckner and wife.

On the 31st of December, 1870, the cause being heard, it was adjudged that both the original and cross-suits be dismissed without prejudice. It was further ordered that the decree be entered as of the 24th of December, 1870. At the same time there was filed in the cause a certificate of all the evidence used on the final hearing in the Circuit Court.

Each party prosecuted an appeal. The case was heard in the Supreme Court of the State at its January term, 1871, and on the 5th of October, 1871, that court reversed the decree of the Circuit Court and remanded the cause with special directions as to the decree to be entered, and for further proceedings. *Kingsbury* v. *Burnside*, 58 Illinois, 310, 337.

The following extract from the opinion of the court shows the grounds as well as the extent of the reversal:

"The late Henry W. Kingsbury was, as this case shows, not only a trustee of the property for his sister, but he was an honest trustee. By the last act of his life, in this respect, he designed to, and did, admit the existence of the trust, and endeavored to execute it. Immediately after his death, his widow, one of the defendants, in a letter to the mother of her deceased husband, recognized and admitted the trust, so far as she was concerned, in the most express terms, and seemed distressed at the suggestion of any obstacle to its immediate execution. Though her relations in life, and to the *cestui que trust*, became afterwards changed by another marriage, yet it is incredible that if she has been cognizant of the efforts which have been made to conceal the most important item of evidence of her former husband's relation to this vast property, and to wrest it from its proper channel, she can view them otherwise than with feelings of sorrow and regret. Her conduct has been the subject of severe criticism by counsel, but we are inclined to believe that she, like the unconscious infant whose name appears as plaintiff in the original bill, is but the involuntary instrument in the hands of designing men, who stand in no such relation to the memory of the deceased trustee as does Eva Lawrence.

"The trust being sufficiently manifested and proved by writings, signed by the party who was, by law, enabled to declare it, it must be executed.

"This conclusion renders unnecessary any discussion of the question, made by appellants in the cross-bill, as to the sufficiency of the acknowledgment of the deed by Mary J. Buckner, or of the question made by appellant in the original bill as to the execution and probate of the will; because, if properly executed and admitted to probate, the will would be governed by the laws of this State, where the property is situated; and the posthumous birth of the infant Henry W. Kingsbury would, by those laws, operate as an abatement of all devises of property so situated. Gross' Statutes, p. 800, sec. 16, Wills. Besides, the testator was incapable of divesting the property,

held in his name, for the use of Mary J. Buckner, by any devise he could make.

"The decree of the court below, dismissing both bills without prejudice, must, therefore, be reversed and the causes remanded, with directions to that court to dismiss the original bill absolutely, and to grant the relief prayed in the cross-bill, by a decree establishing the equitable title in Mary J. Buckner, to her proper share of the real estate described in the deed of May 15, 1861, declaring the trust, and requiring the proper conveyance of the legal title to her, divested of any life estate in her husband, (he having renounced the same,) and of all right of dower in Eva Lawrence; that an account be taken between said Mary J. Buckner and all other parties interested in the estate of Julius J. B. Kingsbury, deceased, according to the rules and practice of the court of chancery in such cases, and it be decreed accordingly."

The cause was redocketed in the Circuit Court of Cook County, and on the 13th of November, 1871, in pursuance of the special directions of the Supreme Court of Illinois in its mandate and opinion, the original bill was dismissed for want of equity. It was also ordered and adjudged, pursuant to such mandate and opinion, that the master in chancery make, execute, acknowledge and deliver a deed conveying, for Henry W. Kingsbury, the infant defendant to the cross-bill to Mrs. Buckner, the real estate and premises conveyed by the deed of May 15, 1861, divested of any life estate in her husband.

It was further ordered and adjudged, that partition be made between Henry W. Kingsbury and Mrs. Buckner, as tenants in common of the real estate inherited from Major Kingsbury, (one undivided half of which was owned by each,) the share of the lots or lands assigned to the former to be subject to the dower rights of Jane C. Kingsbury and Eva Lawrence, and the share assigned to Mrs. Buckner to be subject to the dower rights of Jane C. Kingsbury. It was further adjudged that Eva Lawrence be enjoined from asserting any claim for dower in the property assigned to Mrs. Buckner. The accounting between the parties to the cross-bill, and the costs, and the question in regard to the dower of Mrs. Kingsbury, were reserved for the further order of the court.

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The commissioners appointed to make partition made their report on the 22d of January, 1872, and the same was confirmed, February 12, 1872, except as to that part of the premises known as the Spencer tract, in respect to which objections had been filed in behalf of Kingsbury by his guardian *ad litem*. Under writs of assistance issued in favor of Mrs. Buckner on the 29th of January, 1872, she was placed in possession of the property assigned and confirmed to her. On the 26th of March, 1872, the court sustained a motion for leave to the receiver to pay Mrs. Buckner one-half of all moneys collected by him on policies of insurance. From that order the infant, by his guardian *ad litem*, prayed and was allowed an appeal to the Supreme Court of the State. It is stated that the exceptions filed for the infant to the reports were overruled on the 2d of August, 1872, and a decree entered confirming those parts of them to which exception had been taken, and declaring the parties vested with the title to the lands respectively set off and allotted to them. And from that decree the infant, by his guardian *ad litem*, prayed and was allowed an appeal.

The case was again carried to the Supreme Court of the State upon the infant's appeal, by his then guardian *ad litem*, (a new one having been appointed,) who assigned numerous errors in that court, among which were the following: That the court erred in rendering the decree of November 13, 1871; that it was rendered without proof against the infant, and was contrary to law; and that it was not in accordance with the mandate of the court, and was without jurisdiction in the Cook Circuit Court. The remaining assignments related, principally, to alleged errors in reference to the partition, the report of the commissioners, the distribution of insurance money and the apportionment of the incumbrances. Upon the hearing of this last appeal, the solicitor representing the infant and his guardian *ad litem* urged numerous objections to the proceedings in the Circuit Court among which were these: That the Circuit Court had no jurisdiction over the infant to render the decree of November 13, 1871, on the cross-bill of Buckner and wife; and that such decree was rendered without

sufficient proof, was collusively obtained against the infant, and was manifestly unjust. In connection with these general objections the solicitor of the infant presented many specifications of fraud alleged to have been practised by the former guardian *ad litem* of the infant in and about the proceedings culminating in the decree of November 13, 1871. Most of these specifications are again presented in the present suit, and will be hereafter examined.

At the September term, 1872, of the Supreme Court of Illinois, the last decree was reversed mainly upon the ground that Mrs. Buckner had no interest in what was called the Spencer tract. *Kingsbury* v. *Buckner*, 70 Illinois, 514. In reference to the attempt made upon that appeal to reopen the questions decided on the first appeal, the court said:

"A labored argument has been made to prove the error of the former decision of the court, and it is charged that fraud and collusion were practised, and incompetent testimony adduced, to obtain it. If this were true, we cannot determine questions so grave upon *ex parte* affidavits. If there have been fraud and collusion, the proper remedy would be in chancery, and then the parties assailed could have an opportunity of making a defence; or, if the decree is directed by the court of final resort, by an application for a rehearing.

"Upon the former hearing, after full argument, this court decided that Henry W. Kingsbury held the property conveyed by the deed from Mrs. Buckner and husband to him, as trustee; that the trust had been manifested by a writing; and that she had an equitable title to a share in the estate. The cause was remanded to ascertain her share, and not to determine the trust. The latter had been established by the declaration of this court. This appeal is prosecuted from the decree making partition, and can bring before us no other question, except questions incident to the order for partition. We cannot examine as to the merits of the original case, but only as to proceedings subsequent to the decision at the former hearing. . . The trust relation between the parties was established by the former decision, and the court has not the power to reverse it."

A rehearing was granted, and at the September term, 1873, of the Supreme Court of the State, the following opinion was delivered:

"*Per curiam:* A rehearing was ordered in this cause upon the present appeal, not for the purpose of reconsidering the case upon the merits, or to change, or, in any substantial sense, to modify our former decision, but to render the opinion of the court more explicit, and prevent misconception of its meaning. This seems demanded by the peculiar state of the record, which was inadvertently overlooked, and the language employed in the opinion, to which our attention has been called by the application for a rehearing.

"When the cause was before us upon a former occasion, the principal questions involved were definitely settled. The decree of the court below, dismissing both the original and cross-bills, was reversed, and the cause remanded, with directions to grant the relief prayed by Mrs. Buckner's cross-bill. 58 Illinois, 310. In pursuance of those directions, a decree was entered in the Circuit Court, November 13, 1871. This decree established the principal rights of the parties, and the court proceeded to carry them into effect, which involved the necessity of entering three subsequent decretal orders, and on August 2, 1872, another and final decree. This decree disposed of a controversy arising between the parties upon proceedings for partition, involving a claim by Mrs. Buckner, to a share in what is called the 'Spencer tract,' as a part of her father's estate, and by that decree her claim was allowed, from which an appeal was taken on behalf of the infant, Henry W. Kingsbury, to this court. No appeal was taken from the decree of November 13, 1871, but appeals were taken from some of the decretal orders intervening that and the final decree of August 2, 1872.

"Upon these appeals the whole record was brought to this court, and errors assigned, questioning the propriety of the decree of November 13, 1871, entered in conformity with the directions of this court, some of the intervening orders, and the final decree of August 2, 1872. The questions raised and attempted to be raised were all carefully considered, and the

conclusion arrived at was, that no error could be assigned upon the first decree, entered in pursuance of the directions of this court; that the points made upon the intervening orders were not well taken, but that the decree of August 2, 1872, was erroneous and ought to be reversed, for the reasons given in the opinion. These views, however, are not clearly announced in the former opinion, and it follows also that the directions contained in the opinion which have no relation to the matters involved in the decree of August 2, 1872, are wholly inappropriate, and may be considered as withdrawn from the opinion.

"The judgment which we intended to enter was, that the several decrees and decretal orders antecedent to the final decree of August 2, 1872, and upon which error was assigned, be affirmed, but that the decree of August 2, 1872, concerning Mrs. Buckner's claim in the Spencer tract, be reversed, and the cause remanded for further proceedings in conformity with the former opinion, as herein explained and modified, and that each party pay half of the costs in this court."

It should be here stated that the present transcript does not contain the decree of August 2, 1872.

On the 7th of March, 1877, the death of Mrs. Buckner was suggested in the Circuit Court, and her daughter, Lily Buckner, was substituted in her place as a co-complainant in the cross-bill, and on the same day a decree was rendered in conformity with the opinion and judgment of the Supreme Court of the State, annulling so much of the deed executed by the master to Mrs. Buckner as conveyed to her one undivided half of the Spencer tract, and directing a conveyance of that tract to the infant, Henry W. Kingsbury.

The present suit was brought in the Circuit Court of Cook County, Illinois, on the 11th day of August, 1873, for Henry W. Kingsbury, by Eva Lawrence, his next friend, against Simon B. Buckner, Mrs. Buckner, Jane C. Kingsbury, John J. D. Kingsbury, Ambrose E. Burnside and Corydon Beckwith. As already stated, its object was to obtain a decree declaring the proceedings, above referred to, to be erroneous, fraudulent and void as to him, and restoring him to the possession and ownership of

the property embraced by the deed executed May 15, 1861, by Buckner and wife to his father. The bill is lengthy, setting forth substantially all the above steps taken in the suit in the state courts, and going very much into detail in respect to the various grounds upon which he bases his claim to relief.

Shortly after this bill was filed, Beckwith, Buckner and wife, and Burnside, filed general demurrers. But no further steps were taken in the cause until April 16, 1877, when it was dismissed for want of prosecution. The order of dismissal was, however, set aside, and Buckner and Burnside, having obtained leave to withdraw their demurrers, filed May 17, 1877, (Mrs. Buckner having died,) a plea in bar, based upon the bill, cross-bill, pleadings, proceedings, and decrees in the former case. They also filed a joint and several answer. The cause was removed upon the petition of the plaintiff to the Circuit Court of the United States for the Northern District of Illinois, where, upon final hearing, and after replications were filed, in behalf of the infant, to both the plea and the answer of Buckner and wife, the suit was ordered to be abated as to Mrs. Buckner, the demurrers of Beckwith and Mrs. Kingsbury were sustained, and the bill dismissed for want of equity. This is the decree which has been brought here for review.

Mr. Lyman Trumbull for appellant.

I. A minor may file a bill to impeach a decree procured by fraud, or for error appearing upon the face of the decree. *Lloyd* v. *Malone*, 23 Illinois, 43; *Kuchenbeiser* v. *Beckert*, 41 Illinois, 172; *Hess* v. *Voss*, 52 Illinois, 472; *Lloyd* v. *Kirkwood*, 112 Illinois, 329; Story's Eq. Pl. § 427; *Gooch* v. *Green*, 102 Illinois, 507; *Wright* v. *Miller*, 1 Sandf. Ch. 103. The demurrers admit the fraud, collusion and falsification of the record as charged, and should have been overruled.

II. The original suit of Henry W. Kingsbury, of Newport, in the State of Rhode Island, an infant seven years and seven months of age, commenced by Corydon Beckwith, as his next friend, July 18, 1870, was instituted without authority of said infant, without filing the bond required by the statute,

and gave the court no jurisdiction to pass upon his rights. Rev. Stats. Illinois, 1845, c. 47, § 13; *Lathers* v. *Fish*, 4 Lansing, 213; *Gray* v. *Larrimore*, 4 Sawyer, 638.

III. The so-called cross-bill of Buckner and wife against Henry W. Kingsbury, was, in fact, an original bill. It was not germane to the original suit, and whether germane or not, the Circuit Court had no jurisdiction of the same without the service of process upon the minor. The appointment of Beckwith guardian *ad litem* of the minor, who had no notice of the cross-suit, on motion of the complainants therein, was error, and did not give the Circuit Court jurisdiction to divest the minor of his real estate. *Campbell* v. *Campbell*, 63 Illinois, 462; *McDermaid* v. *Russell*, 41 Illinois, 489; *Hickenbottom* v. *Blackledge*, 54 Illinois, 316; *Wright* v. *Miller*, 1 Sandf. Ch. 123; *Walker* v. *Hallett*, 1 Alabama, 379; *Graham* v. *Sublett*, 6 J. J. Marsh. 44; *Rubber Co.* v. *Goodyear*, 9 Wall. 807.

IV. The Supreme Court of Illinois in the Central Grand Division had no jurisdiction of the appeal from the decree of the Circuit Court of Cook County, except by consent of parties. Art. 6, § 8, Constitution of 1870; Starr & Curtis' Stats. 131; *People* v. *Supervisors of Vermilion County*, 40 Illinois, 125; *Owens* v. *McKethe*, 5 Gilman, 79; *Goforth* v. *Adams*, 11 Illinois, 52.

V. Neither an infant, nor his guardian *ad litem*, could, by consent, confer jurisdiction on a court which would not otherwise have it. *Rhoads* v. *Rhoads*, 43 Illinois, 239; *Enos* v. *Capps*, 12 Illinois, 255; *Bank of the United States* v. *Ritchie*, 8 Pet. 128; *Fischer* v. *Fischer*, 54 Illinois, 231; *Wright* v. *Miller*, 1 Sandf. Ch. 103.

VI. It was not competent for the guardian *ad litem* to waive the giving of an appeal bond, by the cross-complainants on their appeal to the Supreme Court. The giving of a bond is a prerequisite to the allowance of an appeal, and even if it were in the power of the guardian *ad litem* to waive it, the Supreme Court had no jurisdiction to entertain the appeal without such bond. Rev. Stats. 1845, c. 83, § 47; Gross' Stats. 1871, p. 516; *Simpson* v. *Alexander*, 5 Gilman, 260; *Chicago, Pekin &c. Railroad* v. *Trustees of Marseilles*, 104 Illinois, 91;

United States v. *Curry*, 6 How. 106; *The Lucy*, 8 Wall. 307, 309; *Washington County* v. *Durant*, 7 Wall. 694; *Villabolos* v. *United States*, 6 How. 81; *Lewis* v. *Shear*, 93 Illinois, 121; *Page* v. *The People*, 99 Illinois, 418; *Protection Ins. Co.* v. *Foote*, 79 Illinois, 361.

VII. The decisions of the Supreme Court of Illinois in assumed appeals from the decrees of the Circuit Court of Cook County, entered December 24, 1870, and August 2, 1872, and reported in 58 Illinois, 310, and 70 Illinois, 515, wherein the question of jurisdiction to entertain said appeals was not raised or passed upon by the court, cannot be set up in bar or be used as evidence against the appellant in this case, when it is made to appear that the Supreme Court did not have jurisdiction of said appeals. *Harris* v. *Hardeman*, 14 How. 333; *Borden* v. *Fitch*, 15 Johns. 121, 141; *S. C.* 8 Am. Dec. 225; *Hollingsworth* v. *Barbour*, 4 Pet. 466.

VIII. After the dismissal of the original bill by the Circuit Court of Cook County, November 13, 1871, the Circuit Court no longer had jurisdiction of said original suit or of the cross-suit, as such. No guardian *ad litem* of the minor was subsequently appointed, and all orders entered after that date in said original suit or said cross-suit, as such, were without jurisdiction and void.

IX. The exhibits offered in evidence by appellees, were inadmissible, and, if admitted, did not sustain the plea. The Circuit Court inadvertently found that no replication was filed to the answers of Buckner and Burnside. The replication is to be found.

X. It was error for the guardian *ad litem* to waive any of the rights of the minor, or to allow the introduction of illegal and incompetent evidence in support of the cross-bill, without objection. *Cartwright* v. *Wise*, 14 Illinois, 417; *Fischer* v. *Fischer*, 54 Illinois, 231. The testimony of Simon Buckner and Jane C. Kingsbury, parties to the cross-bill, and interested in the result of the suit, and upon which the Supreme Court based its decision, was incompetent, and it was the duty of the guardian *ad litem* to have objected to the same. Laws 1867, 183, § 2; Gross' Stats. 1871, 274; *Fischer* v. *Fischer*, 54 Illinois, 231, 235; *Reeves* v. *Herr*, 59 Illinois, 81.

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XI. The whole record shows that the rights of the minor were not presented to the court; that the decree against him upon the cross-bill was the result of negligence; that the entire proceedings in both the Circuit and Supreme Courts were a contrived case, carried on by the waiver of the infant's rights, and are not binding upon the infant, because "there was no earnest controversy." *Gaines* v. *Relf*, 12 How. 472, 537, 539; *Pacific Railroad of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505.

XII. The decision of the Supreme Court of Illinois, 58 Illinois, 310, was obtained by fraud upon a falsified record and should be set aside, and with it all decrees entered by the Circuit Court of Cook County in pursuance of such decision.

Mr. W. C. Goudy for appellees.

Mr. John P. Wilson closed for appellant.

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

The first proposition advanced by appellant is, that a decree against a minor is subject to attack, by an original bill, upon the ground of error apparent upon the record, want of jurisdiction or fraud. Such is the rule in Illinois, in one of whose courts this suit originated, and by one of whose courts the decree sought to be set aside was rendered. *Lloyd* v. *Malone*, 23 Illinois, 43; *Kuchenbeiser* v. *Beckert*, 41 Illinois, 172, 177; *Hess* v. *Voss*, 52 Illinois, 472, 478; *Kingsbury* v. *Buckner*, 70 Illinois, 514, 516; *Lloyd* v. *Kirkwood*, 112 Illinois, 329, 337. In the case last cited, the Supreme Court of Illinois, after observing that there was considerable diversity of opinion as to whether a decree could be assailed by original bill for error merely, said: "In many of the States, however, including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error merely; but, until so attacked, and set aside or reversed, on error or appeal, it is

binding to the same extent as any other decree or judgment. This right to attack a decree by original bill may be exercised at any time before the infant attains his majority, or at any time afterwards within the period in which he may, under the statute, prosecute a writ of error for the reversal of such decree."

Although the cases in Illinois concede the right, by original bill, to impeach a decree for fraud, and although this court has recognized that right as existing even after the decree has been affirmed by an appellate court, *Pacific Railroad* v. *Ketchum*, 101 U. S. 289, 296; *Pacific Railroad of Missouri* v. *Missouri Pac. Railway*, 111 U. S. 505, 519, none of the cases cited from either court sustain the proposition that a party, whether an infant or adult, against whom a decree is rendered by direction of the appellate court, can impeach it, by bill filed in the court of first instance, for errors apparent on the record, and which do not involve the jurisdiction of either court.

The decree which the appellant seeks to have set aside was rendered in conformity with the mandate of the Supreme Court of Illinois, requiring that the original bill in the first suit be dismissed, and that a decree be entered upon the cross-bill, adjudging the property in question to belong to Mrs. Buckner, and not to him. It is the one which the Supreme Court of the State held, in *Kingsbury* v. *Buckner*, 70 Illinois, 514, 516, 517, was beyond even its own control when questioned upon a second appeal in the same case. And this is in accordance with the settled doctrines of this court. In *Roberts* v. *Cooper*, 20 How. 467, 481, (cited in 70 Illinois, 517,) this court said: "It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation." So, in *Durant* v. *Essex Co.*, 101 U. S. 555, 556, it is said:

"On a mandate from this court affirming a decree, the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. . . . The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The Circuit Court had no power after that to do what we might have done and did not do." See also *Browder* v. *McArthur*, 7 Wheat. 58; *Tyler* v. *Magwire*, 17 Wall. 253, 284; *The Lady Pike*, 96 U. S. 461, 462; *Stewart* v. *Salamon*, 97 U. S. 361; *Humphrey* v. *Baker*, 103 U. S. 736, 737. It is obvious that the same principle must apply where a party, instead of prosecuting a second appeal, attempts by a bill of review, or by a new bill in the nature of a bill of review, to reach errors apparent upon the face of the record. In *Southard* v. *Russell*, 16 How. 547, 570 — cited with approval in *Kingsbury* v. *Buckner*, 70 Illinois 514, 516 — it was said: "As already stated, the decree sought to be set aside by this bill of review in the court below was entered in pursuance of the mandate of this court, on an appeal in the original suit. It is therefore the decree of this court, and not that primarily entered by the court below, that is sought to be interfered with. The better opinion is, that a bill of review will not lie at all for errors of law alleged on the face of the decree, after the judgment of the appellate court. These may be corrected by a direct application to that court, which would amend, as matter of course, any error of the kind that might have occurred in entering the decree. Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House

of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits."

