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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1891

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, 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.
HENRY BILLINGS BROWN, Associate Justice.

WILLIAM HENRY HARRISON MILLER, Attorney General.
CHARLES HENRY ALDRICH, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

Mr. Aldrich was commissioned March 21, 1892, in the place of Mr. Taft, resigned.

Correction.

In Volume 142, at the foot of page 338, at the end of *Gisborn* v. *Charter Oak Ins. Co.* add "The Chief Justice took no part in this decision."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1891.

UNITED STATES *v.* BALLIN.

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

No. 1061. Argued December 2, 1891. — Decided February 29, 1892.

The provision in Rule XV of the House of Representatives of the fifty-first Congress, that "on the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business," is a constitutional mode of ascertaining the presence of a quorum, empowered to act as the House.

Under the provision in the act of May 9, 1890, 26 Stat. 105, c. 200, the duties on worsted cloths were, by the terms of the act, and irrespective of any action by the Secretary of the Treasury, to be such as were placed on woollen cloths by the act of March 3, 1883. 22 Stat. c. 121, pp. 488, 508.

In July, 1890, the appellees imported into New York certain goods, which they claimed to be dutiable as manufactures of worsted at the rate described in schedule K, of the act of March 3, 1883. 22 Stat. 488, 509, c. 121. The collector assessed them at the rate prescribed in that schedule as manufactures of wool. 22 Stat. 488, 508, c. 121. This he did by

reason of an act claimed to have been passed by Congress, in 1890, as follows:

"Chap. 200. An act providing for the classification of worsted cloths as woollens.

"Be it enacted, etc., That the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woollen cloths all imports of worsted cloth, whether known under the name of worsted cloth or under the names of worsteds or diagonals or otherwise.

"Approved, May 9, 1890." 26 Stat. 105, c. 200.

The board of general appraisers found these facts:

"(1.) That the goods in question are worsted, and not woollen goods.

"(2.) That the Secretary of the Treasury never examined or classified the goods in question.

"(3.) That the journal of the House of Representatives shows the facts attending the passage of the act of May 9, 1890, thus:

"The Speaker laid before the house the bill of the house (H. R. 9548) providing for the classification of worsted cloths as woollens, coming over from last night as unfinished business, with the previous question, and the yeas and nays ordered.

"The house having proceeded to the consideration and the question being put,

"Shall the bill pass?

"There appeared

"Yeas — 138.

"Nays — 0.

"Not voting — 189.

"The said roll-call having been recapitulated, the Speaker announced, from a list noted and furnished by the clerk, at the suggestion of the Speaker, the following-named members as present in the hall when their names were called, and not voting, viz.:

[Here follows an alphabetical list of the names of seventy-four members.]

"The Speaker thereupon stated that the said members

present and refusing to vote, (74 in number,) together with those recorded as voting, (138 in number,) showed a total of 212 members present, constituting a quorum present to do business: and, that the yeas being 138 and the nays none, the said bill was passed."

On appeal, the Circuit Court of the United States for the Southern District of New York sustained the claim of the importers and reversed the decision of the collector, 45 Fed. Rep. 170, from which judgment the United States appealed to this court.

Mr. Attorney General and *Mr. Solicitor General* for appellant.

Mr. Edwin B. Smith for appellees. *Mr. Stephen G. Clarke* was with him on the brief.

Mr. Justice Brewer delivered the opinion of the court.

Two questions only are presented: first, was the act of May 9, 1890, legally passed; and, second, what is its meaning? The first is the important question. The enrolled bill is found in the proper office, that of the Secretary of State, authenticated and approved in the customary and legal form. There is nothing on the face of it to suggest any invalidity. Is there anything in the facts disclosed by the journal of the house, as found by the general appraisers, which vitiates it? We are not unmindful of the general observations found in *Gardner* v. *The Collector*, 6 Wall. 499, 511, "that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." And we have at the present term, in the case of *Field* v. *Clark*, 143 U. S. 649, had occasion to consider the subject of an appeal to the

journal in a disputed matter of this nature. It is unnecessary to add anything here to that general discussion. The Constitution (Article 1, section 5) provides that "each house shall keep a journal of its proceedings;" and that "the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal." Assuming that by reason of this latter clause reference may be had to the journal, to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby; and assuming, though without deciding, that the facts which the Constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet if reference may be had to such journal, it must be assumed to speak the truth. It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved, and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment. If it be suggested that the Speaker might have made a mistake as to some one or more of these seventy-four members, or that the clerk may have falsified the journal in entering therein a record of their presence, it is equally possible that in reference to a roll-call and the yeas and nays there should be a like mistake or falsification. The possibility of such inaccuracy or falsehood only suggests the unreliability of the evidence and the danger of appealing to it to overthrow that furnished by the bill enrolled and authenticated by the signatures of the presiding officers of the two houses and the President of the United States. The facts, then, as appearing from this journal, are that at the time of the roll-call there were present 212 members of the house, more than a quorum; and that 138 voted in favor of the bill, which was a majority of those present. The Constitution, in the same section, provides, that "each house may determine the rules of its proceedings." It appears that in pursuance of this authority the house had, prior to that day, passed this as one of its rules:

"Rule XV.

"3. On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the house who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." (Ho. Journal, 230, Feb. 14, 1890.)

The action taken was in direct compliance with this rule. The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to for determining the presence of a quorum, nor what matters the Speaker or clerk may of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.

The Constitution provides that "a majority of each [house] shall constitute a quorum to do business." In other words, when a majority are present the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single

member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the house is in a condition to transact business.

As appears from the journal, at the time this bill passed the house there was present a majority, a quorum, and the house was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. As, for instance, in those States where the constitution provides that a majority of all the members elected to either house shall be necessary for the passage of any bill. No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.

It is true that most of the decisions touching this question have been in respect to the actions of trustees and directors of a private corporation, or of the minor legislative bodies which represent and act for cities and other municipal corporations; but the principle is the same. The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole; and the question which has over and over again been raised is, what is necessary to constitute the official action of this legislative and representative body. In *Rex* v. *Monday*, 2 Cowp. 530, 538, Lord Mansfield said: "I will take it for granted that a *majority* of the mayor and aldermen for the time being are sufficient to constitute the assembly. And the fact found by the special verdict is that the majority of those in being did meet. When the assembly are *duly met* I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting." In 5 Dane's Abridgment, p. 150, the rule is thus stated: "When a corporation is composed of a definite number, and an integral part of it is required to vote in an election, *a majority of such integral definite part must attend, aliter* there is no elective assembly, but a majority of those *present* when legally met will bind the rest." In 1 Dillon's Municipal Corporations, (fourth edition,) section 283, the rule is thus stated: "And, as a general rule, it may be stated that not only where the corporate power resides in a select body, as a city council, but where it has been *delegated to a committee or to agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the

whole is necessary to constitute a quorum, and a majority of the quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease." This declaration has been quoted approvingly by this court in the case of *Brown* v. *District of Columbia*, 127 U. S. 579, 586. In 2 Kent's Commentaries, 293, the author draws this distinction between what is necessary to a meeting of a representative, and to that of a constituent body: "There is a distinction taken between a corporate act to be done by a select and definite body as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide." See also *Ex parte Willcocks*, 7 Cowen, 402; *Commonwealth* v. *Green*, 4 Wharton, 531; *State* v. *Green*, 37 Ohio St. 227; *Launtz* v. *The People*, 113 Illinois, 137; *Gas Co.* v. *Rushville*, 121 Indiana, 206; *Gosling* v. *Veley*, 7 Q. B. 406; *S. C.* 4 H. L. Cas. 679.

In *State* v. *Deliesseline*, 1 McCord, 52, it is said: "For, according to the principle of all the cases referred to, a quorum possesses all the powers of the whole body; a majority of which quorum must, of course, govern. . . . The constitutions of this State and the United States declare that a majority shall be a quorum to do business; but a majority of that quorum are sufficient to decide the most important question."

In *Wells* v. *Railway Co.*, 4 C. E. Green (19 N. J. Eq.) 402, we find this language: "A majority of the directors of a corporation, in the absence of any regulation in the charter, is a quorum, and a majority of such quorum when convened can do any act within the power of the directors."

And in *Attorney General* v. *Shepard*, 62 N. H. 383, 384, the question was whether an amendment to a city charter had been properly adopted by the board of aldermen. All the members of the board were present but one. The ordinance was duly read and put to a vote, and declared by the chair to be passed. The yeas and nays were then called; three voted in the affirmative, three refused to vote, and the chair declared

the ordinance passed. The court held, Chief Justice Doe delivering the opinion, that the amendment to the charter was legally adopted by the board of aldermen. He said: "The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present. An arbitrary, technical, and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government, is no part of our common law. The statute requiring the presence of four aldermen does not mean that in the presence of four a majority of the votes cast may not be enough. The journal properly shows how many members were there when the vote was taken by yeas and nays; there was no difficulty in ascertaining and recording the fact; and the requirement of a quorum at that time was not intended to furnish a means of suspending the legislative power and duty of a quorum. No illegality appears in the adoption of the amendment."

Summing up this matter, this law is found in the Secretary of State's office, properly authenticated. If we appeal to the journal of the house, we find that a majority of its members were present when the bill passed, a majority creating by the Constitution a quorum, with authority to act upon any measure; that the presence of that quorum was determined in accordance with a valid rule theretofore adopted by the house; and that of that quorum a majority voted in favor of the bill. It therefore legally passed the house, and the law as found in the office of the Secretary of State is beyond challenge.

With reference to the other question: The opinion of the Circuit Court seemed to be, that the act cast upon the Secretary of the Treasury a special duty of classification in all cases of the importation of worsted cloths, and that unless he so acted in any particular case the duty remained as it was prior to the passage of the act. We quote its language: "This act, however, proceeds upon an entirely novel theory. It provides expressly for a classification in direct non-conformity to the facts. It authorizes an officer of the government who may find an import to be in fact an article which under the tariff

laws pays one rate of duty to call it something else, which it is not, in order to enable the revenue officers to levy upon it a rate of duty which that other article, which it is not, pays. . . . I do not mean by that to suggest for one moment that under the phraseology of this act it is the duty of the Secretary of the Treasury to himself examine the packages of goods, to handle or see their contents; but, having been informed and advised as to the facts in the same way in which he is informed and advised upon any facts upon which he is required to pass, by the examination and report of such trustworthy subordinates as he may select, the final classification of the particular articles is one to be made by him."