Among the cases cited in *Southard* v. *Russell* was that of *Brewer* v. *Bowman*, 3 J. J. Marsh. 492, in which the court, after observing that the remedy by bill of review for errors apparent upon the record was analogous to that of a writ of error said: "Hence, an affirmance in this court upon writ of error would bar a bill of review for any error which might exist in the record, but which was not assigned nor inquired into by this court. It follows that a reversal by this court, upon a writ of error (and we perceive no reason why a reversal upon an appeal should not have the same effect) with directions how to render the decree, and the rendition of the decree by the Circuit Court in pursuance of the mandates of this, would equally bar an attempt by bill of review to inquire into errors which be on the record, but which were not noticed by this court. . . . The decree rendered by the Circuit Court conformed to the opinion of this court. All attempts, therefore, to reach any error apparent upon the face of the record, prior to the decision of this court, came too late." See, also, *United States* v. *Knight's Administrator*, 1 Black, 488, 489; *Kimberly* v. *Arms*, 40 Fed. Rep. 548; Story's Eq. Pl. § 408; *Cleveland* v. *Quilty*, 128 Mass. 578, 579; *McCall* v. *Graham*, 1 Hen. & Munf. 12, 13; *Campbell* v. *Price*, 3 Munf. 227, 228; *Campbell* v. *Campbell*, 22 Grattan, 649, 674; *Jewett* v. *Dringer*, 31 N. J. Eq. 586, 590; *Rice* v. *Carey*, 4 Georgia, 558, 570; *Watkins* v. *Lawton*, 69 Georgia, 674, 675; *Ryerson* v. *Eldred*, 18 Michigan, 490; 2 Barb. Ch. Pr. 2d rev. ed. 92.

It has been suggested that the rule is different in the case of infants, and that the right of the infant Kingsbury to file an original bill to set aside the decree of November 13, 1871, for errors apparent on the record, was not affected by the fact that such decree was entered pursuant to the mandate of the Supreme Court of Illinois. In this view we do not concur. By the practice in chancery in Illinois, a decree against an infant is absolute in the first instance, and no day is given to

show cause after he becomes of age; and instead thereof the infant Kingsbury had five years after reaching full age within which to prosecute an appeal from the decree of December 31, 1870, dismissing his bill in the original suit. Rev. Stats. Illinois, 1845, p. 421, § 53; Rev. Stats. Illinois, 1874, p. 785; *Enos* v. *Capps*, 15 Illinois, 277; *Barnes* v. *Hazleton*, 50 Illinois, 429, 432; *Wadhams* v. *Gay*, 73 Illinois, 424; *Hess* v. *Voss*, 52 Illinois, 472; *Lloyd* v. *Kirkwood*, 112 Illinois, 337. But action, in his behalf, need not have been deferred for so long a time. It was competent for him, during his minority, by his *prochein amy*, to carry that decree to the highest court of the State for reëxamination, or file in the court rendering it an original bill to have it set aside for error apparent on the record. In *McClay* v. *Morris*, 4 Gilman, 370, 383, the court, after observing that whatever may have been the practice elsewhere the right of an infant to prosecute a writ of error was not to be doubted in Illinois, said: "If an infant sues out a writ of error, and a decree in this court is passed against him, such decree would be conclusive as well against him as it would have been had he attained full age, both under the provisions of the statute before recited and upon the principle that he is a plaintiff in error, and, as such, concluded by the judgment or decree." And in *Kuchenbeiser* v. *Beckert*, 41 Illinois, 172, 176, 177, it was said: "It was urged that the trial was had and the decree executed and carried into effect so long since that it should not now be disturbed. This would be unquestionably true, had the parties all been adults when the decree was rendered, or had the period elapsed which bars a writ of error after the minor becomes of age. But under our practice a minor defendant to a bill is entitled to his day in court, whether it is expressly reserved by the decree or not, and he may at any time during his minority, by his next friend or guardian, file an original bill to impeach a decree against him." *Lloyd* v. *Malone*, 23 Illinois, 43; *Lloyd* v. *Kirkwood*, *ubi supra*; *Richmond* v. *Tayleur*, 1 P. Wms. 734; Chambers on the Property of Infants, 798. The infant, by his *prochein amy*, having prosecuted an appeal to the Supreme Court of Illinois from the original decree rendered

in the suit brought by him, and having appeared by guardian *ad litem* to the appeal of Buckner and wife, is as much bound by the action of that court, in respect to mere errors of law, not involving jurisdiction, as if he had been an adult when the appeal was taken. In *Gregory* v. *Molesworth*, 3 Atk. 626, Lord Hardwicke said that "it is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion appear in the *prochein amy;* then the infant might open it by a new bill." So in *Lord Brook* v. *Lord Hertford*, 2 P. Wms. 518, 519: "An infant, when plaintiff, is as much bound and as little privileged as one of full age." See, also, *Brown* v. *Armistead*, 6 Randolph, 594; *Jameson* v. *Moseley*, 4 T. B. Mon. 414; *Hanna* v. *Spott's Heirs*, 5 B. Mon. 362.

It results that no inquiry can be made in this case in respect to errors of law apparent on the record, that do not involve jurisdiction of the original suit brought by the plaintiff when an infant.

But it is contended that the record shows upon its face a want of jurisdiction of the person of the infant and of the subject matter at the time the decree of November 13, 1871, was rendered. In *McDermaid* v. *Russell*, 41 Illinois, 489, 491, it was decided that when notice by publication against infant non-resident defendants in chancery was nugatory and void, the appointment of guardians *ad litem* for them, based upon such publication, "was also void, for they were not in court, amenable to any of its orders." To the same effect is *Campbell* v. *Campbell*, 63 Illinois, 462, in which the court declared the 47th section of the old chancery statute of Illinois, (Rev. Stats. Illinois, 1845, c. 21,) so far as it authorized a decree against infant defendants, without service of process on them, to be unconstitutional. In *Chambers* v. *Jones*, 72 Illinois, 275, 278, where the appearance of an infant defendant was entered by a guardian *ad litem*, appointed by the court to defend for her, it was said: "This did not give the court jurisdiction, and hence the whole proceedings were *coram non judice.* It is very clear no title passed to Jones by his purchase under the

decree. The decree and sale were absolutely null and void, and could be attacked directly or collaterally by the heirs owning the fee. The court had no jurisdiction to pronounce a decree that would affect their interests, having no jurisdiction of their persons by service of process or otherwise." Upon the authority of these cases it is insisted that, as there was no service of process, actual or constructive, upon the infant Kingsbury, in the cross-suit of Buckner and wife, he was not in court in respect to the matters of that cross-suit, and, consequently, the decree against him on the cross-bill was void; and that if he could not be brought into the court of original jurisdiction on the cross-bill merely by the appearance of his guardian *ad litem*, he was not before the Supreme Court of Illinois upon the appeal prosecuted in his name. The defendants insist, upon the authority of cases in this court, that no question can be raised as to the jurisdiction of the Circuit Court of Cook County to pass the decree entered in conformity with the mandate of the Supreme Court of the State. *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Ex parte Story*, 12 Pet. 339; *Washington Bridge Co.* v. *Stewart*, 3 How. 413; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557. But those were not cases in which the party against whom a decree was rendered was not before the court. They do not sustain the proposition that a decree, entered in pursuance of the mandate of an appellate court, but which is void by reason of the party not being before that court, or before the court of original jurisdiction, may not be attacked by an original bill. It is, therefore, necessary to inquire whether the Circuit Court of Cook County had jurisdiction of the infant Kingsbury upon the cross-bill filed by Buckner and wife.

In respect to the plaintiff's contention that he could not have been brought into court as a defendant in the cross-suit, except by summons or publication upon the cross-bill, it may be said that in *Ballance* v. *Underhill*, 3 Scammon, 453, 461, decided in 1842, it was held that the defendant in a cross-suit must be brought into court in the same manner as he would be in any other case. But in *Fleece* v. *Russell*, 13 Illinois, 31,

32, the court, referring to the provisions of the Revised Statutes of 1845, c. 21, §§ 24 to 30 inclusive, relating to cross-bills, said: "Under these provisions of the statute, which have been passed since the decision in the case of *Ballance* v. *Underhill*, 3 Scammon, 453, no process is necessary to bring in the parties to the original bill; but the cross-bill is to be regarded as an adjunct or part of the original suit, and the whole together as constituting but one case." The same principle was announced in *Reed* v. *Kemp*, 16 Illinois, 445, 448. We are not referred to any case holding this principle to be inapplicable in the case of an infant complainant in an original suit, who is a defendant in a cross-bill. He is in court, by his original bill, and process is not required upon a cross-bill against him in the same suit. See also 1 Starr & Curtis, Anno. Stat. 407, 408, §§ 30 to 35 inclusive; Public Laws Illinois, 1871–2, p. 329.

But it is said that the subject matter of the original bill was simply the claim alleged to be asserted, in hostility to the plaintiff, under the will of his father, and that Mrs. Buckner's claim that the property conveyed by the deed of May 15, 1861, was held in trust for her, could not properly be made the subject of a cross-suit; that the jurisdiction, if any, acquired over the infant by the filing of the original bill did not extend to the new matter thus introduced by the cross-bill; and that, therefore, he was not before the court as to such new matter, by the appearance in his behalf of a guardian *ad litem*, without previous service of process, actual or constructive. This view cannot be sustained, for it is clear that the matter in respect to which the plaintiffs in the cross-bill sought relief was embraced by the original bill. The original bill asserted ownership by appellant, subject to certain incumbrances and rights of dower, of the entire real estate standing in his father's name at the time of his death, including that which Buckner and wife conveyed by the deed of May 15, 1861. It made distinct reference to that deed as the source of his father's title to the property here in question, and, therefore, as the foundation of his own claim; and the relief asked was not restricted to a decree simply declaring the alleged

will of 1862 to be invalid. But a decree was sought by which his right and title to the property claimed to be held in trust for Mrs. Buckner by her brother should be confirmed and established, and all the defendants, including her, perpetually enjoined from intermeddling with it, or with its rents, issues, or profits. The subject matter of the original bill, so far as she was concerned, was the title and ownership of the property conveyed by the deed of May 15, 1861. The plaintiff claimed title under that deed, and by inheritance from his father. Mrs. Buckner claimed it under the same deed, but she averred that it was a trust deed. The allegations of the cross-bill related to that property, and, in answer to the plaintiff's demand that his title to it be confirmed, she demanded that the trust created by the deed of 1861 be declared, and her ownership established as against the plaintiff. It is true that the cross-bill alleged additional facts, but its subject matter was not the less, for that reason, germane to that of the original bill. Story's Eq. Pl. §§ 389, 392; 2 Daniell's Ch. Pr. 1548; *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 339, 355; *Hurd* v. *Case*, 32 Illinois, 45, 49.

In *Jones* v. *Smith*, 14 Illinois, 229, 230, 231, 232, the relief sought was a decree establishing the plaintiff's title to certain real estate purchased at an execution sale under various judgments, and which had been conveyed by the judgment debtor to his daughter. The debtor defended upon the ground that the judgments were fraudulently obtained, and that of such fraud the purchaser was cognizant when they were rendered. He filed a cross-bill to have the sales set aside, and satisfaction of the judgments entered. Upon the question whether a cross-bill was proper in such a case, the court said: "A cross-bill is proper whenever the defendants, or any or either of them, have equities arising out of the subject matter of the original suit, which entitle them to affirmative relief, which they cannot obtain in that suit. No fitter case could be imagined for a cross-bill than the one which is presented by these pleadings. . . . No doubt, upon his answer, he [the defendant] was at liberty to prove the facts averred, but this would only defeat Smith's [the plaintiff's] claim to relief, while the same

facts, if established upon a cross-bill, would entitle him to have satisfaction of the judgments actually entered; without this he might be put to the necessity of proving them repeatedly." In *Lloyd* v. *Kirkwood*, 112 Illinois, 329, 336, in which the relief sought was a decree of partition, it was said that if the defendant, as matter of law, was entitled to have the decree upon which the plaintiffs based their right to partition set aside, on a bill for that purpose, such right was an appropriate matter for a cross-bill to an original bill filed to enforce such partition. So, in the case before us, while Mrs. Buckner might, perhaps, have defeated the plaintiff's suit by proving, under her answer, the facts set out in the cross-bill, it was competent for her in the same suit, to obtain such affirmative relief as was appropriate under proof that her brother did not become the absolute owner of the property by the conveyance of 1861, but was invested with the title in trust for her. It results that it was not essential to the jurisdiction of the Circuit Court of Cook County that there should have been service of process, actual or constructive, upon the cross-bill of Buckner and wife against the infant.

The jurisdiction of that court to entertain the original suit instituted July 18, 1870, is questioned upon the ground that it was commenced without authority of the infant, and because no bond for costs was filed by the guardian *ad litem*. This position is supposed to be justified by the following provisions of the Revised Statutes of Illinois: "Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend." Rev. Stats. Illinois, 1845, c. 21, § 4, Title, Chancery. "Minors may bring suits in all cases whatever, by any person that they may select as their next friend; and the person so selected shall file bond with the clerk of the Circuit Court, or justice of the peace before whom the suit may be brought, acknowledging himself bound for all the costs that may accrue and legally devolve upon such minor. And after bond shall have been so filed, said suit shall progress to final judgment and execution, as in other cases." Rev. Stats. Illinois, 1845, c. 47, § 13, Title, Guardian and Ward. Surely, these provisions are not to be interpreted to mean that no suit in the name of an

infant, by next friend, can be entertained, unless such next friend is selected by the infant. Such a construction is inadmissible. It would prevent a suit being brought by next friend, where the infant was so young as to be incapable of making a selection of a person to represent him. The section, first above quoted, is only a recognition of the general rule that "the court, in favor of infants, will permit any person to institute suits in their behalf," exercising, however, a "very large discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants, and on the other, to prevent any abuse of that right and any wanton expense to the prejudice of infants." 1 Daniell's Ch. Pr. 69, 71; *Starten* v. *Bartholomew*, 6 Beavan, 143, 144; Macpherson on the Law of Infants, 364; Chambers on the Property of Infants, 757. In any view, the right to bring the suit does not depend upon the execution of a bond for costs, although, according to the letter of the statute, the next friend may be required to give such a bond before the suit proceeds to final judgment and execution. It is, also, said that there is nothing to show that Beckwith had any authority to sue as next friend, except that in his affidavit to the original bill he states that he is the next friend of the infant. It was not necessary to the jurisdiction of the court that he should exhibit with the bill evidence of special authority to bring it as next friend. It was in the power of the court, under whose eye he acted, at any time to inquire into his fitness to represent the interests of the infant, to remove him if he was a mere intermeddler, and to allow some one else to be substituted in his place. All the circumstances show that his institution of the original suit as next friend was with the knowledge and assent of the infant's mother and guardian. It is impossible to believe that he moved in the matter without the approval of those nearest to the infant. There is no ground to say that he proceeded without authority.

There is still another question of jurisdiction to be considered. By the constitution of Illinois "appeals and writs of error may be taken to the Supreme Court held in the Grand

Division in which the case is decided, or, by consent of the parties, to any other Grand Division." Illinois Constitution of 1870, Art. 6, §§ 2, 5, 8. The county of Cook is in the Northern Grand Division, and, unless the parties consent, cases from that county, which may be taken to the Supreme Court, must go to the court sitting in that Grand Division. The record discloses the fact that upon the entry, in the Circuit Court of Cook County, of the decree of December, 1870, dismissing both the original and cross-bills without prejudice, an order was made showing that the plaintiff by his next friend, Beckwith, prayed and was allowed an appeal to the Supreme Court, a bond, upon his part, being waived by the other parties; that the plaintiffs in the cross-bill prayed and were allowed an appeal, a bond on their part being waived; and that the parties, in open court, agreed that "such appeals may be prosecuted to and the record filed in the Central Grand Division at the next term, and that one record may be used for both appeals." Now it is contended that the Supreme Court of the State, sitting in the Central Grand Division, could not, except by consent, entertain jurisdiction of those appeals, and that the next friend and guardian *ad litem* was incapable, in law, of giving such consent. It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. There is but one Supreme Court of Illinois, although for the convenience of litigants it sits in different places in that State, and, unless the consent of parties is given, can take cognizance, when holding its session in a particular Grand Division, only of cases arising in such division. But it is the same court that sits in the respective divisions, and a consent by the next friend or guardian *ad litem* that a case be heard in a particular division, could not possibly prejudice the substantial rights of

the infant. It is true that the consent of the plaintiff's next friend and guardian *ad litem*, that the case should go to the Central Grand Division, brought it to a more speedy hearing than it would otherwise have had, if such consent had not been given. But, certainly, it was not to the interest of the plaintiff that the final determination of his case should be delayed. The cases cited by counsel — *Owens* v. *McKethe*, 5 Gilman, 79; *Goforth* v. *Adams*, 11 Illinois, 52; and *People* v. *Supervisors of Vermilion County*, 40 Illinois, 125 — do not establish any different principle. They decide nothing more than that, in the absence of consent, the Supreme Court, sitting in one Grand Division, cannot take cognizance of a case from another Grand Division.

It is further contended that the Supreme Court of Illinois could not entertain the appeal from the decree dismissing the cross-bill of Buckner and wife without an appeal bond being executed by them, and that it was not competent for Beckwith to waive the giving of such bond. In support of this position counsel cite: *Chicago, Pekin &c. Railroad* v. *Trustees of Marseilles*, 104 Illinois, 91, and *Lewis* v. *Shear*, 93 Illinois, 121. In the first of those cases the party appealing had not filed a transcript of the record in the Supreme Court within the required time, nor taken any steps whatever to bring the case before the court for consideration. A motion to dismiss the appeal having been made, it was held that a mere waiver by the appellee of an appeal bond did not operate to perfect the appeal for any purpose. The court said: "There is no appeal here for us to act upon — nothing to dismiss. The case will be stricken from the docket." In the other case cited, which was an action of replevin, the question was whether the record showed the requisite amount involved to give the Supreme Court jurisdiction. As it did not, the appeal was dismissed, the court observing that it could not take jurisdiction of a case from the Appellate Court unless the record showed, in some manner, that it was one of which it could take cognizance. Neither case is an authority for the proposition that an appeal bond is essential to the jurisdiction of the Supreme Court of the State where the appeal is allowed and a tran-

script of the record is filed in due time. A mere failure to execute the bond within due time may be ground for dismissing an appeal, but does not deprive the court of the right to proceed to a determination of the appeal. So here, the waiver by the infant's guardian *ad litem* and next friend of a bond by Buckner and wife upon their appeal — the latter having waived an appeal bond on his part — did not affect the jurisdiction of the court. And such is the rule of practice in the Supreme Court of the United States. *Edmonson* v. *Bloomshire*, 7 Wall. 306, 311; *Richardson* v. *Green*, 130 U. S. 104, 114; *Evans* v. *State Bank*, *ante*, 330. The cases cited by counsel from the latter court do not announce any different rule.

We come to consider whether the record discloses any ground for holding that the decree of November 13, 1871, was obtained by fraud, as distinguished from mere error, or by collusion with the guardian *ad litem*. In considering this question we have not overlooked the fact that there were replications in the present suit to both the plea and the answer of Buckner and wife, although the final decree below inadvertently states that no replication to the answer was filed. The general contention, in behalf of the plaintiff, is that the original and cross-bills were not a genuine case, but were contrived, and the proceedings in the state court were conducted throughout, for the purpose of depriving an infant of his estate, without bringing attention to the real merits of his claim to the property in dispute. Of course, if the record disclosed a case of that character, the decree complained of would not constitute an obstacle in the way of giving relief to the plaintiff. What are the grounds upon which the charge of fraud and collusion is based?

It may be observed that no claim is made of newly discovered evidence, and that all the facts now relied upon to show fraud and collusion were disclosed by the record before the Supreme Court of the State, upon the first appeal, when the merits of Mrs. Buckner's claim to the property were examined. No effort has been made to prove any state of case different from that disclosed in the original and cross-suit. The issue as to fraud must be determined entirely by the record of the pro-

ceedings in the state court, and by such inferences as may be justly drawn therefrom; for no evidence, apart from that record, was introduced.

It is said that the attention of the court was not specially called to the various points now made against the theory of a trust advanced in behalf of Mrs. Buckner. That fact, if established, would not necessarily show fraud or collusion. But it does not appear what points were made in argument upon the first appeal to the Supreme Court of the State. Certainly, the errors assigned by the next friend in behalf of the infant were broad enough to cover every objection now raised against the right of Mrs. Buckner to the property. Those errors were, the dismissal of the original bill, the refusal to grant the relief asked by the plaintiff, and the admission of incompetent evidence against him. Under such an assignment of errors, it was competent for the *prochein amy* to contend, as one of the plaintiff's counsel insists he should have contended, that "the object of making the deed of May 15, 1861, was to leave the Buckners free to take sides in the civil war against the United States without jeopardizing this large estate in the city of Chicago;" and that a party making a deed for such a purpose was in no better position, in a court of equity, than one who makes a deed to defraud his creditors. For aught appearing in the record, this view was pressed upon the Supreme Court of the State. The absence from the opinion of that court of any reference to it, does not prove that the guardian *ad litem* and next friend failed to make the point, or that he purposely avoided allusion to it. If, in considering so grave a charge as that of fraud, we should indulge in conjecture as to what controlled the mind of the state court, the inference might be fairly drawn that, as this point arose out of the evidence, it was passed without notice, because the court regarded it as not sustained by the proof, or as one that ought not to control the decision of the case.