We do not so construe the act. We understand it rather as a declaration by Congress as to the construction to be placed upon that portion of the act of 1883 which refers to imported woollen cloths. It was an act suggested by the contest then pending in the courts, and which was finally decided adversely to the government in the case of *Seeberger* v. *Cahn*, 137 U. S. 95, in which it was held by this court that "cloths popularly known as 'diagonals,' and known in trade as 'worsteds,' and composed mainly of worsted, but with a small proportion of shoddy and of cotton, are subject to duty as a manufacture of worsted, and not as a manufacture of wool, under the act of March 3, 1883, c. 121." The form of expression used in the act may be novel, but the intent of Congress is quite clear. Recognizing the fact that the Secretary of the Treasury is the head of the financial department of the government, that to him, as its chief administrative official, is given the supervision of the tariff and all the collections thereunder, it directs him to classify all worsted cloths as woollen cloths, and it gives to him no discretion. He may not classify some worsteds as woollens and others as not. There is given no choice or selection, but it is the imperative direction of Congress to him, as the chief administrative officer in the collection of duties, to place all worsted cloths, by whatever name properly known or known to the trade, within the category of woollen cloths, and, of course, if placed within that category, or using the familiar language of the tariff, if "classified as woollen cloths,"

subject to the duty imposed on such cloths. If action were necessary by the Secretary of the Treasury to put this act into force, which was not as we think, such action was taken by the circular letter of May 13, 1890, from the Treasury Department to all customs officers, publishing the act for the information and guidance of the public.

Our conclusion, therefore, is that the act was legally passed; and that by its own terms, and irrespective of any action by the Secretary of the Treasury, the duties on worsted cloths were to be such as were placed by the act of 1883 on woollen cloths.

The judgment of the Circuit Court will be reversed, and the case remanded for further proceedings, in accordance with this opinion.

ANSONIA BRASS AND COPPER COMPANY *v.* ELECTRICAL SUPPLY COMPANY.

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

No. 165. Argued January 19, 1892. — Decided March 14, 1892.

Letters patent No. 272,660, issued February 20, 1883, to Alfred A. Cowles for an "insulated electric conductor," are void for want of patentable novelty in the alleged invention covered by them.

The cases reviewed which establish (1) 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 result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated; and (2) that on the other hand, if an old device or process be put to a new use which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability.

THE court stated the case as follows:

This was a bill in equity for the infringement of letters

patent number 272,660, issued February 20, 1883, to Alfred A. Cowles for an "insulated electric conductor."

In his specification, the patentee stated that "before my invention copper wires had been covered with one or two braidings of cord, and paraffine, tar, asphalt and various substances had been employed for rendering the covering waterproof and furnishing a proper insulation. With conductors of this character several accidents occurred in consequence of the conductor becoming heated and setting fire to the insulation. For this reason objections were made to insuring buildings against loss by fire where electric lamp wires were introduced. To render the conductor fire-proof without interfering with the insulation led me to invent and manufacture the insulated electric conductors to which the present invention relates, which conductors have gone extensively into use during about a year and a half before the date of this specification."

His method of preparing the wire was stated substantially as follows: The wire was first passed through a braiding machine, and a layer of cotton or other threads braided about it; the covered wire was then passed through a vessel containing paint, preferably white lead or white zinc ground in oil and mixed with a suitable drier. A second braiding was then applied directly upon the fresh paint; the threads thus braided upon the paint force the paint into the first braided covering and at the same time the paint oozes through between the threads. In this way the paint was incorporated throughout the braided covering and filled up the pores; and the wire was thus perfectly insulated, and there was no possibility of inflaming the covering. "With intense heat the threads may char, but they will not burn."

"If desired," said he, "a coat of paint may be applied outside of the outer layer of fibrous material, and this may be colored, so as to be used in distinguishing the wires. It is always preferable to braid the second or subsequent coats upon the paint when fresh; but I do not limit myself in this particular, as the paint may be dried, or partially so, before the next layer of braiding is applied. Paint might be applied to the wire before the first braiding."

"I am aware that wire has been covered with braided threads; also that india-rubber, asphaltum and similar materials have been applied upon the covering, either hot or cold; but one coating of such material was allowed to set or harden before the next layer of braided material was applied. Hence the asphaltum or similar material was not forced into the interstices, and besides this all these substances ignite by the wire becoming heated, or fire will follow along upon such covering.

"I have discovered that ordinary paint composed of lead or zinc with linseed oil is practically non-combustible, and it prevents the covering being ignited by the wire becoming hot if there is a resistance to the electric current; besides this, fire will not burn along the conductor, as is the case where the fibrous covering is saturated with asphaltum, india-rubber, or similar material.

"I claim as my invention —

"1. The method herein specified of insulating electric conductors and rendering the coating substantially non-combustible, consisting in applying a layer of fibrous material, a layer of paint, and a second layer of fibrous material upon the paint before it dries or sets, substantially as set forth.

"2. An insulated and non-combustible covering for electric conductors, composed of two or more layers of cotton or similar threads, with paint that intervenes between the layers and fills the interstices of the covering, substantially as set forth."

Upon a hearing upon pleadings and proofs in the Circuit Court plaintiff's bill was dismissed, (32 Fed. Rep. 81, and 35 Fed. Rep. 68,) and an appeal taken to this court.

Mr. Charles E. Mitchell and *Mr. Joshua Pusey* for appellant.

Mr. Charles R. Ingersoll and *Mr. Morris W. Seymour* for appellee.

Mr. Justice Brown delivered the opinion of the court.

The stress of this case is upon the question of patentable

novelty. The art of insulating electric wires has been known almost as long as that of conducting electricity for practical purposes by means of wires. Prior to the use of electricity for lighting, however, the feeble character of the currents conveyed upon these wires did not require that the insulating material should be non-combustible, and the skill of the inventor was directed toward a method of insulation which should protect the wire from moisture and other external injury. For this purpose the wires were covered with braid which had been saturated or covered with tar, paraffine, india-rubber, gutta-percha, asphaltum and various substances of like nature, to exclude the action of the water and afford a proper insulation.

Upon the introduction of electric lighting it was found that this method of insulation, while efficient to protect the wire from external influences, was unable to withstand the intense heat frequently generated in the wire itself by the powerful currents of electricity necessary for illuminating purposes. At first these wires were covered with cotton which had been saturated in paraffine and other similar substances; the result was that the insulating material was melted or set on fire, and dropped off the wire while still burning, and became so frequently the cause of conflagrations that the insurance companies declined to issue policies upon buildings in which this method of insulating wires was employed. A new substance was needed which would not only operate as a non-conductor of electricity, and as a protection against moisture, but which should also be non-combustible.

This material was discovered in ordinary paint. Mr. Cowles was not the first, however, to discover that paint was useful for the purpose of insulating electric wires. In several English patents put in evidence, paint is suggested as a proper covering for protective as well as for insulating purposes, in lieu of gutta-percha, india-rubber, resin, pitch or other similar substances, but as a non-combustible insulator was never required for telegraphing purposes, there is no intimation in any of them that it possessed this quality. It had, however, been a matter of common knowledge for many years that paint was

practically non-combustible. While the linseed oil in paint is to a certain extent combustible, the carbonate of lead is a material both non-combustible and a non-conductor.

It is clear that none of these English patents can be claimed as anticipations, since they all relate to the protection of land or submarine telegraph cables, and the use of paint, so far as it was used at all, was simply as a water-proof covering for a braided wire. There is nothing to indicate that the paint, as used by them, was applied in the manner indicated by the patent, or that it made the covering non-combustible, or was intended at all for that purpose.

The most satisfactory evidence of the use of a non-combustible covering for electric wires is found in the testimony of Edwin Holmes, manufacturer of an electric burglar alarm, who states that when he first commenced using electric conductors "the wire was insulated by winding a thread, larger or smaller as the case might be, around the wire, and that thread was covered with paint," and that all his wires were "insulated in that way until paraffine was substituted for the paint." The paint was applied by drawing the wire through a vessel containing the paint, and then through a piece of thick rubber or gutta-percha, which removed the surplus paint and left a smooth surface on the thread which covered the wire. He began to cover his wires in this way as early as 1860, and says that he accomplished his insulation "sometimes by covering the wire with a thicker thread and two coats or more of paint; sometimes by a thread covering and a coat of paint, then another thread covering and a coat of paint on that." And upon being asked to describe the condition of the first coating of paint when the second coating of fibrous material and paint was put on, he said: "The first coat was partially dried, so as to keep its place, but would admit of an impression from the next covering of thread." On being called upon subsequently for an affidavit to be used on an application for a rehearing, he stated that his object was not to produce a non-inflammable wire, and that the wire used by him was not non-combustible or non-inflammable, and was no better adapted for electric light conduction than the paraffine-coated wire. He

further stated that when the second layer of braid was laid on, the condition of the first layer was not such as to cause the threads of the second layer to force the paint into the interstices, and so load the wire with an abnormal quantity of paint, as is done in the process described in the Cowles patent. The substance of his testimony in this particular was, that the coating of paint upon his first layer was allowed to harden before the second layer was applied, so that the application of the second layer would not cause the paint upon the first layer to be forced into the interstices of that layer or to ooze through the braiding of the second layer.

Thomas L. Reed, another witness, gave a somewhat similar experiment of the method of insulating wires by passing the naked wire through a tub containing paint, then braiding it, and then immersing it in a second tub containing paint, and finally passing it through jaws to scrape off the surplus paint and compress it. As this method of insulation, however, does not resemble so closely the Cowles patent as that employed by Mr. Holmes, it is unnecessary to notice it further.

Practically the only difference between the Holmes and Cowles insulators is in the fact that the coat of paint applied to the first braid in the Holmes process was allowed to dry before the second coat of braid was applied, and thereby the braid was not so thoroughly permeated with the paint as is the case in the Cowles patent. That the idea of applying the second coat of braiding upon the interposed insulating material, while such material was wet or unset, is not in itself a novel one is evident from the English patents to Brown and Williams, to Duncan and to Henley, all of which describe a method for insulating conductors by applying a layer of fibrous material, a layer of insulating material, and a second layer of fibrous material upon the former, before the insulating material is set or hardened. Indeed, it is doubtful whether Cowles considered this feature of his process as of any great importance at the time he made his application, since he speaks of it only as a *preferable* method, and says that he does not limit himself in this particular, "as the paint may be dried, or partially so, before the next layer of braiding is applied." But however

this may be, the method described by Cowles differs only in degree and not in kind from that described by Holmes. In other words, it is a more thorough doing of that which Holmes had already done, and, therefore, involving no novelty within the meaning of the patent law. Indeed, we are not satisfied that the method employed by Holmes did not, for all practical purposes, saturate the first layer of braid as completely as if the second coat had been applied while the first was still wet. The process and the results in both cases are practically the same, viz.: protection, insulation and incombustibility. There were certain affidavits introduced which tended to show that the Holmes insulator was not incombustible; but in view of the experiments made by Mr. Earle, the defendant's expert, by applying the same current of electricity to wires insulated by these different methods, we incline to the opinion that the method practised by Mr. Holmes was nearly, if not quite, as efficient in this particular as the other. If his testimony be true, and no attempt is made to show that it is not, it is difficult to see, even if his insulator were not incombustible, that Mr. Cowles did more than make use of his process in a somewhat more efficient manner.

In the case of *Gandy* v. *Main Belting Company*, recently decided, 143 U. S. 587, the patentee found that the canvas theretofore manufactured was unfit for use as belting by reason of its tendency to stretch, and to obviate this he changed the constitution of the canvas itself by making the warp threads heavier and stronger than the weft; in short, he made a new canvas constructed upon new principles, and accomplishing a wholly new result. That case is not a precedent for this.