The depositions of Simon B. Buckner and Jane C. Kingsbury were taken in the suit brought by the infant in 1870, upon interrogatories by the plaintiffs in the cross-suit, and cross-interrogatories by Mr. Lawrence. It is contended that

these persons were incompetent, by the laws of Illinois, to testify in support of the cross-bill, and that the guardian *ad litem* failed to object upon that ground to their depositions. This charge of collusion fails altogether if they were not incompetent as witnesses. By the first section of a statute of Illinois, passed February 19, 1867, and which was in force when their depositions were taken, it was provided that "no person shall be disqualified as a witness in any civil action, suit or proceeding," except in certain specified cases, "by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime, but such interest or conviction may be shown for the purpose of affecting the credibility of such witness." The second section provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein, of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as . . . heir . . . of any deceased person, . . . unless when called as a witness by such adverse party so suing or defending," except in certain cases that have no application here. The fifth section of the same act provides that "no husband or wife shall, by virtue of section one of this act, be rendered competent to testify for or against each other . . . except in cases where the wife would, if unmarried, be plaintiff or defendant, . . . and except, also, in cases where the litigation shall be concerning the separate property of the wife; . . . in all which cases the husband and wife may testify for or against each other, in the same manner as other parties may under the provisions of this act." Pub. Laws Illinois, 1867, p. 183.

It is clear from these statutory provisions that Buckner was not incompetent, by reason of his relation of husband, to testify in support of his wife's claim to the property, because if Mrs. Buckner had been unmarried she would have been a defendant in the original suit, and the plaintiff in the cross-suit, and also, because that suit concerned her separate property. In the cross-bill he joined with his wife in asking that the

trust intended to be created by the deed of 1861 be enforced, and gave his assent to any decree that would place the property under her sole control and preserve it for her benefit. This was regarded by the Supreme Court of the State as a renunciation by him of even a life estate, and the decree of 1871 proceeded upon that ground. Nor was he incompetent by reason of the inhibition contained in the second section of the act, because, although a formal party to the cross-suit, he was not directly interested in the event thereof, and was not, in the sense of the statute, a party adverse to the heir of his deceased brother-in-law. The only party adverse to the heir, in respect to the issues made by the cross-suit, was Mrs. Buckner. She could not have testified on her own motion, or in her own behalf, unless called by the opposite party. But, looking at the policy and language of those enactments, we perceive no reason why Buckner was not competent as a witness, in support of his wife's suit, under the first section of the act. We are, also, of opinion that Mrs. Kingsbury was a competent witness. She had no interest adverse either to appellant or to Mrs. Buckner. Her interest in the property was recognized by all the parties. No decree could have affected her rights. The fact that she was a party to the suit did not, of itself, disqualify her as a witness.

There are other facts in connection with the depositions of Buckner and Mrs. Kingsbury, which are relied upon to establish the charge of fraud and collusion upon the part of the guardian *ad litem*. They are these: He was not appointed guardian *ad litem* in the cross-suit until November 25, 1870, and yet he appears from the record to have assumed the position of guardian *ad litem* before that date, by assenting in writing, under date of November 22, 1870, that a *dedimus potestatem* might be sued out, on the 30th of November, to take the deposition of Buckner, thereby waiving the benefit of a notice of ten days given by the statute in such cases; and he failed to file cross-interrogatories to Buckner and Mrs. Kingsbury. These facts contain nothing of substance, when taken in connection with other circumstances. It may be that he did not, in fact, sign the above writing until after his appoint-

ment as guardian *ad litem*, and that he signed it without observing its date. Be that as it may, five days intervened between his appointment as guardian *ad litem* and the time named for suing out the commission to take Buckner's deposition. The statutory provision requiring ten days' notice for the suing out of a commission to take depositions is one for the benefit of the party against whom the depositions are to be read, and might be waived. The waiver of full notice, in respect to Buckner's deposition, was first signed by the attorney of Lawrence and wife, the latter being the mother and guardian of the infant. It was equally competent for the guardian *ad litem* or next friend to join in the waiver, unless it be assumed, as we are unwilling to do, that his fidelity is to be measured by his capacity and willingness to delay litigation, when there is nothing to be thereby accomplished. Nor is fraud and collusion to be imputed to Beckwith because he did not, after his appointment by the court, file cross-interrogatories to Buckner and Mrs. Kingsbury. Cross-interrogatories were filed by his partner in behalf of Mrs. Lawrence, and were of the most searching character. They were prefaced with formal objections, upon the ground of immateriality and incompetency, to more than twenty of the interrogatories relating to the deed of May 15, 1861, to the circumstances under which it was executed, and to the alleged trust in favor of Mrs. Buckner. And, at the hearing, objections were made to the competency of the evidence contained in the depositions for the cross-plaintiffs, but the depositions were received subject to all legal objections upon the ground of sufficiency, competency and relevancy. There is no suggestion that the cross-interrogatories which were filed did not cover the whole ground of dispute between the parties. It would have served no good purpose for the guardian *ad litem* to repeat them on behalf of the infant, for Mrs. Buckner was bound to support her claim by proof; and without filing cross-interrogatories the infant was entitled to avail himself of every fact to his advantage brought out by the cross-interrogatories upon the part of his mother.

Another badge of fraud is supposed to be found in the fact

that the decree dismissing the bill and cross-bill, without prejudice, was, in fact, rendered December 31, 1870, and yet was entered as of December 24, 1870, without objection from the guardian *ad litem*. We assume that the object of all this was to enable the parties to get the case before the Supreme Court at its session commencing in January, 1871, and have it there determined at an early day. There is nothing in all this to show fraud or collusion. Of course, the guardian *ad litem*, by technical objections, could have postponed the hearing of the case in that court until September, 1871; but there is no circumstance disclosed by the record tending in any degree to show that the infant would have profited by such delay.

But it is said that the failure of the guardian *ad litem* to apply for a rehearing of the original appeal is evidence of bad faith upon his part. We cannot assent to any such view of his duty. The opinion of the state court shows that the legal questions presented by the appeal were carefully considered, and there is no ground to suppose that its conclusion would have been modified if a rehearing had been granted. Be this as it may, we cannot agree that the mere failure of the guardian *ad litem* and next friend to apply for a rehearing raised any presumption of infidelity to his trust.

Some stress is laid upon the fact that Beckwith met this suit by demurrers to the bill, and did not file an answer. This does not show fraud or collusion. There was no need of making him a defendant. No relief was prayed against him. He was neither a necessary nor proper party to the relief asked. If he preferred to terminate the suit as to himself by a demurrer, it was his privilege to pursue that course.

In respect to the charge that the case was presented to the Supreme Court of the State upon a falsified or changed record, it is only necessary to say that there is no foundation for it in the record before us.

Without noticing other matters discussed by counsel, which we do not deem of importance, we are of opinion that the plaintiff has failed to show that the decree of November 13,

Counsel for Parties.

1871, or any decree subsequent to that date, was, in any degree, the result of fraud or collusion.

The decree is *Affirmed.*

Mr. Chief Justice Fuller took no part in the consideration or decision of this case.

LEAVENWORTH COUNTY COMMISSIONERS *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 251. Argued April 3, 1890. — Decided April 14, 1890.

A consolidation of railroad companies in Missouri, under the act of Missouri of March 24, 1870, § 1, held valid.

A provision for the filing with the Secretary of State, by each of the consolidating companies, of a resolution accepting the provisions of the act, passed by a majority of the stockholders, at a meeting called for the purpose, was not observed, but its non-observance did not render the consolidation void.

The object of the statute was to prevent the consolidation of competing roads, and to confine it to roads forming a continuous line.

A certified copy from the office of the Secretary of State of the copy of the articles of consolidation filed there, under the statute, is conclusive evidence of the consolidation in every suit except one brought by the State to have the consolidation declared void.

A foreclosure of a mortgage on a railroad, and its sale under a decree, held valid, in a suit attacking them for fraud, because of the trust relations of the parties, when there was no collusion or fraud in fact.

In equity. Decree dismissing the bill. The plaintiffs appealed. The case is stated in the opinion.

Mr. S. S. Gregory and *Mr. J. M. Flower* (with whom was *Mr. D. K. Tenney* on the brief) for appellants.

Mr. Thomas F. Withrow (with whom was *Mr. M. A. Low* on the brief) for appellee.

Opinion of the Court.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The bill in this case was filed in the Circuit Court of the United States for the Western District of Missouri, on the 25th of September, 1882, by the Board of County Commissioners of the County of Leavenworth, a municipal corporation of the State of Kansas, on behalf of itself and of all other stockholders of The Chicago and Southwestern Railway Company, chartered in Missouri, against The Chicago, Rock Island and Pacific Railway Company, an Illinois corporation, The Chicago and Southwestern Railway Company in Iowa, The Chicago and Southwestern Railway Company, (consolidated,) The Iowa Southern and Missouri Northern Railroad Company, the last-named three companies being Iowa corporations, The Chicago and Southwestern Railway Company, a Missouri corporation, David Dows and Frederick S. Winston, citizens of New York, and Calvin F. Burnes, a citizen of Missouri. The plaintiff sues as the owner of $300,000 out of $3,000,000 of the capital stock of The Platte City and Fort Des Moines Railroad Company, a Missouri corporation, which stock it originally subscribed for and paid for at par. The Circuit Court, held by Mr. Justice Miller, on a final hearing on pleadings and proofs, dismissed the bill, 25 Fed. Rep. 219, and the plaintiff has appealed.

The following are the material facts of the case, in the view we take of it, substantially as they are set forth in the opinion of Mr. Justice Miller, delivered in the Circuit Court: The Platte City and Fort Des Moines Railroad Company was created for the purpose of constructing and operating a railroad to commence at a point on the Missouri River opposite or nearly opposite the city of Leavenworth, Kansas, and run thence northeasterly to a point on the state line between Missouri and Iowa in the direction of Fort Des Moines. The name of the company was afterwards lawfully changed to the Leavenworth and Des Moines Railway Company, and later to the Chicago and Southwestern Railway Company. Such changes, however, were merely of name and without prejudice to the rights of stockholders in such original company. This company was also authorized by law to build a branch

road from some point on the main line to a point on the north line of Missouri in the direction of Ottumwa, Iowa.

On the 12th of May, 1869, a corporation was duly formed under the general laws of Iowa, and called the Chicago and Southwestern Railway Company in Iowa, for the purpose of building and operating a railroad from Washington, in Iowa, southwesterly, to meet the road of said Chicago and Southwestern Railway Company, chartered in Missouri, at the state line between Iowa and Missouri. The capital stock of this Iowa corporation was fixed in the articles of incorporation at $3,000,000, and it was provided in said articles "that in the event of the consolidation of this corporation with the Chicago and Southwestern Railway in Missouri, the company in which the two companies may be consolidated shall have the power to subject the said corporation to such amount of indebtedness or liability as the board of directors may deem necessary, not exceeding, however, six million of dollars."

On the 25th of September, 1869, these two companies adopted articles of consolidation and became one company under the name The Chicago and Southwestern Railway Company, for the purpose of building a railroad from some point on the Washington branch of the Chicago, Rock Island and Pacific Railroad, in the State of Iowa, to the Missouri River, in the State of Missouri, at a point on the Missouri River opposite or nearly opposite the city of Leavenworth, in the State of Kansas. In the proceedings which resulted in this act of consolidation the county of Leavenworth, as one of the stockholders in the Chicago and Southwestern Railway Company of Missouri, was represented by its duly appointed agent, who gave his assent to the consolidation.

On the 1st of October, 1869, six days after this consolidation, the new company entered into a contract with the Chicago, Rock Island and Pacific Railroad Company, whereby it agreed to issue its bonds to the amount of $5,000,000, payable thirty years after date, bearing interest at the rate of seven per cent per annum, for which coupons were to be attached to the bonds, the whole to be secured by a mortgage on its entire line of road to the Missouri River.

In consideration that the proceeds of those bonds should be placed in the hands of the Rock Island Company, and certain advantages be secured to that company by the contract, in the way of connection and running arrangements between the two companies and their roads, the Rock Island Company agreed to endorse those bonds, and out of the proceeds of their sale to pay the interest on all of them, until the new road was constructed and turned over to the Southwestern Company.

In pursuance of this agreement the Southwestern Company issued its bonds to the amount of $5,000,000, and placed them in the possession of the Rock Island Company; and on the 6th of October, 1889, made and delivered to the defendants Dows, Winston, and Burnes, a deed of trust upon their entire line of road from the Missouri River, in Missouri, to a point on the Washington Branch of the Chicago, Rock Island and Pacific Railroad in Iowa, to secure the payment of the bonds and interest, as agreed. The Rock Island Company endorsed the bonds and sold them in open market, or paid them, with its guaranty on them, to the contractors who built the road.

On the 16th of August, 1871, articles of consolidation were signed between the Chicago and Southwestern Railway Company of the States of Missouri and Iowa and another company organized under the laws of the State of Missouri, by the name of the Atchison Branch of the Chicago and Southwestern Railway Company, which was authorized to construct a road from a point on the east bank of the Missouri River opposite the city of Atchison, in the State of Kansas, by the most practicable route, to a junction with the Chicago and Southwestern Railway. These articles of consolidation were duly filed in the office of the Secretary of State of the State of Missouri according to the law of that State. The validity of that consolidation is assailed by the plaintiff on the ground that it is void by reason of a failure to conform to the laws of Missouri.

The original bill prays for the appointment of a receiver to take possession of the railroad operated by the Chicago, Rock Island and Pacific Railway Company, extending from Washington in Iowa to the Missouri River, and for a decree declar-

ing the articles of consolidation between the Chicago and Southwestern Railway Company, chartered in Missouri, and the Chicago and Southwestern Railway Company in Iowa, to be void; that those companies and the stockholders of each be remitted to their rights as existing before such attempted consolidation; that the $5,000,000 of bonds and their coupons, and the trust deed securing them, be decreed to be void as a lien upon the road; that the trust deed be cancelled by the trustees, as a cloud upon the title; that all payments of interest made on those bonds by the Rock Island Company or for such consolidated company, on any account whatever, be adjudged to have been voluntary and unauthorized; that it be declared that no right of action ever existed for the reimbursement thereof; that the proceedings for the foreclosure, hereinafter mentioned, of the trust deed, be decreed to have been and to be collusive, fictitious, and fraudulent; that the decree therein, the sale thereunder, the personal judgment against the consolidated company, and all other proceedings had under such decree be held to be fraudulent and void; that the organization of the Iowa Southern and Missouri Northern Railroad Company, hereinafter mentioned, the consolidation of the last-named company with the Chicago, Rock Island and Pacific Railway Company, and all acts done by either in execution or confirmation thereof, be adjudged to be void; that an accounting be had between the plaintiff and the Southwestern Railway Company, chartered in Missouri, on the one part, and the other defendants charged as trustees, on the other part, as to all proceedings had by either, involving the receipt or lawful disbursement of money, in which the plaintiff or the Chicago and Southwestern Railway Company, chartered in Missouri, had or have any interest, as well as for the use and occupation of the road and franchises of the latter company; that the true balance be ascertained, and the parties from whom and to whom payable; that, if the balance should be found due to the plaintiff or to the latter company, a decree be given for its recovery against the party indebted, and, if the balance be found against the plaintiff or that company, the plaintiff or it be decreed to pay the same, which the plaintiff offers to do;

that the line of railroad running from the Missouri River, opposite or nearly opposite the city of Leavenworth in Kansas, by way of Cameron, to the state line between Iowa and Missouri, be decreed to belong to the Chicago and Southwestern Railway Company, chartered in Missouri; that the same be delivered up to that company, free and discharged of all liens; and that that company and the plaintiff be re-established in all the rights, properties, and franchises of that line of railroad; and for general relief.

The Chicago, Rock Island and Pacific Railway Company answered the bill, and Dows and Winston, trustees, also answered it, those answers being filed on the 5th of March, 1883. On the 30th of March, 1883, the plaintiff filed exceptions to the first answer, and on the 2d of April, 1883, exceptions to the second answer. These exceptions were heard by the court, held by Judges McCrary and Krekel, and were overruled. The opinion of the court, delivered by Judge McCrary, is reported in 18 Fed. Rep. 209. The conclusion of the court was, that the articles of consolidation between the Chicago and Southwestern Railway Company in Missouri and the Iowa corporation of the same name, having been entered into on the 25th of September, 1869, and the bill not having been filed until the 25th of September, 1882, and a case of concealed fraud not being shown, the defences of laches and of a bar under the Statute of Limitations of Missouri, set up in the answers, must be sustained.

On the 16th of February, 1884, the plaintiff filed an amended bill, with substantially the same prayers as those of the original bill.

To resume the history of the road, it was completed after several years, and the money with which this was done was mainly raised by the sale of the bonds of the Southwestern Company, endorsed by the Rock Island Company, and the Rock Island Company paid the interest on the bonds, as it had assumed to do. The possession of the road, as it became fit for use, was taken by the Rock Island Company, so that, when it was completed from one end to the other, it was in the possession and use of that company and so remained for

two or three years afterwards. The Rock Island Company says, in its answer, that it paid the interest on the bonds out of the sale of the bonds themselves, according to the contract, until the road was finished, and after that paid it out of its own money, by reason of its obligation as guarantor or endorser of the bonds. After interest had thus accrued and been paid in this latter mode to the amount of $1,000,000, according to its statement, it made application to the trustees in the deed of trust for a foreclosure, under the provisions of that deed, on account of the default of the Southwestern Company in paying such interest. The trustees accordingly brought such a suit in the Circuit Court of the United States for the District of Iowa where a decree was rendered. A sale of the Southwestern road was made to a corporation organized under the laws of Iowa for its purchase. Under that sale a deed was made to that company by the Chicago and Southwestern Railway Company, by order of the court, and the deed and sale were confirmed. To that suit of foreclosure the Chicago and Southwestern Railway Company and the Chicago, Rock Island and Pacific Railway Company and others were made defendants, and the two companies appeared by counsel.

After the second consolidation, in which the Atchison Branch came into the Southwestern Company, that company issued bonds to raise money for the construction of this Atchison Branch, and a mortgage or deed of trust was made to secure the payment of those bonds, which was a first mortgage on the Atchison Branch and a second mortgage on the remainder of the consolidated company's road. The trustees in that mortgage were made defendants in the foreclosure suit, and the holders of the bonds so secured were afterwards, on motion, admitted to defend for their interest in the suit.

After the sale of the road under the decree, and its purchase by the new organization, which was called the Iowa Southern and Missouri Northern Railroad Company, that company entered into a consolidation with the Chicago, Rock Island and Pacific Company, which consolidation included other roads, or pieces of roads, built under the auspices of the Rock Island Company, all of which were now consolidated under

the name of the Chicago, Rock Island and Pacific Railway Company, which is the principal defendant in this suit.

This suit of the county of Leavenworth is founded on the proposition that the attempted consolidation of the Chicago and Southwestern Company with the Atchison Branch Company is utterly void, and that, as the real Southwestern Company, which issued the bonds and made the mortgage on which the foreclosure suit and sale were based, was never served with process or appeared in that suit, that decree and foreclosure sale are also void. As the real Southwestern Company, which gave this mortgage, refuses to take any steps to assert its rights, the county of Leavenworth, as one of its stockholders, comes forward, on behalf of itself and other stockholders, to do so, and prays that the decree and sale under the proceedings in the Iowa Circuit Court be set aside and held for naught, as well as the pretended second consolidation. Should this second consolidation be held valid, then it asks that the sale of the road under that decree, and the decree itself, be set aside and held for naught, on the ground of fraud and abuse of trust by the Rock Island Company.

The first question considered by the Circuit Court was, whether the consolidation with the Atchison Branch was so void that no company formed by such consolidation had an existence making it capable of doing any business, and especially of being a defendant in the suit to foreclose the mortgage for $5,000,000. The court said: "It is obvious that if this second consolidated company was not the legal owner of the Chicago and Southwestern Railroad, and was not liable for the bonds and mortgage, then no company was before the court which foreclosed that mortgage, which had any interest in the road, or was under any obligation to defend the suit. As we have already stated that the first consolidated company was not before that court at all, nor represented in the proceedings, except as it was a part of the second consolidated company, it would therefore follow that the foreclosure proceedings are void as to the real Chicago and Southwestern Company; the sale of its road is void, and the consolidation with the Chicago and Rock Island, as transferring the owner-

ship of that road, is ineffectual; and the real Southwestern Company, under the first consolidation, is still in existence, is the legal owner of the road, and has a right to pay the overdue interest on its bonds, and to take possession of it."

The consolidation took place in Missouri under an act of that State approved March 24, 1870, (Laws of 25th General Assembly, adjourned session, p. 89,) the first section of which is as follows: "Section 1. Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges, and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted: *provided, however*, that the foregoing provisions of this section shall not be construed to authorize the consolida-

tion of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; *and provided*, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the Circuit Court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this act, they shall each file with the secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same."