It is true that the insulator used by Holmes was not intended to be, and perhaps was not known to be, incombustible, since this feature of its incombustibility added nothing to its value for protecting a burglar-alarm wire, which carries a current of comparatively low tension; but, as already observed, the testimony indicates that the insulator employed by him was in fact nearly, if not quite, as incombustible as that made by the plaintiff under the Cowles patent. If this be so, and

the two insulators are practically the same in their method of construction, it is clear that Cowles has no right to claim the feature of incombustibility as his invention, since nothing is better settled in this court than that the application of an old process to a new and analogous purpose does not involve invention, even if the new result had not before been contemplated. It was said by Chief Justice Waite in *Roberts* v. *Ryer*, 91 U. S. 150, 157, that "it is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to all the uses to which it can be put, no matter whether he had conceived the idea of the use or not."

In *Pennsylvania Railway* v. *Locomotive Truck Co.*, 110 U. S. 490, 494, the adoption of a truck for locomotives which allowed a lateral motion was held not to be patentable, in view of the fact that similar trucks had been used for passenger cars. All the prior cases are cited, and many of them reviewed, and the conclusion reached 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 result substantially distinct in its nature, will not sustain a patent, even if the new form of result had not before been contemplated." The principle of this case was expressly approved and adopted in that of *Miller* v. *Foree*, 116 U. S. 22, and has been frequently applied in the administration of patent law by the Circuit Courts. *Crandall* v. *Watters*, 20 Blatchford, 97; *Ex parte Arkell*, 15 Blatchford, 437; *Blake* v. *San Francisco*, 113 U. S. 679; *Smith* v. *Elliott*, 9 Blatchford, 400; *Western Electric Company* v. *Ansonia Co.*, 114 U. S. 447; *Spill* v. *Celluloid Manufacturing Co.*, 22 Blatchford, 441; *Sewall* v. *Jones*, 91 U. S. 171.

On the other hand, if an old device or process be put to a new use which is not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability. That, however, is not the case here, since the Cowles process had been substantially used by Holmes for the same purpose of insulating an electric wire, and the discovery of its incom-

bustible feature involved nothing that was new in its use or method of application.

The utmost that can be said for Cowles is that he produced a somewhat more perfect article than Holmes, but as was said by this court in *Smith* v. *Nichols*, 21 Wall. 112, 119, "a mere carrying forward, or new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent." It was held in this case that where a textile fabric, having a certain substantial construction, and possessing essential properties, had been long known and in use, a patent was void when all that distinguished the new fabric was higher finish, greater beauty of surface, the result of greater tightness of weaving, and due to the observation or skill of the workman, or to the perfection of the machinery employed. See also *Morris* v. *McMillin*, 112 U. S. 244; *Busell Trimmer Co.* v. *Stevens*, 137 U. S. 423, and cases cited.

The decree of the Circuit Court is, therefore,

Affirmed.

Mr. Justice Field dissented.

LARKIN *v.* UPTON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

No. 175. Argued March 1, 1892. — Decided March 14, 1892.

Where special findings are irreconcilable with a general verdict, the former control the latter.

If the findings are fairly susceptible of two constructions, the one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction.

The top or apex of a vein must be within the boundaries of the claim, in order to enable the locator to perfect his location and obtain title; but

this apex is not necessarily a point, but often a line of great length, and if a portion of it is found within the limits of a claim, that is sufficient discovery to entitle the locator to obtain title.

Prior to March, 1882, plaintiffs in error, defendants below, filed their application in the United States land office at Helena, Montana, for a patent to the Smelter lode claim. Defendants in error, plaintiffs below, "adversed," claiming as owners of a conflicting location, called the Comanche lode claim, and thereafter commenced this action in the District Court of the Second Judicial District of the Territory of Montana to determine the right of possession to the disputed territory, an area, as alleged, of seven and seventy-nine one-hundredths acres. There were two trials in the District Court, in each of which the verdict and judgment were in favor of the plaintiffs. The first judgment was reversed by the Supreme Court of the Territory, and a new trial ordered. 5 Montana, 600. The second judgment was affirmed by that court, 7 Montana, 449, which judgment of affirmance was brought to this court by writ of error.

Mr. W. M. Stewart (with whom was *Mr. M. Kirkpatrick* on the brief) for plaintiffs in error.

Mr. S. S. Burdett and *Mr. W. W. Dixon* (with whom was *Mr. M. F. Morris* on the brief) for defendants in error.

Mr. Justice Brewer delivered the opinion of the court.

The first judgment was reversed by the Supreme Court of the Territory, on the ground that there had been no discovery of a vein or lode within the Comanche territory at the time of the location of that claim. Immediately north of the Comanche was the Shannon claim, which at the time of the commencement of this suit had been surveyed and patented; and it appears from the opinion of the Supreme Court, that at the first trial the testimony showed that the discovery shaft of the Comanche was wholly within the limits and boundaries of the Shannon claim. The contest at the second trial was as to the position of that discovery shaft and of the apex of

the vein disclosed by it. Unquestionably if not on the boundary line between the Comanche and Shannon claims, the shaft was very close to it. The testimony of the defendants tended to show that it was wholly on the Shannon claim; that of the plaintiffs, that it was partly on both claims, extending some 19 inches in width into the Comanche claim, and that the apex of the vein was within the limits of these 19 inches.