The Circuit Court, after quoting this section of the statute, proceeds to say: "A certified copy of the articles of agreement under which the consolidation was effected, with the corporate name of the new company, was duly filed with the secretary of State, as this law requires. But there is no evidence in this record of the filing with the secretary of State, by each of the companies so consolidated, of a resolution accepting the provisions of the act, passed by a majority of the stockholders, at a meeting of stockholders called for the purpose of considering the same, nor is there any evidence of such

meeting of the stockholders of the companies separately, except such as may be implied from the certified copy of the articles of agreement of consolidation duly filed in the secretary's office. Is the absence of any evidence of these meetings and of the passage of the resolutions to accept the provisions of the act by the respective companies fatal to the creation of the new consolidated company, when all other requirements of the statute shall have been complied with? It will be observed that this is the last provision in the statute, though the thing ordered to be done is one of the first steps required in the process. It is also a provision which may well be held to be directory, and designed to secure evidence that each of the companies intending to consolidate recognized the statute as the sole authority for such consolidation, and their obligation to be governed by its provisions. If the other essential provisions of the act were complied with, it does not necessarily follow that the whole proceeding would be void for a failure to comply with this direction of the act. It is argued, however, that by the express language of the statute it is declared that, 'in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise.' This sentence does not come after but before the provision concerning the resolution accepting the law under which consolidation is made. In the orderly succession of ideas, this concerning the accepting the provisions of the statute was not in the mind of the draftsman when the provision making the consolidation void was penned. On the other hand, the limitation that the companies which are authorized to consolidate are only those whose roads when united 'will form in the whole or in the main one continuous line of railroad,' and that this authority 'shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolida-

tion a continuous line of road is secured, running in the whole or in the main in the same general direction,' and 'it shall not be lawful for said roads to consolidate in the whole or in part, when by doing so it will deprive the public of the benefit of competition between said roads,' immediately precedes the declaration that any attempt to consolidate contrary to the provisions of the act shall be void. It is the consolidation of such roads as do not form when so consolidated one continuous line, but may be made up of parallel and competing lines, which is forbidden and declared to be void. The language of the remedy prescribed by the statute indicates that it is for the violation of this principle that it is given. The court of the county in which the road lies or through which it passes, not that where the company has its organization or offices, shall have jurisdiction, and the remedy shall be to restrain the company by injunction or otherwise. It is the continuity or parallelism of the roads, the benefit of competition by roads between the same points, which is to be secured. And it is clear that the legislature was not so much interested about the companies and their amalgamation into one company as they were that rival roads and competing roads should not be consolidated and brought under the same control. I doubt very much whether the legislature intended to declare that even for a violation of this principle, much less of any of the other mere details of the mode of accomplishing this consolidation, it should be absolutely void, void *ab initio*, void anywhere and under all circumstances, but only, as the word 'void' is so often used in legislation and in written agreements, that it should be voidable; that if on investigation the roads were of that character which the statute forbids to be consolidated, the proper court could so declare and annul and avoid the consolidation. This is the more reasonable, as the parallelism or competing character of the two roads, if it were disputed, could only be satisfactorily ascertained by a judicial investigation, and it could not be permitted that any man who wished to do so could assume for himself that the consolidation was void and act accordingly. Without the aid of the statute, if the legislature or the governor or the attorney-gen-

eral of the State believed the roads were not such as the law permitted to be consolidated, they could, by the institution of proper proceedings in a court of justice, have the act of consolidation annulled, if they were correct in their views. This statute confers the right on any person aggrieved by such improper consolidation to have relief by application to the proper court, which would not otherwise exist.

"In regard to the acceptance of the provisions of the consolidation act to be filed with the secretary of State, this is eminently a matter between the State and the corporations whose rights are affected, and if, on a failure to file such acceptance, the consolidation is to become void, it is the privilege of the State to enforce the forfeiture or annulment, and not of every private person who shows an injustice or injury done to himself. But if this was more doubtful than it is, it appears to me that the proposition here insisted on is concluded by this language of the act: 'A certified copy of such articles of agreement [for consolidation], with the corporate name to be assumed by the new company, shall be filed with the secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of State shall be deemed conclusive evidence thereof.' This certified copy from the secretary's office is to be considered evidence of something. Let us consider what and its effect as evidence. 1. Of what is it to be a copy? Of the articles of agreement for consolidation made by the companies to be consolidated; not of all the requirements of the statute, preliminary or otherwise. 2. What shall it prove? That thereafter the consolidation shall be considered duly consummated. There is no ambiguity in this. It shall be evidence that the consolidation has been perfected, and has resulted in the creation of a new corporation, whose name is to be found in this certified copy. 3. What is the effect of this evidence? The statute says it shall be conclusive. It is not necessary here to hold that, in a direct proceeding on the part of the State to have a declaration of the nullity of such a consolidation, no evidence can be received to impeach the validity of the original act of consolidation. It is my opinion that in such case

the certified copy from the secretary's office would not be conclusive, but *prima facie*, evidence.

"But what is meant and what is reasonable is, that when a corporation so organized comes into a court of justice, either as plaintiff or defendant in a contest with individuals or other corporations in regard to any matter affecting its rights, its powers, its authority to make contracts, to sue or to be sued, the production of the paper mentioned shall end all inquiry into its existence as a corporation, with such powers as the law confers on it. It would be burdensome in the extreme, a hardship altogether unnecessary to any proper purpose, to require of a corporation doing an immense business to prove, in every controversy it may have growing out of that business, that all the steps which the law directs for the consolidation proceedings have been strictly complied with. The hardship would be as great on those who sue it for violated duty of contract, or otherwise, to be required to prove in the same manner the existence of the corporation which they bring into court.

"The question of the existence of this corporation arises incidentally in this effort of the county of Leavenworth to assert the rights of another company, and, though the bill prays that the consolidation be held void, it is not the State which makes this request or institutes or controls this proceeding, nor is the proceeding itself of the character of a direct suit for the purpose of procuring such a decree, which would bind the company in any other case.

"I am of the opinion that the consolidation of August, 1871, was valid, and that this corporation thus formed succeeded to the rights, the property, and the obligations of the Chicago and Southwestern Company created by the consolidation of September, 1869, and that it was the proper party to be sued and to represent all the interests of all the stockholders in all the corporations of which it was composed, including the county of Leavenworth as one of these stockholders."

We have carefully considered the views urged on the part of the appellant, in regard to the propositions thus laid down

by the Circuit Court, and are of opinion that those propositions are sound; and it is sufficient for us to express our concurrence in them, without adding more.

The Circuit Court, in its opinion, next discusses the question of the validity of the proceedings in the Circuit Court of the United States for the District of Iowa, under which the road of the Southwestern Company was sold, and afterwards became a part of the new system of consolidated roads held by the Rock Island Company, and says: "The matter is much simplified by the fact that that court had jurisdiction of the case, jurisdiction of the parties plaintiff and defendant, of all the necessary parties to the relief sought, and of the subject matter of the suit. For any mere error of that court in its decision on matters of law or fact, the proper remedy was by appeal, and one of the parties did, as to its own interest, take such appeal to the Supreme Court of the United States, which affirmed the decree. Another remedy was by bill of review asking the same court to reconsider and reverse or modify its decree on the same or on newly discovered evidence. This course has not been adopted, and it admits of very serious doubt whether any proceeding can be sustained in any other court the purpose of which is to set aside the decree of that court in the matter, of which it had jurisdiction. I know of no reason why the suit to have a decree declaring null and void the foreclosure proceedings of that court, by reason of any fraud in its procurement, whether it be legal fraud implied from the relations of the parties, or actual fraud practised in the progress of the case, should not have been brought in the court where these proceedings were had.

"Conceding, however, the jurisdiction of this court — the Circuit Court for the Western District of Missouri — to grant some form of relief inconsistent with the binding efficacy of the decrees of the Circuit Court for the District of Iowa, let us inquire on what grounds the efficacy of those decrees is denied. Although in the more enlarged use of the word it may be said the grounds are all founded on fraud, they present in reality two distinct propositions, namely:

"(1) That such were the relations of the trustees in the

mortgage to the Chicago, Rock Island and Pacific Company, at whose instance the mortgage was foreclosed, and the relations of those trustees and the governing officers of the Rock Island Company to the debtor, the Southwestern Company, and the relations of the officers of both these companies to each other and to both of these companies, that there could be no just and rightful foreclosure as between these parties, and that the action of the trustees in the mortgage deed and of the Rock Island Company, as moved by its officers, in promoting the foreclosure, was a violation of the trust reposed in all these parties, for the breach of which the whole proceeding must be held void."

By a statement in the brief of the counsel for the appellant, showing the shares of the stock and the stockholders of the Chicago and Southwestern Railway Company, as voted at the meetings of the stockholders from 1869 to 1876 inclusive, and a list of its officers and directors during the same period, the following appears:

At the first meeting of the stockholders of the consolidated company, in 1869, there were present 10,396 shares, being those held in the original constituent companies. Of these shares, Leavenworth County voted 3000, the East Leavenworth Improvement Association 5000, four officers and directors of the Rock Island Company 10 each, and the remaining shares were held by various individuals in small amounts. Thirteen directors were elected at that meeting, of whom five were officers or directors of the Rock Island Railroad Company, one of such five being its general solicitor.

No meeting of the stockholders was held in 1870. In 1871, at the stockholders' meeting, 67,500 shares were voted, of which 25,000 were voted by such general solicitor, and 25,000 by another person connected with the Rock Island Company. Of the directory of thirteen persons, nine were officers or directors of the Rock Island Company. Two of the five officers of the road, namely, the treasurer and transfer agent and the general solicitor, were connected with the Rock Island Company; and of the executive committee of five, three were officers of the latter company.

At the stockholders' meeting in 1872, 88,719 shares were voted, of which 60,933 were voted by persons connected with the Rock Island Company; and on the day after such meeting 68,247 shares of the stock of the Southwestern Company were transferred to the president of the Rock Island Company, who was also a director of the Southwestern Company. In 1872, nine out of the thirteen directors of the Southwestern Company, including the president and the treasurer, were representatives of the Rock Island Company, as were also three out of the five members of the executive committee.

In 1873, 77,284 shares were voted, of which 68,250 were voted by persons connected with the Rock Island Company, all of the shares so voted, except 1505, being represented by the solicitor of the Rock Island Company. Of the board of directors of the Southwestern Company during 1872, nine of the thirteen were officers or directors or employés of the Rock Island Company.

At the stockholders' meeting in 1874, 74,628 shares were voted, of which all except 504 were voted by representatives of the Rock Island Company.

At the stockholders' meeting in 1875, 75,781 shares were voted, all of which were voted by representatives of the Rock Island Company.

At the stockholders' meeting in 1876, 76,788 shares were voted, all but 505 of which were voted by the general solicitor of the Rock Island Company, as proxy.

At the subsequent meetings of the stockholders, held down to 1880, 68,246 shares were voted in the interest of the Rock Island Company. It does not appear by the records that there has been any meeting of the board of directors of the Southwestern Company, or any election of officers of the company other than directors, since 1876.

This state of things is summed up thus in the opinion of the Circuit Court: "It must be admitted that the case made is a very strong one. One of the trustees of the mortgage deed was a director in the Rock Island Company; both the others were stockholders in it. The president of the Rock Island Company was president of the Southwestern Company. A

majority of the directors of the Southwestern Company were directors in the Rock Island Company. There was in the hands of the president of the Rock Island Company a majority of the stock of the Southwestern Company. The attorney who appeared and represented the Southwestern Company had been previously in the employ of the Rock Island Company, and the attorneys who brought the foreclosure suit in the name of the trustees were afterwards, in many matters, attorneys for the Rock Island Company, and one of the attorneys of the Rock Island Company in the foreclosure suit was at the time a director in the Southwestern Company."

On these facts the Circuit Court remarks as follows: "As regards the attorneys it can hardly be admitted as an impeachment of the attorney of the defendant, the Southwestern Company, that he had been or was afterwards an attorney of the Rock Island Company, nor will it be presumed that if he was even then in the employment of the Rock Island Company in other matters he did not or would not faithfully represent the Southwestern Company in this matter; and his character repels any such inference. Nor does the fact that the attorney of the Rock Island Company was a director in the Southwestern Company, though the interest of the two companies might conflict, preclude him from acting as attorney for the former company, and we see no reason why the men then and afterwards attorneys for the Rock Island Company should not represent the trustees in the mortgage as there was no conflict of interest between the trustees and the Rock Island Company. In reference to the relations of the officers of the two companies to those companies and to each other, it is quite apparent, from the consolidation of the Iowa and the Missouri companies on the 26th of September, 1869, and the contract between this consolidated company and the Rock Island on the 1st day of October, that the purpose of the Rock Island Company, or of those who had its control, was to secure and retain a paramount influence in the directory of the Chicago and Southwestern; and in point of fact it cannot be doubted that it did obtain and exercise at times such control. While it is not necessary to

consider that the purpose of this contract was to injure the Southwestern Company, but in the view of all the parties it was to advance the interest of both companies, it is certainly true that the primary object in the minds of those controlling the Rock Island Company was to make the other road a subsidiary and feeding road to its own line. This purpose was not necessarily a bad one, and was or might have been consistent with the best interests of both companies. The Rock Island Company paid a valuable consideration for this control and the other company received it. It endorsed the bonds of the Southwestern Company to the amount of $5,000,000 and agreed to protect it against a foreclosure of the mortgage given to secure the payment of these bonds during the period of construction of the road. The burden of this obligation and its importance to the success of the undeveloped enterprises of the new company cannot be easily overrated. The road could not have been built without it. The money for the construction of the track and laying it with iron came almost exclusively from the sale of these bonds, and that the money was raised on them was due, not to the credit of the Southwestern Company or to the mortgage on a road barely begun, but to the endorsement of the Rock Island Company and the credit which that endorsement gave to the bonds. This credit and assumption of liability by the Rock Island Company enabled the Southwestern Company to build its road to completion. There was nothing, therefore, fraudulent or oppressive in that company's seeking to retain such control of the road as would enable it to realize the consideration for which it assumed this obligation of $5,000,000. Matters were in this condition when the road was completed, but the Southwestern Company had no means of equipping its road with rolling stock and meeting other necessary outlays. The Rock Island Company furnished this, and used the road under an arrangement for lease, never, perhaps, fully consummated. But at the end of two or three years, in which it kept an account of receipts and expenditures, it was found that the Southwestern Company was indebted over a million of dollars for repairs and construction of the road, and had defaulted in payment

of the interest on its bonds to an amount nearly equal, the coupons for which had been paid by the Rock Island Company as endorser, and were held by it. That company determined then to assert the right which its contract gave to have the mortgage foreclosed to satisfy the interest which it had paid on the bonds it had endorsed. Unless there was some injustice in the manner in which it had managed the road or kept its accounts, I see no defect in its right to insist on the foreclosure. If the Rock Island Company had a right to insist on this foreclosure, it was the duty of the trustees in the deed of trust to bring the suit for that purpose. I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the power of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could be shown that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not could they do these things, but have the relations of the parties — the trust relations, if indeed such existed — been abused to the serious injury of the Southwestern Company. In regard to the legal right of the Rock Island Company to have the mortgage foreclosed in satisfaction of the sum paid by it for interest after the completion of the road, it seems to me there can be no reasonable doubt."

The counsel for the appellant, in his brief, after urging the

propositions that the plaintiff is entitled to bring and maintain this suit for the relief prayed, contends that, by reason of the trust relations existing between the Rock Island and the Southwestern Companies, quite aside from any proof of actual fraud or damage, the decree of foreclosure is no bar to the accounting and relief sought by the bill in this case. To support this proposition the cases are cited of *Davoue* v. *Fanning*, 2 Johns. Ch. 252; *Michoud* v. *Girod*, 4 How. 503; *Koehler* v. *Black River Falls Iron Co.*, 2 Black, 715; *Drury* v. *Cross*, 7 Wall. 299; *Marsh* v. *Whitmore*, 21 Wall. 178, 183, 184; *Jackson* v. *Ludeling*, 21 Wall. 616; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Wardell* v. *Railroad Co.*, 103 U. S. 651; *Thomas* v. *Railroad Co.*, 109 U. S. 522; *Allen* v. *Gillette*, 127 U. S. 589; *Benson* v. *Heathorn*, 1 Younge & Coll. 326; *Aberdeen Railway Co.* v. *Blakie*, 1 Macqueen, H. L. 461; *Lydney &c. Co.* v. *Bird*, 55 Law Times, N. S. 558; *Hoyle* v. *Plattsburgh & Montreal Railroad Co.*, 54 N. Y. 314; and other cases.

But, notwithstanding the general principle laid down in the cases cited, we concur in the views thus taken of the present case by the Circuit Court, and place our decision as to this branch of it on the same grounds.

The next proposition considered by the Circuit Court is as to whether there was any actual fraud perpetrated in the progress of the foreclosure suit, to the prejudice of the present plaintiff.

On that question, the Circuit Court says in its opinion: "The principal ground of complaint under this head is, that the Rock Island Company, being in actual possession and use of the road on which the mortgage was a lien, should have used its revenue first to pay the interest and have postponed the repairs and construction to that purpose. The proper place to have made this defence was in the foreclosure suit. Though it may be said that the Southwestern Company made no such defence because it was in the control of the Rock Island Company directory, which is plausible if not sound, it is to be observed that this suit was in the court for more than a year; that it is hardly possible that the authorities of the county of Leavenworth did not know of its pendency and who

were the directors in its own company, and if it had at any time appeared in that court and sought to make the defence it now sets up it would have been permitted to do so. Such defence, including also the correctness of the accounts of the Rock Island Company, was made by a Mr. Mueller, representative of the bondholders under the second mortgage made to obtain money to build the Atchison Branch. On his motion he was made defendant and permitted to file a cross-bill. The claim of the Rock Island Company for the interest paid by it as endorser, its claim for expenditures in repairs and construction, and the correctness of its accounts and its appropriation of the receipts from the Southwestern road, were all assailed by him in a cross-bill and referred to a master, before whom his counsel appeared and to whose report he excepted. This report was confirmed and became the basis of the decree as to the amount due the Rock Island Company under the mortgage, and of a personal judgment for repairs and construction. From this decree Mueller took an appeal to the Supreme Court of the United States, where the decree was affirmed. But I must add that even now, after all the proofs taken in the present case, I do not see that, if the county of Leavenworth had been a party to that suit, or if the counsel for the Southwestern Company had been ever so anxious to prevent a foreclosure, what defence he could have successfully presented, or how he could have diminished the amount which the court found to be due from that company on the mortgage. The case is one not uncommon of a road completed which in its first years did not earn enough money to pay its running expenses, its necessary repairs, and the interest on its bonded debt. Such roads have often been sold out under foreclosure proceedings, and passing into other hands have become successful and profitable enterprises. The original owners see then, when it is too late, that they permitted a valuable property to pass from them which they would gladly reclaim. But courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance, or even the want of means of those to whom they were once presented. It follows from these views, without reference to many other

matters presented for consideration, that the plaintiff is not entitled to the relief it asks or to any relief founded on this bill. It must, therefore, be dismissed, and it is so ordered."

On the question thus considered the counsel for the appellant cites the cases of *United States* v. *Throckmorton*, 98 U. S. 61, and *Pacific Railroad of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505. But we concur in the views of the Circuit Court, and are of opinion that it is not shown that the decree in the foreclosure suit was procured by fraud or collusion. It would serve no good purpose to examine in detail the testimony bearing on this subject.

These conclusions make it unnecessary to consider the defences of the statute of limitations and of laches, as urged by the appellees.

The decree of the Circuit Court is *Affirmed.*

Mr. Chief Justice Fuller and Mr. Justice Brewer did not sit in this case or take any part in its decision.

APPENDIX.

CENTENNIAL CELEBRATION

OF THE

ORGANIZATION OF THE FEDERAL JUDICIARY,

HELD AT NEW YORK, FEBRUARY 4, 1890.

The first Monday of February, 1790, fixed by the Judiciary Act of 1789 as the day for opening the first term of the Supreme Court of the United States, fell upon the first day of that month. When the judges met in the room which had been assigned to the court in the Royal Exchange, at the foot of Broad Street, on the line of Water Street, in the city of New York, no quorum was present.

Chief Justice Jay was there, then forty-six years of age. The place of meeting was in his own town, where he not only lived, but where he was then assisting Washington in guiding the new ship of state, by taking the practical supervision of the conduct of Foreign Affairs. He had been for years the Secretary for Foreign Affairs under the old form of government; and, when the change took place, he remained there at Washington's request, until Mr. Jefferson should determine whether he would accept the place, and, if accepting, until he should assume the duties of the office. In the language of the President in offering the place of Secretary of State to Jefferson, "Those papers which more properly pertain to the office of Foreign Affairs are under the superintendence of Mr. Jay, who has been so obliging as to continue his good offices."

Mr. Justice Cushing, just approaching his fifty-eighth birthday, was there. He had held the first place in the Supreme Judicial Court of Massachusetts, and now took his seat upon the bench of the Supreme Court of the United States.

Mr. Justice Wilson, Scotch by birth, and in his forty-eighth year, had arrived from Philadelphia; but no other Justice appeared, and, as the statute prescribed four as a quorum, the court of necessity adjourned to the next day at the same place.

Mr. Justice Blair, who was then fifty-seven years of age, reached

New York before the morning of the next day, and the court was then organized. What took place is thus described by Mr. William Allen Butler, in his address at the celebration:

"On the first Monday of February, 1790, the day fixed for the opening of the session of the court, a quorum was not present: on the following day, the first Tuesday of February — one hundred years ago — the room in the Exchange, set apart for the court, the Federal Hall being occupied by Congress, was, as we are informed by the *United States Gazette*, in its issue of the next day, 'uncommonly crowded.' Numerous Federal, State and municipal officers were present, and 'a great number of members of the bar.' The Chief Justice and Associate Justices Cushing, Wilson and Blair, took their seats on the bench, attended by the Attorney General of the United States, Edmund Randolph of Virginia; the letters patent commissioning all these officers were read by John McKesson, Esq., who acted as temporary clerk; Richard Wenman was appointed 'cryer'; proclamation was made, and the Supreme Court of the United States was opened.