The jury returned a general verdict for the plaintiffs, and also made certain findings of fact at the instance of the respective parties. It is doubtless true that where special findings are irreconcilable with a general verdict, the former control the latter; and upon this rule plaintiffs in error rely for a reversal. It is also true that if the findings are fairly susceptible of two constructions, one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction, because it will not be presumed that the jury had different intentions in the findings and in the verdict. *St. Louis & San Francisco Railway Co.* v. *Ritz*, 33 Kansas, 404. So that if the meaning of these findings be doubtful, we should adopt that which conforms to and upholds the verdict.

It is unquestioned law that the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title. Turning to the findings, these three are all that are pertinent to this question — two in response to interrogatories submitted by the plaintiffs, and the other to one submitted by the defendants:

"1st. Did the locators of the Comanche lode claim, prior to the location of said claim, discover in the shaft claimed by them as discovery shaft a vein or crevice of quartz or ore, with at least one well-defined wall on a lode or vein of rock in place bearing gold, silver or other valuable mineral deposits?

"Answer. Yes.

"2d. If your answer to the foregoing interrogatory be 'yes,' then answer: Was any part of such vein or lode discovered by the locators of said Comanche claim at the point of discovery, south of the south boundary line of the Shannon lode claim as patented and within the limits of the said Comanche lode claim as located?

"Answer. Yes."

"1st. If the jury find that the locators of the Comanche lode claim discovered a vein in the hole or shaft claimed as the Comanche discovery, then the jury will answer: Was the top or apex of such vein within the limits of the Shannon claim as patented?

"Answer. No."

We fail to see any conflict between these findings and the general verdict. They show that within the discovery shaft a vein was disclosed, and that the top or apex of such vein was not within the limits of the Shannon claim. It follows, of course, that it must have been within the Comanche claim, and that was sufficient to sustain the location. It is said that the second finding, which is to the effect that a part of such vein or lode was south of the boundary line and within the limits of the Comanche claim, carries with it the implication that part was north of that boundary and within the Shannon claim; that as the testimony shows that the general direction of the dip was southward, and only a part of the vein or lode was within the Comanche claim, the apex of this vein was necessarily within the Shannon claim. But it is distinctly found that the top or apex was not within the limits of the Shannon claim; and because the jury responded "yes" to a question as to whether a part of this vein was within the Comanche claim, it does not follow that they would have responded "no" if the question had been whether all of the vein was within the Comanche territory. Doubtless the form of this question was adopted by counsel for plaintiffs in view of the conflict as to the boundary line; but it is not fair to infer from the mere form that the jury meant to find, or would have found, if the distinct inquiry had been presented to them, that any portion of the vein was within the Shannon territory. It would be a strained inference from the facts as found, that any portion of the vein, from its apex downward, at least so far as disclosed in the discovery shaft, was north of the boundary line within the limits of the Shannon claim. There is, therefore, no conflict between the findings and the verdict, and there was ample testimony to sustain both.

Opinion of the Court.

Counsel for plaintiffs in error insists that under the instructions the jury might have found for the plaintiffs, if any portion of the apex was within the Comanche territory, and in support thereof refers to this instruction:

"8. (Given.) The apex of a vein or lode is the highest point thereof, and may be at the surface of the ground or at any point below the surface. When the vein or lode does not crop out, but is what is called a blind vein or lode, the apex thereof would necessarily be below the surface of the ground; and in this case you are instructed that if the locators of the Comanche lode vein, at the time of the location thereof, found, or if, from the work done by others prior thereto, they could see, at any point within the limits of said location, a lode or vein the top or apex of which was within the said lines of their location, then, in such case, they made a discovery of a lode or vein such as the law requires to be made to entitle them to locate the ground, and it is wholly immaterial as to the amount or quantity of such vein or lode which may have been found within the limits of their said location; any amount of it would suffice, however small, either as to the amount of the vein or its apex within the limits of the said location."

While the giving of this instruction was at the trial excepted to, error has not been here assigned thereon, and with one construction, at least, of its language it is undoubtedly correct. The apex of a vein is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his end lines, and the vein beyond those end lines is subject to further discovery and appropriation. That such was the understanding by the jury of the instruction and such the fact in this case is evident from the findings. Indeed, it would seem from some of the testimony that the course or strike of this vein was not exactly along the boundary line between the Comanche and the Shannon, but varying somewhat therefrom; hence the apex, in its full width and with some portions of its

length, might be found in each claim, and so discovered justify the discoverer in obtaining title to each.

We see no error in the proceedings, and the judgment will be

Affirmed.

UNITED STATES *v.* WILSON.

APPEAL FROM THE COURT OF CLAIMS.

No. 1157. Argued January 26, 1892. — Decided March 14, 1892.

Under the act of March 3, 1883, "to adjust the salaries of postmasters," 22 Stat. 600, c. 142, a postmaster who is assigned by the Postmaster General to the third class, at a designated salary, from a designated date, is entitled, if he performs the duties of the office, to compensation at the rate of that salary, from that date, without regard to his appointment by the President and confirmation by the Senate.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for appellant.

Mr. Harvey Spalding for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action in the Court of Claims by a late postmaster of Chadron, Nebraska, to recover an alleged balance of salary claimed to be due.