"By these acts, marked with true republican simplicity, the full breath of life was breathed into the government of the United States, and it became a living organism.

"John Jay wore on this occasion the ample robe of black silk, with salmon-colored facings on the front and sleeves, which the pencil of Gilbert Stuart has perpetuated in the fine portrait, a copy of which is now in the chambers of the Supreme Court at Washington. It was, as the family tradition declares, the academic gown of a Doctor of Laws, according to the usage of the University of Dublin, which had conferred this degree not long before upon the new Chief Justice; who, in the absence of precedent or rule, thus gracefully associated the garb of the University with the dignity and destiny of the new tribunal in which he presided, a not unfitting attestation that the true equipment and investiture for judicial office is not political affiliation, but professional fitness.

"The Associate Justices wore the ordinary black robe, which has since come into vogue as the vestment of all the members of the court."

Except to appoint its officers, to frame its rules and to provide for the formation of its bar, there was nothing for the court to do at its opening term. In a little over a week it adjourned. The following is a reduced fac-simile of the entire record for the term; all of which, I am told by the present clerk of the court, is in the hand-writing of Mr. Tucker, the first of his predecessors:

At the Supreme Judicial Court of the Uni-ted States, begun and held at New York (being the Seat of the national Government) on the first Monday of February, and on the first day of said month Anno Domini 1790 —

Present —

The Honble John Jay Esqr. Chief Justice —
The Honble William Cushing and
The Honble James Willson Esqr. Associate Justices

This being the day assigned by Law, for commencing the first Sessions of the Supreme Court of the United States, and a sufficient Number of the Justices not being convened the Court is adjourned, by the Justices now present, untill to Morrow, at one of the Clock in the afternoon —

Mr. Justice Wilson's name is consistently misspelled in this record. Compare it with his signatures to the Declaration of Independence and to the Constitution. I am happy to bear witness to the fact that the modern successors of the first clerk are more accurate than he was.

Tuesday, Feby. 2d. 1790 ———

Present

The Hond.le John Jay Esq.r Chief Justice

The Hond.le { William Cushing
James Wilson, and
John Blair Esq.re Associate Justices

Proclamation is made and the Court is opened —

Letters patent to the Honorable John Jay Esq.r bearing date the 26th. day of Sept.r 1789 appointing him Chief Justice of the Supreme Court of the United States are openly read, and published in Court ——

Letters patent to the Hond.le William Cushing Esq.r bearing date the 27th. day of Sept.r 1789 appointing him Associate Justice of the Sup.r Court of the United States are openly read and published in Court ——

Letters patent to the Honble James Wilson Esqr. bearing date the 29th day of Septr. 1789 appointing him Associate Justice of the Sup. Court of the United States, are openly read and published in Court

Letters patent to the Honble John Blair Esq. bearing Date the 30th day of Septr. 1789 appointing him Associate Justice of the Sup Court of the United States are openly read and published in Court

Letters patent to Edmund Randolph of Virginia Esq. bearing date the 26th day of Septr. 1789. appointing him Attorney General for the United States are openly read and published in Court

Ordered that Richard Wenman, be and he is appointed Cryer of this Court

Adjourned until to morrow at one of the Clock in the Afternoon.

Wednesday, Feb.y 3.d 1789

Present

The Honble John Jay, Esqr. Chief Justice
The Honble { William Cushing
James Wilson, and
John Blair, Esqr. Associate Justices

Proclamation is made and the Court is opened

Ordered, that John Tucker Esqr. of Boston, be the Clerk of this Court — That he reside, and keep his Office at the Seat of the national Government, and that he do not practise either as an Atty. or a Counsellor in this Court while he shall continue to be Clerk of the same

The said John Tucker in open Court takes the Oath of Office by Law prescribed to be taken by the Clerk of this Court, and an Oath to support the Constitution of the United States, and also gives Bond (approved of by the Court) to the United States, for the faithful discharge of his Duty as Clerk aforesaid, as by Law required

Ordered that the Seal of this Court shall be the Arms of the United States, engraved on a circular piece of Steel of the Size of a Dollar, with these words in the Margin "The Seal of the Supreme Court of the United States". And that the Seals of the Circuit Courts shall be the Arms of the United States engraven on circular pieces of Silver of the Size of half a Dollar, with these words in the Margin viz. In the upper part "the Seal of the circuit Court, in the lower part the name of the district for which it is intended —

Ordered, that the Clerk of this Court cause the before mentioned Seals to be made accordingly, and when done that he convey those for the Circuit Courts to the District Clerks respectively —

Adjourned to Friday the fifth day of Feb.y 1790 —

Friday Feby 5th 1790 —

Present —

The Hons^le John Jay Esq^r Chief Justice
William Cushing
The Honble James Wilson, and
John Blair, Esq^rs Associate Justices.

Proclamation is made, and the Court is opened —

Elias Boudinot of New Jersey, Esq^r
Tho^s Hartley of Pennsylvania and
Richard Harrison of New York Esq^r
are severally sworn as by Law required, and are admitted
Counsellors of this Court —

Ordered, that (until further Order) no Gentleman shall be requisite to the admission of Attorneys or Counsellors to practice in this Court that they shall have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional Character shall appear to be fair —

Ordered, that Counsellors shall not practice as Attornies; nor Attornies as Counsellors in this Court.

Ordered, that they respectively take the following Oath, viz. I do Solemnly swear that I will demean myself as an Attorney or Counsellor) of the Court uprightly, and according to Law; and that I will support the Constitution of the United States —

Ordered, that unless and until it shall be otherwise provided by Law) all Process of this Court shall be in the Name of "the President of the United States" —

Adjourned until Monday the 8th. day of Feby. 1790 —

Monday Feby. 8th. 1790 —

Present

The Hons^ble John Jay Esq^r. Chief Justice —
Will^m Cushing
James Wilson. and
John Blair Esq^r. Associate Justices

The Hons^ble

Proclamation is made and the Court is opened —

Egbert Benson — John Laurence — Theodore Sedgwick — William Smith — Morgan Lewis — James Jackson — Fisher Ames — George Thacher Richard Varick — and Rob. Morris Esq.r are severally sworn according to Law. and admitted Counsellors of this Court —

William Houston Esq.r is also sworn as the Law directs, and is admitted an Attorney of this Court —

Adjourned to Tuesday the 9th day of Feb.y 1790 —

Tuesday Feb.y 9th 1790 — Present —

The Hon.ble John Jay Esq.r Chief Justice —
The Hon.ble William Cushing
James Wilson and
John Blair Esq.r Associate Justices

Proclamation is made and the Court is opened

Sam.l Jones — Abraham Ogden — Elisha Boudinot — Wm. Paterson — Ezekiel Gilbert — and Cornelius I. Bogart Esq.r are severally sworn as the Law directs: and are admitted as Counsellors of this Court

Edwards Livingston and Jacob Morton Esqrs
are severally sworn according to Law, and admitted
Attornies of this Court —

Adjourned to Feby. 10th 1790 —

Wednesday Feby. 10th 1790

Present

The Hon^ble John Jay Esq^r Chief Justice
William Cushing
James Wilson and
John Blair Esq^r Associate Justices

Proclamation is made and the Court is opened —

Bartholom^w De Haart — John Keep — Peter
Masterton, and Wm Willcocks Esq^rs are now severally sworn as the Law directs, and are admitted
Attornies of this Court —

New York Feby. 10th 1790 — Previous Proclamation being made this Court is adjourned to the time
and place appointed by Law

Ja. Tucker Clerk

Thus it will be seen that the court was actually organized on the first Tuesday of February in the year 1790. The Bar Association of the State of New York, the State in which the organization took place, took the lead in the measures adopted for a proper celebration of this important historical event, by the appointment of a committee, charged with making the preparations for it, and with superintending it. This committee consisted of the following gentlemen:

William H. Arnoux of New York, Chairman; Francis Lynde Stetson of New York, Treasurer; William B. Hornblower of New York, Secretary; Austin Abbott of New York; Robert C. Alexander of New York; Henry H. Anderson of New York; Arthur L. Andrews of Albany; William W. Astor of New York; Charles S. Baker of Rochester; Franklin Bartlett of New York; Tracy C. Becker of Buffalo; John N. Beckley of Rochester; Frederic H. Betts of New York; Robert D. Benedict of Brooklyn; Samuel Appleton Blatchford of New York; Charles J. Buchanan of Albany; John E. Burrill of New York; Charles Henry Butler of New York; William Allen Butler of New York; Michael H. Cardozo of New York; James C. Carter of New York; Howard C. Chipp, Jr., of Kingston; Joseph H. Choate of New York; A. T. Clearwater of Kingston; Grover Cleveland of New York; W. Bourke Cockran of New York; George F. Comstock of Syracuse; Martin W. Cooke of Rochester; Frederic R. Coudert of New York; Esek Cowen of Albany; Charles P. Daly of New York; Julien T. Davies of New York; Noah Davis of New York; Chauncey M. Depew of New York; William C. DeWitt of New York; John F. Dillon of New York; George M. Diven of Elmira; T. E. Ellsworth of Lockport; William Maxwell Evarts of New York; Thomas Ewing of New York; Charles S. Fairchild of New York; Enoch L. Fancher of New York; J. Sloat Fassett of Elmira; David Dudley Field of New York; J. Newton Fiero of Kingston; Robert L. Fowler of New York; Elbridge T. Gerry of New York; Jasper W. Gilbert of Brooklyn; John Gillette of Canandaigua; James F. Gluck of Buffalo; Robert S. Green of New York; Matthew Hale of Albany; M. H. Hirschberg of Newburgh; Frank Hiscock of Syracuse; George Hoadly of New York; Meyer S. Isaacs of New York; John Jay of Katonah; Francis Kernan of Utica; Sherman W. Knevals of New York; Jesse S. L'Amoreaux of Ballston Spa; Joseph Larocque of New York; Daniel Lockwood of Buffalo; Grosvenor P. Lowrey of New York; John J. McCook of New York; Isaac P. Martin of New

York; John G. Milburn of Buffalo; William Mitchell of New York; Levi P. Morton of New York; E. H. Movius of Buffalo; Stephen P. Nash of New York; Homer A. Nelson of Poughkeepsie; William S. Opdyke of New York; R. A. Parmenter of Troy; John E. Parsons of New York; Charles E. Patterson of Troy; Charles A. Peabody of New York; Fletcher C. Peck of Nunda; Edwards Pierrepont of New York; L. B. Proctor of Albany; Orlando B. Potter of New York; William A. Poucher of Oswego; William H. Robertson of Katonah; Sherman S. Rogers of Buffalo; Daniel G. Rollins of New York; Elihu Root of New York; Simon W. Rosendale of Albany; Horace Russell of New York; Leslie W. Russell of New York; Augustus Schoonmaker of Kingston; Robert Sewell of New York; Elliott F. Shepard of New York; Charles F. Tabor of Albany; Benjamin F. Tracy of Brooklyn; Robert T. Turner of Elmira; A. V. W. Van Vechten of New York; John Van Voorhis of Rochester; John D. Wendell of Fort Plain; Zerah S. Westbrook of Amsterdam; Everett P. Wheeler of New York; William C. Whitney of New York; John Winslow of Brooklyn; and Stewart L. Woodford of Brooklyn.

The Bar Association of the city of New York appointed a coöperating committee consisting of the following members: Frederic R. Coudert, President of the Association; Clifford A. Hand; E. Ellery Anderson; Austen G. Fox; and William G. Wilson.

The American Bar Association appointed as a coöperating committee on its part: David Dudley Field of New York, Chairman; Lyman Trumbull of Illinois; Henry Hitchcock of Missouri; J. Randolph Tucker of Virginia; Thomas J. Semmes of Louisiana; William C. Endicott of Massachusetts; Edward J. Phelps of Vermont; Cortlandt Parker of New Jersey; Henry Wise Garnett of the District of Columbia; Francis Rawle of Pennsylvania; and Charles Henry Butler of New York, Secretary.

It was determined that the celebration should take place in the city of New York on Tuesday the 4th of February, 1890, being the first Tuesday in the month; and that it should consist of two parts: the first, Commemorative Literary Exercises, to take place at the Metropolitan Opera House, on the morning of that day; and the second a Banquet at the Lenox Lyceum on the evening of that day. The following sub-committees were appointed to carry out this plan:

Executive Committee. — Grover Cleveland, Chairman; Chauncey M. Depew, David Dudley Field, John F. Dillon, Francis Lynde Stetson, Robert Ludlow Fowler, Charles P. Daly. *Ex-officio*, William H. Arnoux, William B. Hornblower, Orlando B. Potter, Joseph Larocque, Robert Sewell, James C. Carter.

Committee on Finance. — Orlando B. Potter, Chairman; Elliott F. Shepard, Elbridge T. Gerry, Julien T. Davies, Noah Davis, Edwards Pierrepont, Robert D. Benedict, Horace Russell, John G. Milburn. *Ex-officio*, William H. Arnoux, William B. Hornblower, Francis Lynde Stetson.

Committee on Invitations. — Joseph Larocque, Chairman; A. V. W. Van Vechten, A. T. Clearwater, Daniel G. Rollins, Elihu Root. *Ex-officio*, William H. Arnoux, William B. Hornblower.

Committee on Commemorative Exercises. — Robert Sewell, Chairman; Thomas Ewing, Frederic R. Coudert, George Hoadly, John Winslow. *Ex-officio*, William H. Arnoux, William B. Hornblower.

Sub-Committee on Transportation. — Robert Ludlow Fowler, Chairman; Chauncey M. Depew.

Committee on Entertainments and Receptions. — James C. Carter, Chairman; Joseph H. Choate, Matthew Hale, Martin W. Cooke, John Van Voorhis, William H. Robertson, William M. Evarts, Frank Hiscock, Stewart L. Woodford, Everett P. Wheeler, William S. Opdyke, J. Sloat Fassett, M. H. Hirschberg, George M. Diven, E. L. Fancher. *Ex-officio*, William H. Arnoux, Chairman Judiciary Centennial Committee; William B. Hornblower, Secretary Judiciary Centennial Committee; Frederic R. Coudert, President of the Bar Association of the city of New York; Clifford A. Hand, E. Ellery Anderson, Austen G. Fox, William G. Wilson, Committee of the Bar Association of the city of New York; Charles Henry Butler, Secretary American Bar Association Committee.

Sub-Committee on the Reception and Entertainment of Invited Guests. — Julien T. Davies, Chairman; William Mitchell, Frederic H. Betts, Robert C. Alexander, Secretary.

Sub-Committee on Toasts. — Stewart L. Woodford, Chairman; Martin W. Cooke, George M. Diven, Clifford A. Hand, Austen G. Fox, James C. Carter.

Sub-Committee on the Banquet. — William S. Opdyke, Chairman; Samuel A. Blatchford, Charles Henry Butler.

I.

COMMEMORATIVE LITERARY EXERCISES AT THE METROPOLITAN OPERA HOUSE.

Before half-past ten in the morning, the hour set for the commencement of the exercises, the vast auditorium of the house was well filled — orchestra seats, boxes and galleries. At the appointed time the committees, with their guests, entered the hall in procession, the grand symphony orchestra playing Meyerbeer's "Coronation March." They proceeded down the aisle, through the audience, to the stage, in the following order:

The Chairman of the Executive Committee; the Chairman of the Committee of One Hundred; the Chief Justice of the Supreme Court of the United States; the Associate Justices and ex-Justice of the Supreme Court of the United States in order of seniority, walking in pairs; the Clerk and the Marshal of the Supreme Court of the United States; the President of the Bar Association of the city of New York; the Chairman of the Committee of the American Bar Association; the Senators and ex-Senators of the United States; members of the Judiciary Committee of the House of Representatives of the United States; the President *pro tem.* of the Senate of the State of New York; the speakers of the day; the Chairmen of the Committees on Commemorative Exercises and on Entertainments and Receptions; the Chairmen of the Committees on Invitations and on Finance; the Secretary and the Treasurer of the Committee of One Hundred; the Chief Judge of the Court of Appeals of the State of New York, First Division, and the Associate Judges and ex-Judge in order of seniority; the Chief Judge of the Court of Appeals of the State of New York, Second Division, and the Associate Judges in order of seniority; the Clerk of the Court of Appeals of the State of New York; the United States Circuit Judges and ex-Circuit Judges; the United States District Judges and ex-District Judges; the Judges of the highest Appellate Court of each State, the States ranking alphabetically, and the Chief Judge and Associate Judges of each court walking in pairs, and the Associate Judges in order of seniority; the Presiding Justices of the Supreme Court of the

State of New York; the Chief Judges of the Superior Court and Court of Common Pleas of the city of New York; the Justices of the Supreme Court of the State of New York; the Judges of the superior City Courts of the State of New York; other invited guests; members of the Committee of One Hundred; and last, members of the Reception Committee.

Mr. Grover Cleveland, as Chairman of the Executive Committee, took the chair.

On the right of Mr. Cleveland were Chief Justice Fuller, and Associate Justices Miller, Field, Bradley, Harlan, Gray, Blatchford, Lamar and Brewer. Mr. Justice Strong, retired, sat next them. Immediately behind the Justices of the Supreme Court, were the Rev. Dr. Dix, Chief Judge William C. Ruger of the Court of Appeals of New York, and Associate Judges Andrews, Peckham, Earl, Finch, Gray and O'Brien, with ex-Judge Danforth of the same court.

On the left of Mr. Cleveland were William H. Arnoux, F. R. Coudert, and the following Judges of the United States Circuit and District Courts: Le Baron B. Colt, Circuit Judge of the First Circuit; Nathan Webb, District of Maine; William J. Wallace and E. Henry Lacombe, Circuit Judges of the Second Circuit; Nathaniel Shipman, District of Connecticut; Addison Brown, Southern District of New York; Charles L. Benedict, Eastern District of New York; Leonard E. Wales, District of Delaware; Edward T. Green, District of New Jersey; William Butler, Eastern District of Pennsylvania; R. W. Hughes, Eastern District of Virginia; John Paul, Western District of Virginia; Robert A. Hill, Districts of Mississippi; J. G. Jenkins, Eastern District of Wisconsin; Moses Hallett, District of Colorado; and Amos M. Thayer, Eastern District of Missouri.

The names of the others seated on the stage were: George W. Stone, Chief Justice of the Supreme Court of Alabama; Charles B. Andrews, Chief Justice of the Supreme Court of Connecticut; Dwight Loomis, Associate Justice of the Supreme Court of Connecticut; Joseph P. Comegys, Chief Justice of the Supreme Court of Delaware; Ignatius C. Grubb and John W. Houston, Associate Justices of the Supreme Court of Delaware; John W. Champlin, Chief Justice of the Supreme Court of Michigan; Alexander T. McGill, Chancellor of New Jersey; Manning W. Knapp, Jonathan Dixon, Charles C. Garrison and Abraham C. Smith, Judges of the Court of Errors and Appeals of New Jersey; David L. Follett, Chief Judge, Second Division of the Court of Appeals of New York; George B. Bradley, Joseph Potter, Irving G. Vann, Albert Haight

and Alton B. Parker, Associate Judges, Second Division of the Court of Appeals of New York; Guy C. H. Corliss, Chief Justice of the Supreme Court of North Dakota; John H. Stiness, Associate Justice of the Supreme Court of Rhode Island; Lunsford L. Lewis, President of the Supreme Court of Appeals, Virginia; J. Sloat Fassett, President *pro tem.* of the Senate of the State of New York; Alfred C. Chapin, Mayor of the city of Brooklyn; Seth Low, President of Columbia College; A. S. Webb, President of the College of the City of New York; Rev. Talbot W. Chambers, Pastor of the Collegiate Reformed Dutch Church of the city of New York; Thomas F. Bayard of Delaware; John A. King, President of the New York Historical Society; Wayne McVeagh of Philadelphia; General William T. Sherman, U. S. A.

Mr. Cleveland, who was introduced by Mr. Coudert as the Chairman of the day's proceedings, then made the introductory address.

When this was concluded the Reverend Morgan Dix, D.D., D.C.L., Rector of Trinity Church, New York, offered appropriate prayers, from the Prayer Book of the Protestant Episcopal Church.

Mr. William H. Arnoux, Chairman of the Judiciary Centennial Committee of the New York State Bar Association, next made the "Address of Welcome to the Court" speaking "in behalf of those who are here assembled, representing the executive and legislative departments of the government, national and state, the bench and the bar of the Federal and State courts, whose selected delegates have gathered here from Maine to California, and the people of the United States, the freest and the happiest in the world."

Mr. William Allen Butler, LL.D., of New York then made an address upon "The Origin of the Supreme Court of the United States, and its place in the Constitution"; at the close of which the orchestra gave a selection from Verdi's "Aida."

Mr. Henry Hitchcock of Missouri then made an address upon "The Supreme Court and the Constitution."

Mr. Thomas J. Semmes of Louisiana followed in an address upon the "Personal Characters of the Chief Justices."

An intermission of ten minutes was then taken, and the orchestra played the *entr'acte* of Gounod's "La Colombe."

Mr. Edward J. Phelps of Vermont then made an address upon "The Supreme Court and the Sovereignty of the People."

Mr. Chief Justice Fuller made the following remarks in acknowledgment, and in presenting Mr. Justice Field:

REMARKS OF CHIEF JUSTICE FULLER.

Mr. Chairman: I rise to express to the New York State Bar Association and to those who have coöperated with it, on behalf of the Supreme Court of the United States, the appreciation of its members of the admirable manner in which the centennial anniversary of the organization of the judicial department of the general government is being celebrated, and their sense of the cordial hospitality with which they have been welcomed to the metropolitan city, where the first session of the court was held. Their acknowledgments are due for the terms in which that welcome has been extended during these exercises, and for the discriminating and eloquent addresses in historical and biographical review of the court, and in exposition of its powers, the ends which it secures, and the vital functions which it exercises in the masterly constitutional scheme devised to perpetuate popular government — addresses worthy of the eminent men who have pronounced them, leaders in that great fraternity whence the membership of courts is derived, and upon whose assistance and support all courts rely.

But it is not for me, while tendering these acknowledgments, to enter upon these comprehensive reflections suggested by the occasion, and which should find expression on our part. That grateful duty appropriately devolves upon one of those veteran jurists, the fruitful labors of whose many years have imparted imperishable fame to the tribunal and themselves. Three of them, still shining in use, find work of noble note may yet be done in the cause to which their lives have been dedicated; while another, the recipient of the liveliest attachment on the part of his brethren and of the people he has served so well, maintains, in his well-earned retirement, a never-ceasing interest in the exalted administration of justice.

And I deem it a peculiar felicity that at a celebration conducted under the auspices of the bar of the State of New York — that bar which has given to the Supreme Bench a Jay,

a Livingston, a Thompson, a Nelson and a Hunt, and whose Blatchford continues most worthily to adorn it — I am enabled to introduce, as the representative of the court, a member of the same bar, who has reflected so much credit upon its training in more than thirty years of distinguished judicial service, Mr. Justice Field of California.

ADDRESS OF MR. JUSTICE FIELD.

Mr. President and Gentlemen:

As the Chief Justice of the United States has been pleased to refer to my former connection with the bar of this State and city, I beg to say that I still claim, with pride, membership there, and trust that the claim will be allowed. Although I remained in this city but a few years, swept away by the current which set, in 1849, for the Eldorado of the West, dreaming that I might perhaps in some way aid in laying the foundations of that great Commonwealth, which every one saw was to arise on the Pacific, I carried with me, and still retain, pleasant recollections of the learned bar of that period, and of its great lawyers, to whom I looked up with admiration: George Wood, George Griffin, Daniel Lord, Francis B. Cutting, Benjamin F. Butler, John Duer, Charles O'Conor, James W. Gerard, James T. Brady and others — names never spoken of throughout our land without profound respect. In my subsequent life, in the varied experiences with which it has been marked, and with the extended acquaintance I have had with the legal profession, I have always regarded them as among the ablest and most learned of great advocates.

The Chief Justice, in behalf of himself and his associates, has expressed in fitting terms their high appreciation of the courtesy extended to them by the Association of the Bar of the State of New York, the remembrance of which they will carry through life. He has also expressed the pleasure which they have felt, in common with all here present, in listening to the addresses made upon the organization of the Supreme

Court, and its place in the constitutional system of the United States, and upon the lives and careers of the justices who, by their expositions of the Constitution and their maintenance of its principles, have shed lustre upon that tribunal. But far beyond these eloquent discourses, and beyond the power of expression in words, is the eulogium presented by this vast assembly, — composed of great lawyers, eminent judges, and men distinguished in different departments of life for their honorable public services, — gathered from all parts of our country, to celebrate the centennial anniversary of the court's organization, and to listen to the story of its labors during the hundred years of its existence — an assembly presided over by one who has held the high office of President of the United States.

In every age and with every people there have been celebrations for triumphs in war — for battles won on land and on sea — and for triumphs of peace, such as the opening of new avenues of commerce, the discovery of new fields of industry and prosperity, the construction of stately temples and monuments, or grand edifices for the arts and sciences, and for the still nobler institutions of charity.

But never until now has there been in any country a celebration like this, to commemorate the establishment of a judicial tribunal as a coördinate and permanent branch of its government. The unobtrusive labors of such a department, the simplicity of its proceedings, unaccompanied by pomp or retinue, and the small number of persons composing it, have caused it to escape rather than to attract popular attention and applause.

This celebration had its inspiration in a profound reverence for the Constitution of the United States as the sure and only means of preserving the Union, with its inestimable blessings, and the conviction that this tribunal has materially contributed to its just appreciation and to a ready obedience to its authority. For that Constitution the deepest reverence may well be entertained. Its adoption was essential to that dual government by which alone free institutions can be maintained in a country so widely extended as ours, embracing every variety of climate, furnishing different products, supporting

different industries, and having in different sections people of different habits and pursuits, and in many cases of different religious faiths.

Of this complex government — of its origin and operation — I may be pardoned if I say a few words, before speaking of its judicial department and of the peculiar functions which distinguish it from the judicial departments of all other countries, and before speaking of the necessity of legislation, that its tribunal of last resort may be as useful in the future as we believe it has been in the past.

Experience has shown that in a country of great territorial extent and varied interests, peace and lasting prosperity can exist with a civilized people only when local affairs are controlled by local authority, and, at the same time, there are lodged in the general government of the country such sovereign powers, as will enable it to regulate the intercourse of its people with foreign nations and between the several communities, protect them in all their rights in such intercourse, defend the country against invasion and domestic violence, and maintain the supremacy of the laws throughout its whole domain. This principle the framers of the Constitution acted upon in establishing the government of the Union, by leaving unimpaired the power of the States to control all matters of local interest, and creating a new government of sovereign powers for matters of general and national concern. They thus succeeded in reconciling local self-government — or home-rule, as it is termed — with the exercise of national sovereignty for national purposes. Under this dual government each State may pursue the policy best suited to its people and resources, though unlike that of another State. And yet there can be no violent conflicts so long as the central government exercises its rightful power, and secures them against foreign invasion and internal violence, and extends to the citizens of each State protection in the others. The adaptation of this form of government for a far more extended territory than that existing at its adoption, has been demonstrated by the addition to the Union of new States with interests and resources in many respects essentially different from those of the original States, but which, from experience of its benefits and their instinctive

yearning for nationality, have formed a like attachment to the Constitution.

The prosperity which has followed this distribution of governmental powers not only attests the wisdom of the framers of the Constitution, but transcends even their highest expectations. In the history of no people — ancient or modern — has anything been known at all comparable with the progress of this country since that time in the development of its resources, in the addition to its material wealth, in its application of science to works of public utility, in the increase of its population and in the general contentment and happiness of its people. The predictions of the most enthusiastic as to its growth and prosperity never equalled the stupendous reality.

The Constitution of the United States, which, in ordaining this complex government, has been productive of such vast results, was the outgrowth of institutions and doctrines inherited from our ancestors and applied under the new conditions of our country. A distinguished English statesman has designated it as the most wonderful product struck off at a given time by the brain and purpose of man; but this designation is only true as to the character of the instrument. Though it received definite form from the labors of the Convention of 1787, it was, in its division of governmental powers into three departments, and in its guaranties of private rights, the product of centuries of experience in the government of England. It had its roots deep in the past, as all enduring institutions have. The colonists brought with them the great principles of civil liberty, which had been established there after many a conflict with the Crown, and which were proclaimed in Magna Charta and in the Declaration of Rights. Our country was in this respect the heir of all the ages. Not a blow was struck for liberty in the Old World that did not wake an echo in the forests of the New. Every vantage ground gained there on its behalf was courageously and stubbornly held here. Thus liberty, with all its priceless blessings, passed from country to country, from hemisphere to hemisphere, and from generation to generation. Claiming this inheritance, the Continental Congress, assembled in 1774 to provide measures to resist the encroachments of the British Crown, declared that the inhabitants

of the colonies were entitled, "by the immutable laws of nature, the principles of the English Constitution and their several charters, to all the rights, privileges and immunities of free and natural-born subjects within the realm of England." And when a subsequent Congress, in 1776, declared the independence of the colonies, it proclaimed that the rights of man to life, to liberty and to the pursuit of happiness — having then risen to a just appreciation of their true source — were held by him, not as a boon from king or parliament, or as the grant of any charter, but as the endowment of his Creator; also, that to secure these rights — not to grant them — governments are instituted among men, deriving their just powers from the consent of the governed. The different communities, which, by the separation from the mother country, had ceased to be colonies and had become States, when framing new constitutions to conform to their new conditions, inserted guaranties for the protection of these rights, with other provisions required for the government of free commonwealths.

It was foreseen, however, by members of the Continental Congress and by thoughtful patriots throughout the country, that when the independence of the colonies was recognized by the mother country, as sooner or later it must be, they would be at once surrounded by difficulties and dangers, threatening their peace and even their existence as independent communities. It was plain to them that, without some common protecting power, disputes from conflicting interests and rivalries, incident to all neighboring States, would arise between them, which would inevitably lead to armed conflicts and invite the interference of foreign powers, ending in their conquest and subjection; and that all that was gained by the experience of centuries and by the revolution on behalf of the rights of man and free government would be lost.

To provide against these apprehended dangers, a federation or league between the States was proposed as a measure of common defence and protection. Articles of Confederation were accordingly framed and submitted to the legislatures of the States, and finally adopted in 1781.

But, as we all know, these articles provided no mode of carrying into effect the measures of the Confederation, or

even the treaties made by it. They established no tribunal to construe its enactments and enforce their provisions. Its power was simply that of recommendation to the States, its framers appearing to have believed that the States had only to know what was necessary, in the judgment of Congress, for the general welfare, to provide adequate means for its accomplishment. A government which could only enforce its enactments upon the approval of thirteen distinct sovereignties necessarily contained within itself the seeds of its dissolution; it could not give the general protection needed. Having no power to exact obedience or to punish for disobedience to its advisory ordinances, its recommendations were disregarded not only by States but by individuals.

But though the government of the Confederation failed to accomplish the purpose of its creation, its experience was of inestimable value; it made clear to the whole country what was essential in a general government in order to give the needed security and protection, and thus prepared the way for the adoption of the Constitution of the United States. So out of the necessities of the times, to preserve whatever of freedom had been gained in the past, — gained after years of bitter experience, both in the mother country and in our own, — and to secure its full fruition in the future, that instrument was framed and adopted. By it the great defects of the Confederation were avoided, and a government created with ample powers to give to the States and to all their inhabitants the needed security — a government taking exclusive charge of our foreign relations, representing the people of all the States in that respect as one nation, with power to declare war, make peace, negotiate treaties and form alliances, and at the same time securing a republican government to each State and freedom of intercourse between the States, equality of privileges and immunities to citizens of each State in the several States, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the States and their people.

By the union of the States, which had its origin in the necessities of the war of the Revolution, which was declared in the Articles of Confederation to be perpetual, but which

was rendered perfect only under the Constitution, the political body known as the United States was created and took its place in the family of nations. With that union the States became, in their relations to foreign countries and their citizens or subjects, one nation, and their people became one people, with a government designed to be perpetual. A dissolution of the Union would, indeed, remit the States to their original position of separate communities, and the United States ceasing to be a political body would pass from the family of nations. But such a possibility was never considered by the framers of the Constitution; no provisions are found within it contemplating such a result. As aptly stated by Chief Justice Chase, "the Constitution in all its provisions looks to an indestructible Union composed of indestructible States." Its government was clothed with the means to give effect to all its measures, which none have been able during the century of its existence successfully to resist. In the late civil war its strength was subjected to the severest test. But notwithstanding the immense forces wielded by the Confederate States, the extent of territory they controlled, and the vast numbers which recognized their authority, the government of the Union never for one hour renounced its claim to supreme authority over the whole country, and to the allegiance of every citizen thereof. And when the contest ended — a contest which was the most tremendous and awful civil war known in history, though made resplendent with unprecedented acts of heroic courage on both sides — the armies of the Confederate States were scattered, and their whole government overthrown. Whilst the fiery courage and the martial spirit of their people extorted our admiration, — we are all of the same warrior race, — their attempts to break the Union only disclosed the immovable solidity of its foundations and the massive strength of its superstructure. It was the dash of the tempestuous waves against the eternal rock. And, now, in all its wide domain, in respect to every right secured by the Constitution, no citizen of the Republic is beyond its power or so humble as to be beneath its protection. We can now confidently look forward to the time when the country will embrace hundreds of millions of people, and are justified in

believing that the States will be united then, as now, by kindred sentiments, and common pride in the greatness and the glory of the country. We have an abiding faith that when we shall have surpassed — as we are destined to do — in the vastness of our empire, as in the civilization and wealth of our people, ancient Rome in her greatest days, we shall continue to be, for all national purposes, as now, one nation, one people, one power.

The crowning defect in the government under the Articles of Confederation was the absence of any judicial power; it had no tribunal to expound and enforce its laws.

In no one particular was the difference between that government and the one which superseded it more marked than in its judicial department. The Constitution declares not only in what courts the judicial power of the United States shall be vested, but to what subjects it shall extend. It is vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, and it extends not only to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects; but also to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made under their authority. Cases are considered as arising under the Constitution, laws, and treaties of the United States, whenever any question respecting that Constitution and those laws or treaties is presented in such form that the judicial power can act upon it — that is to say, when a right or claim is asserted for the maintenance of which a construction of that Constitution, or of a law or a treaty of the United States, is required.

No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising upon its constitution and laws.

The judicial department established under the Constitution is thus coextensive; it reaches to every judicial question which arises under the Constitution, treaties, and laws of the United States. It has devolved upon it, when such a question arises, beyond the ordinary functions of a judicial department under a single, as distinguished from a dual, government, the duty of determining whether the delegation of powers to Congress on the one hand, or the reservation of powers to the States on the other, is passed by either, and thus of preventing jarring conflicts. And in two particulars it is distinguished from the judicial department of any other country; one, in that it can summon before it the States of the Union, and adjust controversies between them, going even to the extent of determining disputes as to their boundaries, rights of soil and jurisdiction; the other, in that it can determine the validity or invalidity of an act of Congress or of the States, when the validity of either is assailed in litigation before it.

Controversies between different states of the world respecting their boundaries, rights of soil and jurisdiction have been the fruitful source of irritation between their people, and not unfrequently of bloody conflicts. The history of many of the principalities of Germany in the fifteenth century is a history of desolating wars over disputed boundaries. The license, disorders and crimes usually attendant upon border warfare were the cause of widespread misery, until the establishment under Maximilian of an imperial chamber for the settlement of such controversies, which brought out of chaos order and tranquillity in the German Empire.

Between the States in this country, under the Articles of Confederation, there were also numerous conflicts as to boundaries and consequent rights of soil and jurisdiction. They existed between Pennsylvania and Virginia; between Massachusetts and New Hampshire; and between Virginia and New Jersey. By the judicial article of the Constitution all such controversies are withdrawn from the arbitrament of war to the arbitrament of law. Thus, for the first time in the history of the world is the spectacle presented of a provision embodied in the fundamental law of a country, that controversies between States — still clothed for purposes of internal

government with the powers of independent communities — shall be submitted to the peaceful and orderly modes of judicial procedure for settlement — controversies which Lord Chancellor Hardwicke, in the case of *Penn* v. *Lord Baltimore*, said were worthy the judicature of a Roman senate rather than of a single judge.

The practical application of the power of the Supreme Court in this particular has been fruitful of happy results. In 1837 it settled a disputed boundary between Rhode Island and Massachusetts; in 1849 it brought to an adjustment the disputed line between Missouri and Iowa; and, in 1870, it settled the controversy between Virginia and West Virginia as to jurisdiction over two counties within the asserted boundaries of the latter. Certainly no provision of the Constitution can be mentioned, more honorable to the country or more expressive of its Christian civilization, than the one which provides that controversies of this character shall be thus peacefully settled. In determining them, the court is surrounded by no imperial guard; by no bands of janissaries; it has with it only the moral judgment and the invisible power of the people. Should the necessity arise, that invisible power would soon develop into a visible and irresistible force.

The power of the court to pass upon the conformity with the Constitution of an act of Congress, or of a State, and thus to declare its validity or invalidity, or limit its application, follows from the nature of the Constitution itself, as the supreme law of the land, — the separation of the three departments of government into legislative, executive and judicial — the order of the Constitution — each independent in its sphere, and the specific restraints upon the exercise of legislative powers contained in that instrument. In all other countries, except perhaps Canada under the government of the Dominion, the judgment of the legislature as to the compatibility of a law passed by it with the constitution of the country has been considered as superior to the judgment of the courts. But under the Constitution of the United States, the Supreme Court is independent of other departments in all judicial matters, and the compatibility between the Constitution and a statute, whether of Congress or of a State, is a judicial and not a

political question, and therefore is to be determined by the court whenever a litigant asserts a right or claim under the disputed act for judicial decision.

This power of that court is sometimes characterized by foreign writers and jurists as a unique provision of a disturbing and dangerous character, tending to defeat the popular will as expressed by the legislature. In thus characterizing it they look at the power as one that may be exercised by way of supervision over the general legislation of Congress, determining the validity of an enactment in advance of its being contested. But a declaration of the unconstitutionality of an act of Congress or of the States cannot be made in that way by the judicial department. The unconstitutionality of an act cannot be pronounced except as required for the determination of contested litigation. No such authority as supposed would be tolerated in this country. It would make the Supreme Court a third house of Congress, and its conclusions would be subject to all the infirmities of general legislation.

The limitations upon legislative power, arising from the nature of the Constitution and its specific restraints in favor of private rights, cannot be disregarded without conceding that the legislature can change at will the form of our government from one of limited to one of unlimited powers. Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the Constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State. Otherwise the limitations upon legislative power expressed in the Constitution or implied by it must be considered as vain attempts to control a power which is in its nature uncontrollable.

This unique power, as it is termed, is therefore not only not a disturbing or dangerous force, but is a necessary consequence of our form of government. Its exercise is necessary to keep the administration of the government, both of the United States and of the States, in all their branches, within the limits assigned to them by the Constitution of the United States, and thus secure justice to the people against the unrestrained legis-

lative will of either — the reign of law against the sway of arbitrary power.

As to the decisions of the Supreme Court respecting the constitutionality of acts of Congress or of the States, they have, as a general rule, been recognized as furthering the great purposes of the Constitution, — as where, in *Gibbons* v. *Ogden*, the court declared the freedom of the navigable waters of New York to all vessels, against a claim of an exclusive right to navigate them by steam vessels under a grant of the State to particular individuals — or where, as in *Dartmouth College* v. *Woodward*, the court enforced the prohibition of the Constitution against the impairment by the legislation of a State of the obligation of a contract, declaring void an act of New Hampshire which altered the charter of the college in essential particulars, and holding that the charter granted to the trustees of the college was a contract within the meaning of the Constitution and protected by it, and that the college was a private charitable institution — not under the control of the legislature; — or where, as in *Brown* v. *Maryland*, the court declared that commerce with foreign nations could not, under a law of the State, be burdened with a tax upon goods imported, before they were broken in bulk, though the tax was imposed in the form of a license to sell; — or where, as in *Weston* v. *Charleston*, the court declared that the bonds and securities of the United States could not be subjected to taxation by the States, and thus the credit of the United States be impaired; — or where, as in *McCulloch* v. *Maryland*, and *Osborn* v. *Bank of the United States*, the court denied the authority of the States, by taxation or otherwise, to impede, burden, or in any manner control the means or measures adopted by the government for the execution of its powers; — or where, as in *Hall* v. *DeCuir*, *The Wabash Railway Co.* v. *Illinois*, *The Philadelphia and Southern Steamship Co.* v. *Pennsylvania*, and other cases determined in the last quarter of a century, the court has removed barriers to interstate and foreign commerce interposed by state legislation.

And so, in the great majority of cases in which the validity of an act of Congress or of a State has been called in question, its decisions have been in the same direction, to uphold and

carry out the provisions of the Constitution. In some instances the court, in the exercise of its powers in this respect, may have made mistakes. The judges would be more than human if this were not so. They have never claimed infallibility; they have often differed among themselves. All they have ever asserted is, that they have striven to the utmost of their abilities to be right, and to perform the functions with which they are clothed, to the advancement of justice and the good of the country.

In respect to their liability to err in their conclusions this may be said — that in addition to the desire which must be ascribed to them to be just — the conditions under which they perform their duties, the publicity of their proceedings, the discussions before them, and the public attention which is drawn to all decisions of general interest, tend to prevent any grave departure from the purposes of the Constitution. And, further, there is this corrective of error in every such departure; it will not fit harmoniously with other rulings; it will collide with them, and thus compel explanations and qualifications until the error is eliminated. Like all other error it is bound to die; truth alone is immortal, and in the end will assert its rightful supremacy.

And now, with its history in the century past, what is needed, that the Supreme Court of the United States should sustain its character and be as useful in the century to come? I answer, as a matter of the first consideration, — that it should not be overborne with work, and by that I mean it should have some relief from the immense burden now cast upon it. This can only be done by legislative action, and in determining what measures shall be adopted for that purpose Congress will undoubtedly receive with favor suggestions from the bar associations of the country. The justices already do all in their power, for each one examines every case and passes his individual judgment upon it. No case in the Supreme Court is ever referred to any one justice, or to several of the justices, to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every justice upon his case.

In considering this matter it must be borne in mind that, in

addition to the great increase in the number of admiralty and maritime cases, from the enlarged commerce on the seas, and on the navigable waters of the United States, and in the number of patent cases, from the multitude of inventions brought forth by the genius of our people, calling for judicial determination, even to the extent of occupying a large portion of the time of the court, many causes, which did not exist upon its organization or during the first quarter of the century, have added enormously to its business. Thus by the new agencies of steam and electricity in the movement of machinery and transmission of intelligence, creating railways and steamboats, telegraphs and telephones, and adding almost without number to establishments for the manufacture of fabrics, transactions are carried on to an infinitely greater extent than before between different States, leading to innumerable controversies between their citizens, which have found their way to that tribunal for decision. More than one-half of the business before it for years has arisen from such controversies.