The material facts are these: The claimant was a fourth-class postmaster, duly appointed and qualified, at Chadron, Nebraska, from July 1, 1885, to January 25, 1887. When he was first appointed the salary of the office was $1000 a year; and it continued at that figure until October 1, 1886, when, by an order of the Postmaster General, issued a few days previously, the office was assigned to the third class, and the salary was increased to $1600 a year. Although the office

was thus advanced in rank and the salary attached to it increased, and the claimant continued to discharge the duties of it, he was not commissioned by the President a third-class postmaster until January 25, 1887; and, under an order of the Sixth Auditor, dated November 16, 1886, he was not permitted to enjoy the benefits of the increased salary until he was commissioned a third-class postmaster, but continued to draw a salary from October 1, 1886, to January 25, 1887, at the rate of only $1000 a year. Insisting that his salary for the period last mentioned should have been at the rate of $1600 a year, under the order of the Postmaster General, instead of at the rate he was paid, the claimant brought his action in the Court of Claims to recover such alleged balance. That court sustained his claim, and rendered judgment in his favor for $190, that being the difference between the amount of his salary for the period mentioned at $1000 a year and at $1600 a year. 26 C. Cl. 186. From that judgment the United States appealed.

To understand the precise nature of the question involved in this case, a reference to the act of March 3, 1883, c. 142, 22 Stat. 600, 602, relating to the salaries of postmasters, is necessary. Section 1 of that act reads thus:

"That the respective compensation of postmasters of the first, second and third classes shall be annual salaries, assigned in even hundreds of dollars, and payable in quarterly payments, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the Auditor of the Treasury for the Post Office Department, or copies or duplicates thereof, to be forwarded to the First Assistant Postmaster General, for four quarters immediately preceding the adjustment, at the following rates, namely."

Then follows a table of what shall constitute offices of the various classes, with the salary attached, the salary in each instance being made dependent upon the gross receipts of the office; and, with reference to third-class offices, the section, in one paragraph, provides as follows:

"Gross receipts, four thousand two hundred dollars, and not exceeding five thousand dollars, salary, one thousand six hundred dollars."

Offices whose gross receipts are less than $1900 per annum are assigned to the fourth class; and by section 2 of the act it is provided that the salary of postmasters of that class shall be determined by a graduated scale of commissions upon postages, etc., and the box rents collected, the same to be ascertained and allowed by the Auditor of the Treasury for the Post Office Department in the settlement of the accounts of such postmasters upon their sworn quarterly returns. The second section then provides as follows:

"That when the compensation of any postmaster of this class shall reach two hundred and fifty dollars for four consecutive quarters each, exclusive of commissions on money order business, and when the returns to the auditor for four consecutive quarters shall show him to be entitled to a compensation in excess of two hundred and fifty dollars per quarter, the auditor shall report such fact to the Postmaster General, who shall assign the office to its proper class, and fix the salary of the postmaster as provided by section one of this act."

"SEC. 3. That the Postmaster General shall make all orders relative to the salaries of postmasters; and any change made in such salaries shall not take effect until the first day of the quarter next following the order; and the auditor shall be notified of any and all changes of salaries."

Reverting again to the facts of the case as found by the Court of Claims, and applying the statute just referred to, a satisfactory solution of the question involved will be found. The third and fourth findings by the Court of Claims are that for the four quarters between July 1, 1885, and July 1, 1886, the claimant made returns from his office to the auditor showing gross receipts amounting to $4912.99, of which $338.50 was from box rent; and that the auditor thereupon reported this fact to the Postmaster General, with a statement showing that the claimant, upon these returns, would be entitled to commissions and box rents amounting to $2150.85 for the four quarters, being at the rate of $537.71 per quarter.

Here, then, was a case in which the returns made by the postmaster to the auditor showed the postmaster "to be entitled to a compensation in excess of two hundred and fifty

dollars per quarter." What, then, was the duty of the auditor? To do precisely as he did do, viz.: "report such fact to the Postmaster General." The duty of the auditor in the premises thereupon ceased. It was completed; and the statute then cast a duty upon the Postmaster General, viz.: to "assign the office to its proper class and fix the salary of the postmaster, as provided by section one" of the act. The fifth finding by the Court of Claims shows that herein the Postmaster General performed the duty enjoined upon him by the statute; for, on the 27th of September, 1886, an order was issued from his department as follows:

"*Ordered*, That the post office at Chadron, Nebraska, be assigned to the third class, and the salary of the postmaster fixed at $1600 a year, from October 1, 1886.

"A. E. Stevenson,
"*First Assis't P. M. General.*"

All this was in exact conformity to the letter of the statute of 1883. The gross receipts of the office for the four quarters ending July, 1886, were more than $4200 and less than $5000; consequently the statute fixed the salary of the postmaster at $1600 a year. By section 3 of the act the change made in the salary could not "take effect until the first day of the quarter next following the order." The next quarter commenced October 1, 1886. Thus it was that the order of the First Assistant Postmaster General designated October 1, 1886, as the day when it should go into operation. The statute was then fulfilled. Its terms had been carried out. The office had been properly changed to one of the third class, and the salary of the postmaster had been changed to meet the mandate of the law. Whoever was then performing the duties of postmaster at that office became entitled to the salary thus fixed. It matters not that the President did not commission a third-class postmaster at that office until some months thereafter. The President had nothing to do with the salary attached to the office. That had been fixed absolutely by the Postmaster General, under the express directions

of a law of Congress. Neither could the salary of the postmaster be affected by any subsequent order of the Sixth Auditor, as was attempted to be done in this case; for, as already stated, his duty and authority in the premises ceased when he made his report of the business transactions of the office to the Postmaster General. The whole theory of the act of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office. The intent of the statute in this respect appears so plain upon a careful reading of it that it is difficult to elucidate it by argument or illustration. The mere statement of its terms is the best argument in favor of the conclusion we have reached.

The judgment of the Court of Claims was correct, and it is

Affirmed.

HEINZE *v.* ARTHUR'S EXECUTORS.