The facility with which corporations can now be formed has also increased its business far beyond what it was in the early part of the century. Nearly all enterprises requiring for their successful prosecution large investments of capital are conducted by corporations. They, in fact, embrace every branch of industry, and the wealth that they hold in the United States equals in value four-fifths of the entire property of the country. They carry on business with the citizens of every State as well as with foreign nations, and the litigation arising out of their transactions is enormous, giving rise to every possible question to which the jurisdiction of the federal courts extends.

The numerous grants of the public domain, embracing hundreds of millions of acres, in aid of the construction of railways; also for common schools, for public buildings and institutions of learning, have produced a great variety of questions of much intricacy and difficulty. The discovery of mines of the precious metals, in our new possessions on the Pacific Coast, and the modes adopted for their development, have added many more. The legislation required by the exigencies of the civil war, and following it, and the constitutional amendments which

were designed to give farther security to personal rights, have brought before the court questions of the greatest interest and importance, calling for the most earnest and laborious consideration. Indeed, the cases which have come before this court, springing from causes which did not exist during the first quarter of the century, exceed, in the magnitude of the property interests involved, and in the importance of the public questions presented, all cases brought within the same period before any court of Christendom.

Whilst the constitutional amendments have not changed the structure of our dual form of government, but are additions to the previous amendments, and are to be considered in connection with them and the original Constitution as one instrument, they have removed from existence an institution which was felt by wise statesmen to be inconsistent with the great declarations of right upon which our government is founded; and they have vastly enlarged the subjects of federal jurisdiction. The amendment declaring that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist in the United States or any place subject to their jurisdiction, not only has done away with the slavery of the black man, as it then existed, but interdicts forever the slavery of any man, and not only slavery, but involuntary servitude — that is, serfage, vassalage, villeinage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. As has often been said, it was intended to make every one born in this country a free man and to give him a right to pursue the ordinary vocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. The right to labor as he may think proper without injury to others is an element of that freedom which is his birthright.

The amendment, declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws, has proclaimed that equality before the law shall forever be the governing rule of all the States of the Union,

which every person however humble may invoke for his protection. In enforcing these provisions, or considering the laws adopted for their enforcement, or laws which are supposed to be in conflict with them, difficult and far-reaching questions are presented at every term for decision.

Up to the middle of the present century the calendar of the court did not average one hundred and forty cases a term, and never amounted at any one term to three hundred cases; the calendar of the present term exceeds fifteen hundred. In view of the condition of the court — its crowded docket — the multitude of questions constantly brought before it of the greatest and most extended influence — surely it has a right to call upon the country to give it assistance and relief. Something must be done in that direction and should be done speedily to prevent the delays to suitors now existing. To delay justice is as pernicious as to deny it. One of the most precious articles of Magna Charta was that in which the king declared that he would not deny nor *delay* to any man justice or right. And assuredly what the barons of England wrung from their monarch, the people of the United States will not refuse to any suitor for justice in their tribunals.

Furthermore, I hardly need say, that, to retain the respect and confidence conceded in the past, the court, whilst cautiously abstaining from assuming powers granted by the Constitution to other departments of the government, must unhesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the Constitution upon the federal and state governments, but also all the guaranties it contains of the private rights of the citizen, both of person and of property. As population and wealth increase — as the inequalities in the conditions of men become more and more marked and disturbing — as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means — as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations — it becomes more and more the imperative duty of the

court to enforce with a firm hand all the guaranties of the Constitution. Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.

That the Justices of the Supreme Court must possess the ability and learning required by the duties of their office, and a character for purity and integrity beyond reproach, need not be said. But it is not sufficient for the performance of his judicial duty that a judge should act honestly in all that he does. He must be ready to act in all cases presented for his judicial determination with absolute fearlessness. Timidity, hesitation and cowardice in any public officer excite and deserve only contempt, but infinitely more in a judge than in any other, because he is appointed to discharge a public trust of the most sacred character. To decide against his conviction of the law or judgment as to the evidence, whether moved by prejudice, or passion, or the clamor of the crowd, is to assent to a robbery as infamous in morals and as deserving of punishment as that of the highwayman or the burglar; and to hesitate or refuse to act when duty calls is hardly less the subject of just reproach. If he is influenced by apprehensions that his character will be attacked, or his motives impugned, or that his judgment will be attributed to the influence of particular classes, cliques or associations, rather than to his own convictions of the law, he will fail lamentably in his high office.

To the intelligent and learned bar of the country the judges must look for their most effective and substantial support. Its members appreciate more than any other class the difficulties and labors and responsibilities of the judicial office; and whilst the most severe and unsparing of critics, they are in the end the most just in their judgments. If they entertain for the judges respect and confidence, if they accord to them learning, integrity and courage, the general public

will not be slow in accepting their appreciation as the true estimate of the judges' character. Sustained by this professional and public confidence, the Supreme Court may hope to still further strengthen the hearts of all in love, admiration and reverence for the Constitution of the United States — the noblest inheritance ever possessed by a free people.

After the rendering of Gillett's "Lion de Bal" by the orchestra, there was to have been "An Address by the President of the United States"; but it was omitted, as the President was detained in Washington by the afflicting calamity which had only the day before fallen upon the family of Mr. Tracy, the Secretary of the Navy,[1] who was himself one of the members of the Committee of the New York State Bar Association. Therefore, after the German Liederkranz Society had sung the Ave Maria; the National Hymn, "My Country, 'tis of Thee"; and a Doxology; the Reverend Doctor Talbot W. Chambers, of the Collegiate Reformed Dutch Church, pronounced a Benediction; and the audience dispersed, the orchestra playing Meyerbeer's "Fackeltanz, in B minor."

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[1] The Vice-President, the Attorney General, and the Reporter of the Court were detained in Washington by the same cause.

II.

THE BANQUET AT THE LENOX LYCEUM, MADISON AVENUE.

Over eight hundred persons sat down to dinner in the Lenox Lyceum, James C. Carter, Esq., of the Bar of the city of New York, presiding and acting as toastmaster.

Across one end of the hall, on a raised platform, in an arc of the Circular Hall, was the guests' table, in the centre of which, facing the audience, was Mr. Carter; and to the right and left of him sat twenty-four other guests, including the Justices of the Supreme Court. The other tables were ranged down the room, at right angles with the guests' table, and were lettered from A to N. Tables A and L, at the extreme left and right, seated each twenty-six persons. Table B, next A to the left, and Table K, next L to the right, each seated fifty persons, each being nearer the centre of the room, and gaining additional length from its circular shape. Tables C, D, E, F, G, H, I and J, situated between B and K, each seated seventy-four persons. Tables M and N were in the arc of the circle opposite the guests' table, and beyond the other tables, and seated eighteen persons each. In addition to these there was a table for the press, with accommodations for sixteen reporters. A plan of the room was given to each person. It showed the arrangements of the table, and the seat to be occupied by each person, and was accompanied by an alphabetical list, designating the table, and the number of the seat at it, assigned to each person; and it thus deprived even the most inveterate grumbler, if such is to be found in the ranks of the law, of the power of complaining that he could not find his place.

In addition to these plans, each person present was furnished with a sumptuously printed pamphlet entitled "Judicial Centennial Banquet given at the Lenox Lyceum, New York, February 4, 1890. — The New York State Bar Association, The American Bar Association, The Association of the Bar of the City of New York." This contained the plans already referred to, and also a list of the "Invited Guests," and another list, entitled "Members of the Associations," with the names of those who had signified an intention to be present. The reporter has necessarily been obliged to

depend upon these lists, supplemented by the personal recollections of some members of the executive committee. Although, in so large a company there may have been, and probably were, some who had intended to come, and who at the last moment stayed away; and others who also at the last moment embraced the opportunity of filling a vacated seat; yet, it is believed that the lists of committees, of invited guests and of members of the Associations present which are contained herein are substantially, if not entirely, accurate. Every name here given is to be found either among the invited guests, or among the members of the Associations, or on the plan of the seats at the tables.

At the table of the Presiding Officer were to have been seated the President, the Vice-President and the Attorney General, all of whom were, as has been said, detained in Washington. There were seated at this table the Chief Justice and Associate Justices of the Supreme Court; Mr. Justice Strong (retired); Mr. Grover Cleveland, Chairman of the Executive Committee; Mr. Matthew Hale of Albany, President of the New York State Bar Association; Mr. Henry Hitchcock of Missouri, President of the American Bar Association; Mr. Frederic R. Coudert of New York, President of the Association of the Bar of the city of New York; Mr. William H. Arnoux of New York city; Mr. Joseph H. Choate of the city of New York; Mr. Hugh J. Grant, Mayor of New York; Mr. William Maxwell Evarts, a Senator in Congress from the State of New York; Mr. Edward M. Paxson, Chief Justice of the Supreme Court of Pennsylvania; Mr. Walter B. Hill of Georgia; the Reverend Dr. William R. Huntington, Rector of Grace Church, New York City; Mr. Seth Low, President of Columbia College, New York; Mr. Chauncey M. Depew of New York; Mr. William Allen Butler of New York; and Mr. Thomas J. Semmes of Louisiana.

In addition to these there were present as guests, Mr. James H. McKenney, Clerk, and Mr. John M. Wright, Marshal, of the Supreme Court; Judge Le Baron B. Colt of the First Circuit, Judge Émile Henry Lacombe of the Second Circuit and Judge Hugh L. Bond of the Fourth Circuit, United States Circuit Judges; Judges Nathan Webb of Maine, Hoyt H. Wheeler of Vermont, Nathaniel Shipman of Connecticut, Charles L. Benedict of the Eastern District of New York, Edward T. Green of New Jersey, Leonard E. Wales of Delaware, William Butler of the Eastern District of Pennsylvania, Robert W. Hughes of the Eastern District of Virginia, John Paul of the Western District of Virginia, Robert A. Hill of the Districts of Mississippi, Henry B. Brown of

the Eastern District of Michigan, J. G. Jenkins of the Eastern District of Wisconsin, Moses Hallett of Colorado and Amos M. Thayer of the Eastern District of Missouri, Judges of United States District Courts; Chief Justice William A. Richardson and Judge Lawrence Weldon of the Court of Claims; and of the Judiciary Committees of Congress, Mr. Evarts on the part of the Senate, already named, and Mr. Stewart of Vermont, Mr. Adams of Illinois, Mr. McCormick of Pennsylvania, Mr. Sherman of New York and Mr. Buchanan of New Jersey, on the part of the House of Representatives.

There were also present the following members of the Highest Appellate and other State Courts, viz.: From *Alabama*, Chief Justice Stone and Associate Justice McClellan; *California*, E. W. McKinsbury, formerly Associate Justice of the Supreme Court, and representing the court; *Connecticut*, Chief Justice Andrews and Associate Justices Carpenter and Loomis; *Delaware*, Chief Justice Comegys and Associate Justices Grubb and Houston; *Louisiana*, Charles E. Fenner, Associate Justice of the Supreme Court; *Maine*, Thomas H. Haskell and Lucilius A. Emery, Associate Justices of the Supreme Judicial Court of that State; *Michigan*, John W. Champlin, Chief Justice of the Supreme Court, and Charles D. Long, Associate Justice; *New Jersey*, Alexander T. McGill, Chancellor of the State, and Manning W. Knapp, Jonathan Dixon and Charles G. Garrison, Judges of the Supreme Court, and Abraham C. Smith, Judge of the Court of Errors and Appeals; *New York*, William C. Ruger, Chief Judge of the Court of Appeals, and Charles Andrews, Rufus W. Peckham, Robert Earl, Francis M. Finch, John C. Gray and Denis O'Brien, Associate Judges; David L. Follett, Chief Judge of the Second Division of the Court of Appeals, and George B. Bradley, Joseph Potter, Irving G. Vaun and Alton B. Parker, Associate Judges of the Second Division of the Court of Appeals and Gorham Parks, Clerk of the Court of Appeals; George C. Barrett, John R. Brady, Charles Daniels, Willard Bartlett, Abraham R. Lawrence and George P. Andrews, Justices of the Supreme Court of the State of New York; Frederick Smyth, Recorder of the city of New York; John Sedgwick, Chief Judge of the Superior Court of the city of New York, and George L. Ingraham, John J. Freedman, Richard O'Gorman, Charles H. Traux and P. Henry Dugro, Judges of that court; Richard L. Larremore, Chief Judge of the Court of Common Pleas of the city of New York, and Joseph F. Daly, Henry Wilder Allen and Henry W. Bookstaver, Judges of that court; *North Dakota*, Guy C. H.

Corliss, Chief Justice of the Supreme Court; *Pennsylvania*, James P. Sterrett, Henry Green, Silas M. Clark, Henry W. Williams and James T. Mitchell, Associate Justices of the Supreme Court; *Rhode Island*, Thomas Durfee, Chief Justice of the Supreme Court, and Pardon E. Tillinghast and John H. Stiness, Associate Justices of that court; *Tennessee*, Horace H. Lurton, Associate Justice of the Supreme Court; *Virginia*, Lunsford L. Lewis, President of the Court of Appeals.

There were also present, as guests: J. Sloat Fassett, President *pro tem.* of the Senate of the State of New York; W. T. Davis, Lieutenant Governor of Pennsylvania; Alfred C. Chapin, Mayor of the city of Brooklyn; A. S. Webb, President of the College of the City of New York; General William T. Sherman, U. S. A.; Right Reverend Henry C. Potter, D.D., LL.D., D.C.L., Bishop of New York; Reverend Morgan Dix, D.D., D.C.L., Rector of Trinity Church, New York; Reverend Talbot W. Chambers, Pastor of the Collegiate Reformed Dutch Church of the city of New York; Reverend W. M. Taylor, D.D., Pastor of Tabernacle Congregational Church, New York City; Reverend R. S. MacArthur, D.D., Pastor of Calvary Baptist Church, New York City; Reverend Henry Van Dyke, D.D., Pastor of Brick Presbyterian Church, New York City; Reverend George Alexander, D.D., Pastor of University Place Presbyterian Church; Archdeacon Alexander Mackay-Smith, D.D.; Thomas F. Bayard, ex-Secretary of State; George F. Danforth; John A. King, President of the New York Historical Society; Irving Browne, Editor *Albany Law Journal;* Patrick Mallon, President Cincinnati Bar Association; Elijah H. Norton, ex-Chief Justice of Missouri; John D. Crimmins of New York; James Legendre of New Orleans; Cyrus W. Field of New York; Professor Theodore W. Dwight of New York; Dr. Sieveking of Hamburg, Germany.

In addition to the twenty-four persons who sat at the chairman's table, and to the sixteen reporters who sat at the reporters' table, about eight hundred persons sat in the body of the hall.

Around the hall, from one end of the stage to the other, were two tiers of boxes. The lower tier was in part given up to the ladies accompanying the court and other guests. The boxes in the upper tier were taken by members of the bar associations.

The first toast of the evening was to "*The President*," to which it had been arranged that the President should respond. In his

absence the company drank the toast standing, and there was no reply.

To the second toast, "*The Supreme Court,*" Mr. Justice Harlan answered as follows:

ADDRESS OF MR. JUSTICE HARLAN.

IN RESPONSE TO THE TOAST, "THE SUPREME COURT OF THE UNITED STATES."

MR. PRESIDENT:

The toast you have read suggests many reflections of interest. But when an attempt is made to give shape to them, in my own mind, the fact confronts me that every line of thought most appropriate to this occasion has been covered by addresses delivered, in another place, by distinguished members of the bar, and by an eminent jurist responding on behalf of the Supreme Court of the United States. They have left nothing to be added respecting the organization, the history, the personnel, or the jurisdiction of that tribunal. It is well that those addresses are to be preserved in permanent form for the delight and instruction of all that are to come after us; especially those who, as judges and lawyers, will be connected with the administration of justice. I name the lawyers with the bench, because upon them, equally with the judges, rests the responsibility for an intelligent determination of causes in the courts, whether relating to public or to private rights. As the bench is recruited from the bar, it must always be that as are the lawyers in any given period, so, in the main, are the courts before which they appear. Upon the integrity, learning and courage of the bar largely depends the welfare of the country of which they are citizens; for, of all members of society, the lawyers are best qualified by education and training to devise the methods necessary to protect the rights of the people against the aggressions of power. But they are, also, in the best sense, ministers of justice. It is not true, as a famous lawyer once said, that an advocate, in the discharge of his duty, must know only his client. He owes a duty to the court of which he is an officer, and to the community of which he is a member. Above

all, he owes a duty to his own conscience. He misconceives his high calling if he fails to recognize the fact that fidelity to the court is not inconsistent with truth and honor, or with a fearless discharge of duty to his client. It need scarcely be said in this presence that the American Bar have met all the demands that the most scrupulous integrity has exacted from gentlemen in their position.

In the addresses to-day much was said of the Supreme Court of the United States that was gratifying as well to those now members of that tribunal as to all who take pride in its history. But, Mr. President, whatever of honor has come to that court for the manner in which it has discharged the momentous trust committed to it by the Constitution must be shared by the bar of America. "Justice, sir," (I use the words of Daniel Webster,) "is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society." The Temple of Justice which has been reared in this fair land is largely the work of our lawyers. If there be security for life, liberty and property, it is because the lawyers of America have not been unmindful of their obligations as ministers of justice. Search the history of every State in the Union, and it will be found that they have been foremost in all movements having for their object the maintenance of the law against violence and anarchy; the preservation of the just rights both of the government and of the people.

I read recently a brief speech by Mr. Gladstone, at a banquet given many years ago in honor of the great French advocate, Berryer. He had visited the south of Europe, and witnessed there much cruel oppression of the people. The executive power, he said, not only had broken the law, but had established in its place a system of arbitrary will. He found, to

use his own words, that the audacity of tyranny, which had put down chambers and municipalities and extinguished the press, had not been able to do one thing — to silence the bar. He, himself, heard lawyers in courts of justice, undismayed by the presence of soldiers, and in defiance of despotic power, defend the cause of the accused with a fearlessness that could not have been surpassed. He was moved, on that occasion, to say of the English Bar, what may be truly said of the American Bar, that its members are inseparable from our national life; from the security of our national institutions.

It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which may be said, what Mr. Justice Buller observed of certain judgments of Lord Mansfield, that they were of such transcendent power that those who heard them were lost in admiration "at the strength and stretch of the human understanding."

Mr. President, I am unwilling to pass from this subject without saying what it is but just to say, that the bar of this imperial State has furnished its quota — aye more than its quota, to the army of great lawyers and advocates, who, by their learning, eloquence and labors, have aided the courts of the Union, as well as those of the States, in placing our constitutional system upon foundations which, it is hoped, are to endure for ages. Not to speak of the living, and not to name all the dead who have done honor to the legal profession in this State, I may mention Alexander Hamilton, "formed for all parts, in all alike he shined, variously great," William H. Seward, John C. Spencer, Thomas Addis Emmet, John Wells, George Wood, Joshua A. Spencer, Benjamin F. Butler, Daniel Lord, John Duer, James T. Brady, Ogden Hoffman, Charles O'Conor and Roscoe Conkling. Gentlemen of the bar of New York, you have in these and other great names upon the roll of lawyers and advocates given to the country by your State, an inheritance beyond all price.

But, sir, while the Supreme Court of the United States is indebted to the bar of the country for its invaluable aid in

the administration of justice, it is still more indebted to the highest courts of the several States, and to the Circuit and District Courts of the Union. Many distinguished members of those courts — judges whose learning and integrity are everywhere recognized — have honored this occasion by their presence. But it is a most felicitous circumstance that we have with us the full bench of the New York Court of Appeals, of whose bar we are guests upon this occasion. Who can adequately estimate, who can overstate the influence for good upon American jurisprudence which has been exerted by the learned judgments delivered by those who have graced the bench of this proud State? Kent, Livingston, Thompson, Spencer, Jones, Nelson, Oakley, Savage, Walworth, Marcy, Bronson, Denio and Selden, not to mention others, will be remembered as long as the science of law has votaries. If what they wrote were obliterated altogether from our judicial history, a void would be left in American jurisprudence that could not be filled. Indeed, the history of American law could not well be written without referring to the judgments and writings of those eminent jurists.

And here it is appropriate to say that the duty of expounding the Constitution of the United States has not devolved alone upon the courts of the Union. From the organization of our government to the present time that duty has been shared by the courts of the States. Congress has taken care to provide that the original jurisdiction of the courts of the Union of suits at law and in equity arising under the Constitution and laws of the United States, or under treaties with foreign countries, shall be concurrent with that of the courts of the several States. This feature of our judicial system has had much to do with creating and perpetuating the feeling that the government of the United States is not a foreign government, but a government of the people of all the States, ordained by them to accomplish objects pertaining to the whole country, which could not be efficiently achieved by any government except one deriving its authority from all the people.

As we stand to-night in this commercial metropolis, where the government created by the Constitution was organized, and where the supreme judicial tribunal of the Union held

its first session, it is pleasant to remember that all along its pathway that court has had the cordial coöperation and support of the highest court of this, the most powerful of all the States. The Supreme Court of the United States, and the highest court of New York, have not always reached the same conclusions upon questions of general law, nor have they always agreed as to the interpretation of the Constitution of the United States. But, despite these differences, expressed with due regard to the dignity and authority of each tribunal, they have stood together in maintaining these vital principles enunciated by the Supreme Court of the United States:

That while the preservation of the States, with authority to deal with matters not committed to national control, is fundamental in the American constitutional system, the Union cannot exist without a government for the whole;

That the Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens;

That the general government, though limited as to its objects, is yet supreme with respect to those objects, is the government of all, its powers are delegated by all, it represents all, and acts for all; and,

That America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent.

Mr. President, a few words more. The members of the Supreme Court of the United States will return to their post of duty, with grateful thanks for the opportunity given them to participate in these Centennial exercises. It has been good for us to be here. You have given us, gentlemen, renewed reason to think that the court of which we are members is regarded with affection and confidence by the bar of the country, and that as long as it shall be equal to the tremendous responsibilities imposed upon it, that affection and confidence will not be withdrawn.

We have met here to celebrate the organization of that court, in this city, one hundred years ago — a tribunal fitly declared to be the living voice of the Constitution. Within

that period the progress of the nation in all that involves the material prosperity and the moral elevation of the people, has exceeded the most sanguine expectations of those who laid the foundations of our government. But its progress in the knowledge of the principles upon which that government rests, and must continue to rest, if it is to accomplish the beneficent ends for which it was created, is not less marvellous. It was once thought by statesmen whose patriotism is not to be doubted, that the power committed to the courts of the Union, especially to the Supreme Court of the United States, would ultimately destroy the independence, within their respective spheres, of the coördinate departments of the national government, and even endanger the existence and authority of the state governments. But the experience of a century, full of startling political and social changes, has shown not only that those apprehensions were groundless, but that the Father of our Country was right when he declared, in a letter to the first Chief Justice of the United States, that the judicial department was the keystone of our political fabric. Time has grandly vindicated that declaration. All now admit that the fathers did not err when they made provision, in the fundamental law, for "one Supreme Court," with authority to determine, for the whole country, the true meaning and scope of that law. The American people, after the lapse of a century, have a firm conviction that the elimination of that court from our constitutional system would be the destruction of the government itself, upon which depends the success of the experiment of free institutions resting upon the consent of the governed. That those institutions, which have answered "the true ends of government beyond all precedent in human history," may be preserved in their integrity; that our country may, under all circumstances, be an object of supreme affection by those enjoying the blessings of our republican government; and that the court whose organization you have assembled to commemorate may, in its membership as well as in its judgments, always meet the just expectations of the people, is the earnest wish of those to whom you have, on this occasion, done so much honor.

The third toast was "*The Congress*"; answered by Mr. Senator Evarts. The fourth was "*The Judiciary of the States*"; acknowledged by Chief Justice Paxson, of the Supreme Court of the State of Pennsylvania. The fifth was "*The Common Law*"; to which Mr. Walter B. Hill of Georgia responded. Mr. Wayne McVeagh of Pennsylvania was to have spoken to the sixth toast, "*The Bar*"; in his absence the reply was made by Mr. Joseph H. Choate of New York. The Reverend Dr. Huntington, Rector of Grace Church, New York, responded to the seventh, "*The Clergy*"; Mr. Seth Low, President of Columbia College, to the eighth, "*The University*"; and Mr. Chauncey M. Depew of New York, to the ninth, "*Our Clients.*"

NOTE.

MEMBERS OF THE ASSOCIATIONS PRESENT, ACCORDING TO THE OFFICIAL LISTS.

Austin Abbott, Samuel G. Adams, Frederick W. Adee, Louis Adler, Mortimer C. Addoms, John G. Agar, Charles B. Alexander, R. C. Alexander, E. Ellery Anderson, Henry H. Anderson and John H. V. Arnold of New York City; Henry B. Atherton of Nashua, N. H.; Addison Atwater, Henry G. Atwater, Joseph S. Auerbach, Lemuel H. Babcock and Henry C. Backus of New York City; George F. Baer of Reading, Pa.; Edward R. Bacon and Edwin Baldwin of New York City; Simeon E. Baldwin of New Haven, Conn.; Charles W. Bangs, F. Sedgwick Bangs, J. Arthur Barratt, Horace Barnard and Lewis T. Barney of New York City; Pope Barrow and Franklin Bartlett of Athens, Ga.; George H. Bates of Wilmington, Del.; William M. Baxter of Knoxville, Tenn.; J. W. B. Bausman of Lancaster, Pa.; Benjamin H. Bayliss, Charles F. Beach, Jr., Edmund E. Bayliss, John Alexander Beall, Charles C. Beaman and Henry R. Beekman of New York City; Charles U. Bell of Lawrence, Mass.; Clark Bell, Robert D. Benedict and Russell Benedict of New York City; W. S. Benedict of New Orleans, La.; E. H. Benn, H. W. Bentley, Charles Benner and Arthur Berry of New York City; Walter V. R. Berry of Washington, D. C.; Edward D. Bettens, Frederic H. Betts, George F. Betts and Samuel R. Betts of New York City; A. Sydney Biddle of Philadelphia, Pa.; Franklin Bien of New York City; George E. Bird of Portland, Me.; Clarence F. Birdseye and James L. Bishop of New York City; James L. Blair of St. Louis, Mo.; James A. Blanchard, Charles Blandy and Samuel A. Blatchford of New York City; W. H. Blodgett of St. Louis, Mo.; Alexander Blumenstiel and Edward C. Boardman of New York City; Herbert Boggs of Newark, N. J.; J. B. Bogart and George B. Bonney of New York City; Charles Borcherling of Newark, N. J.; S. Borrowe, Charles F. Bostwick, C. N. Bovee, Jr., A. F. Bowers,

John M. Bowers, William Bradford, Charles O. Brewster, Arthur v. Briesen, Osborn E. Bright, William B. Bristow, F. A. Brooks, George M. Brooks, Augustus C. Brown, Edwin H. Brown, Edward F. Brown, Silas B. Brownell, Charles H. Brush and Harold C. Bullard of New York City; Jacob F. Burcket of Findlay, Ohio; Chas. C. Burlingham, Henry L. Burnett, Middleton S. Burrill, J. Adriance Bush, Eugene L. Bushe, David F. Butcher, Charles Butler, Charles Henry Butler, William Allen Butler, Jr., James Byrne, John L. Cadwalader and Delano C. Calvin of New York City; John H. Camp of Lyons, N. Y.; Patrick Calhoun of Atlanta, Ga.; Frederick W. Cameron of Albany, N. Y.; Flamen B. Candler of New York City; Peter Cantine of Saugerties, N. Y.; Jacob A. Cantor, Michael H. Cardozo, W. C. Cardozo, Philip Carpenter, Clarence Cary, Charles W. Cass, Henry Phelps Case, John J. Chapman, Lucien B. Chase and George Chase of New York City; William M. Chase of Manchester, N. H.; Simon B. Chittenden, Lucius E. Chittenden and Joseph H. Choate of New York City; Charles A. Clarke of Oswego, N. Y.; Thomas Allen Clarke of Albany, N. Y.; Jefferson Clarke and Samuel B. Clarke of New York City; Alphonso T. Clearwater of Kingston, N. Y.; Nathaniel H. Clement of Brooklyn, N. Y.; Nathan Cleaves of Portland, Me.; Treadwell Cleveland of New York City; Charles W. Clifford of New Bedford, Mass.; Edward S. Clinch, W. Bourke Cochran, Edwin W. Coggeshall, William N. Cohen and James C. Colgate of New York City; James F. Colby of Hanover, N. H.; Hugh L. Cole of New York City; Casper P. Collier and Frederick J. Collier of Hudson, N. Y.; M. Dwight Collier and Joseph I. Connaughton of New York City; J. Hervey Cook of Fishkill, N. Y.; Martin W. Cooke of Rochester, N. Y.; J. C. Cowin of Omaha, Neb.; Charles Coudert of New York City; Esek Cowen of Albany, N. Y.; Macgrane Coxe, Paul D. Cravath, John K. Creevey, Fred. Cromwell and William N. Cromwell of New York City; Adelbert Cronise of Rochester, N. Y.; William B. Crosby of New York City; David Cross of Manchester, N. H.; James R. Cuming, F. Kingsbury Curtis, William E. Curtis, William J. Curtis, Charles M. Da Costa, Charles P. Daly, Charles H. Daniels, George S. Daniels and Thomas Darlington of New York City; Nathaniel Davenport of Troy, N. Y.; William B. Davenport, George T. Davidson, Charles A. Davison, Julien T. Davies, William G. Davies, Noah Davis, W. C. Davis, Charles Stewart Davison, Melville C. Day, F. DeFolsom, Lewis L. Delafield, Edward F. DeLancey, Horace E. Deming, Geroge G. DeWitt, Jr., Francis C. Devlin, Herbert E. Dickson, —— Dickson, Frederick J. Dieter, John F. Dillon and Abram J. Dittenhoefer of New York City; George M. Diven of Elmira, N. Y.; Samuel C. T. Dodd, R. Clarence Dorsett and Spencer C. Doty of New York City; Henry M. Duffield of Detroit, Mich.; John Duer of New York City; John F. Duncombe of Fort Dodge, Iowa; Frank J. Dupignac, Anthony R. Dyett, Robert T. B. Easton, Sherburne B. Eaton, Charles H. Edgar, Alfred L. Edwards, Walter Edwards, Walter D. Edmonds, Stephen B. Elkins, George W. Ellis and Alfred Ely of New York City; William C. Endicott of Salem, Mass.; Thomas G. Evans and Thomas Ewing of New York City; Charles H. Farnam of New Haven, Conn.; Charles S. Fairchild and Thomas L. Feitner of New York City; Joseph W. Fellows of Manchester, N. H.; David Dudley Field and William L. Findley of New York City; Frederick P. Fish of Boston, Mass.; William A. Fisher of Baltimore,

Md.; James M. Fisk, Haley Fiske, Ashbel P. Fitch, Charles A. Flammer and George Fleming of New York City; James Flemming of Jersey City, N. J.; Martin D. Follett of Marietta, Ohio; William Forster of New York City; J. Frank Fort of Newark, N. J.; Frederic De P. Foster, Roger Foster, Robert L. Fowler, Austen G. Fox and Ruford Franklin of New York City; Horace W. Fuller of Boston, Mass.; Paul Fuller, Stephen W. Fullerton, A. Gallup and Hugh R. Garden of New York City; Henry Wise Garnett of Washington, D. C.; Theodore S. Garnett of Norfolk, Va.; A. Q. Garretson of Jersey City, N. J.; Elbridge T. Gerry, Daniel L. Gibbens and James M. Gifford of New York City; N. S. Gilson of Fond du Lac, Wis.; L. Spencer Goble, Lawrence Godkin, H. Godwin, Morris Goodhart, Almon Goodwin, Solomon J. Gordon, L. A. Gould, J. F. Graham and Alexander Grant, Jr., of New York City; Robert S. Green of Elizabeth, N. J.; Samuel H. Grey, of Camden, N. J.; W. Morton Grinnell, Almon W. Griswold, Henry A. Gumbleton and William D. Guthrie of New York City; James Hagerman of Kansas City, Mo.; Ernest Hall, George A. Halsey, Samuel B. Hamburger and A. J. Hammersley, Jr., of New York City; William Hamersley of Hartford, Conn.; Clifford A. Hand and Solomon Hanford of New York City; Nathan S. Harwood of Lincoln, Neb.; Roswell D. Hatch and Edward S. Hatch of New York City; J. Frank E. Hause of West Chester, Pa.; Gilbert R. Hawes, Granville P. Hawes and Eugene D. Hawkins of New York City; Alfred Hemenway of Boston, Mass.; Joseph Hemphill of West Chester, Pa.; Morton P. Henry of Philadelphia, Pa.; G. H. Hepworth, George Hill, James K. Hill and John L. Hill of New York City; Arthur W. Hickman of Buffalo, N. Y.; Edward Otis Hinckley of Baltimore, Md.; Fred. W. Hinrichs and Elizur B. Hinsdale of New York City; M. H. Hirschberg of Newburgh, N. Y.; Henry Hitchcock, Jr., of St. Louis, Mo.; George Hoadly and J. Aspinwall Hodge, Jr., of New York City; James H. Hoffecker, Jr., of Wilmington, Del.; Daniel J. Holden, Artemas H. Holmes, Jabish Holmes, Jr., George C. Holt, Henry F. Homes, William B. Hornblower, George P. Hotaling, John W. Houston, W. T. Houston, Henry E. Howland, Grosvenor S. Hubbard, Thomas H. Hubbard, Charles Burkley Hubbell and Charles E. Hughes of New York City; Ward Hunt of Utica, N. Y.; Waldo Hutchins of New York City; John A. Hutchinson of Parkersburg, W. Va.; E. Francis Hyde, J. E. Hindon Hyde, John B. Ireland, William Irwin, William M. Ivins, Meyer S. Isaacs, Theodore F. Jackson and Abraham S. Jacobs of New York City; John Jay of Katonah, N. Y.; William Jay, William M. Jenks, William A. Jenner, Frederic B. Jennings, Eugene M. Jerome, Charles H. Johnson and Edgar M. Johnson of New York City; Leonard A. Jones of Boston, Mass.; Samuel Jones and W. R. T. Jones of New York City; Frederick N. Judson of St. Louis, Mo.; George R. Kaercher of Philadelphia, Pa.; A. Q. Keasbey of Newark, N. J.; A. J. Kauffman of Columbia, Pa.; Boudinot Keith of New York City; Justin Kellogg of Troy, N. Y., Richard B. Kelly, Andrew Wesley Kent, Alan D. Kenyon, Robert N. Kenyon and William H. Kenyon of New York City; Thomas B. Keogh of Greensboro, S. C.; Francis Kernan and Nicholas E. Kernan of Utica, N. Y.; Edward C. Kehr of St. Louis, Mo.; John B. Kerr, Alexander P. Ketchum, David Bennett King, Antoine Knauth and Sherman W. Knevals of New York City; A. Leo Knott of Washington, D. C.; Charles H. Knox, Eugene G. Kremer,

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CASES QUESTIONED OR OVERRULED.

CERTIFICATE OF DIVISION IN OPINION.

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CONSTITUTIONAL LAW.

CONTEMPT.

CONTRACT.

5. If the vendor notifies the purchaser that he regards the contract as forfeited, and that he will not receive any money from him, the latter is not required, as a condition of his right to specific performance, to make tender of the purchase price. It is sufficient if he offer in his bill to bring the money into court. *Ib.*
6. A note for the purchase price of land is made payable at a particular time and at a particular bank. The payor is ready at such time and place to pay, and offers to pay, but the bank has not received the note for collection; *Held*, (1) The bank is not authorized to receive the money for the payee by reason simply of the fact that the note is payable there; (2) The tender of payment is not payment; (3) A decree of specific performance should not become operative until the money is brought into court; (4) The payee is not entitled to interest unless it appears that the payor, after the tender, realized interest upon the money. *Ib.*
7. M. contracted with a bridge company to construct the road for a railway, according to specifications and profile, from the end of its bridge to Evansville, about six miles. The road was to run on bottom lands, with an uneven natural surface, and the profile showed part trestle and part embankment. It was contemplated that the material for the embankments was to be taken from borrow-pits along the line. The specifications fixed prices for excavation, for filling and for trestling, and provided that the relative amounts of trestle and earthwork might be changed at the option of the engineer without prejudice. During the progress of the work the company decided to modify the plan by abandoning the trestling in the line of the road, substituting for it a continuous embankment, and by making a draining ditch along the whole line, running through the borrow-pits. In order to serve its intended purpose this ditch was required to be of a regular downward grade, with properly sloping sides. Some of the borrow-pits were found to be too deep, and others too shallow, and it was found that they had been excavated without reference to the slope at the sides. There were highways and private roads crossing the line at grade. The contract did not indicate how the approaches of these roads were to be constructed; but when the change was determined on, it was decided to make them of trestle. This work was more expensive than the trestle provided for in the contract. The company directed its engineer to have these modifications carried out, and the contractor was notified of this. He made no objection to the substitution of embankment for trestling; but as to the ditch, he objected that it was not in the contract. A conversation followed, in which the contractor understood the engineer to say that it would be paid for at excavation prices from the surface down, but the company claimed that it was only intended as an expression of the opinion of the engineer, which, it said, was made without authority. As to the trestle approaches the contractor was informed that he would be paid what was right.

CORPORATION.

COURT AND JURY.

DISTRICT OF COLUMBIA.

EMBEZZLEMENT.

EQUITY.

EVIDENCE.

EX POST FACTO LAW.

INSURANCE.

A policy of insurance on a building and its contents against fire, containing a printed condition by which "kerosene or carbon oils of any description are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void," is avoided if kerosene or other carbon oil is drawn upon the premises near a lighted lamp by any person acting by direction or under authority of the assured's lessee; although there was attached to the policy at the time of its issue a printed slip, signed by the insurer, "privileged to use kerosene oil for lights, lamps to be filled and trimmed by daylight only;" and although the insurer has since written in the margin of the policy, "privileged to keep not exceeding five barrels of oil on said premises." *Gunther* v. *Liverpool and London and Globe Ins. Co.*, 110.

INTOXICATING LIQUORS.

See CONSTITUTIONAL LAW, 6, 8, 9.

JURISDICTION.

A. OF THE SUPREME COURT.

1. An order remanding a cause from a Circuit Court of the United States to the state court from which it was removed is not a final judgment or decree, and this court has no jurisdiction to review it. *Richmond & Danville Railroad Co.* v. *Thouron*, 45.
2. An order in the Supreme Court of the District of Columbia, at special term, admitting a writing to probate and record as the will of a deceased person, in conformity with the findings of the jury empanelled, in the same court, to try the issue of will or no will, is one involving the merits of the proceeding, and may be reviewed by the same court in general term, and such review will bring before the general term all the questions arising upon bills of exceptions taken at the trial before the jury: and if the value of the matter in dispute be sufficient, this court has jurisdiction to reëxamine a final order of the Supreme Court of the District of Columbia affirming the order of the Probate Court, and to pass upon the questions of law raised by such bills of exceptions. *Ormsby* v. *Webb*, 47.
3. The value of the property in litigation determines the jurisdiction of this court. *Kenaday* v. *Edwards*, 117.
4. In an appeal from a decree removing a trustee of real estate, and denying him commissions, the jurisdiction of this court is to be determined, not by the amount of the commissions only, but by the value of the real estate as well. *Ib.*

C. OF TERRITORIAL COURTS.

D. OF STATE COURTS.

MAIL MATTER.

MANDAMUS.

MECHANIC'S LIEN.

MORTGAGE.

PRACTICE.

The fact that there is no controversy between the parties may be shown at any time before the decision of the case; and there is no laches in delaying to bring it before the court until after argument heard on the merits. *Little* v. *Bowers*, 547.

See APPEAL, 1, 2, 3; EX POST FACTO LAW, 4; CERTIFICATE OF DIVISION IN OPINION; JURISDICTION A, 11, 12.

PUBLIC LAND.

A rule in force for the subdivision of public lands for disposal under the public land law does not necessarily apply to the subdivision of private lands by their owners after they have been granted by the government without having first made official subdivisions. *McKey* v. *Hyde Park*, 84.

See ACCRETION.

QUIET TITLE.

1. A State may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication. *Arndt* v. *Griggs*, 316.
2. The well-settled rules, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone do not apply when a State has provided by statute for the adjudication of titles to real estate within its limits as against non-residents, who are brought into court only by publication. *Ib.*

RAILROAD.

1. A railroad company made a mortgage to secure an issue of 3000 bonds of $1000 each. It contracted with a contractor for the construction of 31 miles of its road, and as part consideration therefor agreed to give him 310 of these bonds. Before any further issues were made it agreed with a banking house in New York, as a part consideration for their acquiring these bonds, that it would only issue bonds to the extent of $10,000 a mile on its constructed road, and on the faith of this the New York house bought and paid for the bonds, and the 31 miles of road were constructed. Subsequently, and without constructing any additional miles, it issued 147 more bonds which were mostly used in the settlement of debts to parties who had notice of the agreement with the New York house. Default having been made in payment of interest a bill in equity was filed to foreclose the mortgage; *Held*, (1) That as to all persons acquiring any part of the 147 bonds with notice of the agreement with the New York house, the 310 bonds held by the latter were entitled to priority; (2) That holders who

TAX AND TAXATION.

1. The plaintiff in error failed to make a return of its loans to the state authorities as required by law, whereupon the auditor general, under direction of state law, made out an account against it containing the following charge: "Nominal value of scrip, bonds and certificates of indebtedness held by residents of Pennsylvania, $539,000 — tax three mills — $1617.00." The company appealed from this court to the Court of Common Pleas, which decided in its favor, and the Commonwealth from thence to the Supreme Court of the State, which rendered a judgment in favor of the Commonwealth for $666. Among the grounds for the appeal was, that the tax was in violation of section one of the Fourteenth Amendment, because the assessment was for the nominal value, and not for the real value of the bonds; because the owners of the bonds had no notice, and no opportunity to be heard; because the company was taxed for property that it did not own; and because the deduction of the tax from the interest due the bondholders in Pennsylvania took their property without due process of law, and denied to them the equal protection of the laws. The case being brought to this court from the state court by writ of error, a motion was made to dismiss for want of jurisdiction; to which was united a motion to affirm; *Held*, (1) That there was clearly a federal question raised, and the writ could not be dismissed for want of jurisdiction; (2) That although it was doubtful whether, under the rules, there was sufficient color for the motion to dismiss to justify the court in considering the motion to affirm, yet, as the Supreme Court of Pennsylvania, in its opinion, did not seem to have expressly passed upon the federal question, which was clearly in the record, the court could consider that there was color for making that motion; (3) That the provision for the assessment of the tax upon the nominal or face value of the bonds, instead of upon their actual value, was a part of the state system of taxation, authorized by its constitution and laws, and violated no provision of the Constitution of the United States; (4) That the failure to give personal notice to the owners of the bonds involved no violation of due process of law, when executed according to customary forms and established usages, or in subordination to the principles which underlie them; (5) That it was not true, in point of fact, that the corporation was taxed for property which it did not own. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 232.

2. The power conferred by the statutes of Missouri upon counties within the State, to levy and collect annually a tax of one-half of one per cent upon all the taxable wealth of the county for county revenue, is not exhausted by a levy of thirty cents on every one hundred dollars of taxable property for county purposes, and the levy of twenty cents on the same by the board of townships for township and bridge purposes; and a judgment creditor of such a county has a right to require