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

No. 146. Argued March 2, 1892. — Decided March 14, 1892.

Gloves made of cotton and silk, in which cotton was the material of chief value were imported in January, 1874, and charged by the collector with a duty of 60 per cent *ad valorem*, that rate of duty being chargeable only on "silk gloves," under the act of June 30, 1864, c. 171, 13 Stat. 210, and on "ready made clothing of silk, or of which silk shall be a component material of chief value," under § 3 of the act of March 3, 1865, c. 80, 13 Stat. 493. The importer protested and appealed and brought suit. His protest stated that the goods were only liable to a duty of 35 per cent less 10 per cent "being composed of cotton and silk, cotton chief part, the duty of 60 per cent being only legal where silk is the chief part." The goods were made on frames; *Held*,

(1) Under § 14 of the act of June 30, 1864, c. 171, 13 Stat. 214, 215, the protest set forth distinctly and specifically the grounds of the objection of the importer to the decision of the collector, and was sufficient;

(2) It was immaterial that the protest did not specify that the gloves were made on frames;

(3) The goods were dutiable only at 35 per cent less 10 per cent under § 22 of the act of March 2, 1861, 12 Stat. 191, and § 13 of the act of July 14, 1862, 12 Stat. 555, 556, 559, and under § 2 of the act of June 6, 1872, 17 Stat. 231.

THE case is stated in the opinion.

Mr. Stephen G. Clarke (with whom was *Mr. Edwin B. Smith* on the brief) for plaintiffs in error.

Mr. Assistant Attorney General Parker for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Superior Court of the city of New York, July 15, 1874, by Otto Heinze and Francis Gross against Chester A. Arthur, collector of the port of New York, to recover $174.99, as duties paid under protest on gloves made of cotton and silk. The goods were entered at the custom-house of the port of New York, January 14, 1874, and the duties were paid the same day. The protest was filed February 6, 1874, and an appeal was duly taken to the Secretary of the Treasury, February 24, 1874, and decided April 30, 1874. The suit was duly removed by the defendant into the Circuit Court of the United States for the Southern District of New York, by writ of certiorari. The only question involved in the case is as to the sufficiency of the protest. The defendant having died, his executors were substituted as defendants in his stead, in January, 1887. The case was tried before the court and a jury, in June, 1888, and a verdict was rendered for the defendants under the direction of the court, followed by a judgment in their favor, for costs, to review which the plaintiffs have brought a writ of error.

The protest signed by the plaintiffs was as follows: "On an importation of the undersigned firm, per steamer City of Brussels from Liverpool, duty paid January 14, 1874, containing partly cotton gloves mixed with silk, the appraisers of this port have levied a duty of 60% *ad valorem*, although the

article is only liable to a duty of 35% less 10%, being composed of cotton and silk, cotton chief part, the duty of 60% being only legal where silk is the chief part. We have paid the excess in order to get possession of the goods, but shall hold you and the government responsible for the return of the same."

The bill of exceptions states that the plaintiffs' counsel, in opening the case, "announced to the court and jury that they claimed that the goods involved in the suit were dutiable at 35% either as 'gloves made on frames,' under section 22 of the act of March 3rd, 1861, and the 13th section of the act of July 14th, 1862, or as 'manufactures of cotton not otherwise provided for,' under section 6 of the act of June 30th, 1864." It also states that the plaintiffs, to maintain the issues on their part, "introduced evidence tending to show that on January 13th, 1874, they had imported gloves made on frames, composed of cotton and a slight admixture of silk, from 10 to 25% in value, and that the collector, Chester A. Arthur, had assessed thereon a duty of 60% *ad valorem*, which plaintiffs had paid;" that all other requirements as to appeal and suit were complied with; that thereupon the plaintiffs rested, and the defendants' counsel moved the court to direct a verdict for them, on the ground that the protest was insufficient, in that it did not distinctly and specifically point out to the collector the ground of the plaintiffs' objection to his classification, and contained no allegation that the goods in question were made on frames, and that, while there were in force at the time the protest was served many provisions of law, (including those alluded to by the plaintiffs' counsel in his opening, as well as others,) providing for a duty of 35 per cent, which might be applicable to the plaintiffs' goods, there was nothing in the protest to show which one of them was relied on by the importers; that the court granted the motion and the plaintiffs excepted; and that the jury, under the direction of the court, found a verdict for the defendants.

The only statutory provisions in force at the time this importation of gloves, composed of cotton and silk, was made,

under which it could be claimed they were chargeable with a duty of 60 per cent *ad valorem*, were § 3 of the act of March 3, 1865, c. 80, (13 Stat. 493,) which imposed a duty of 60 per cent *ad valorem* on "ready-made clothing of silk, or of which silk shall be a component material of chief value," and § 8 of the act of June 30, 1864, c. 171, (13 Stat. 210,) which imposed a duty of 60 per cent *ad valorem* on "silk . . . gloves," the same section imposing a duty of 50 per cent *ad valorem* on "all manufactures of silk, or of which silk is the component material of chief value, not otherwise provided for."

By § 22 of the act of March 2, 1861, c. 68, (12 Stat. 191,) a duty of 30 per cent *ad valorem* was imposed upon "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women or children, and not otherwise provided for," and on "clothing, ready-made, and wearing apparel of every description, of whatever material composed, except wool, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer."

By § 13 of the act of July 14, 1862, c. 163, (12 Stat. 555, 556,) an additional duty of 5 per cent *ad valorem* was imposed on "caps, gloves, leggins, mits, socks, stockings, wove shirts and drawers, and all similar articles made on frames, of whatever material composed, worn by men, women and children, and not otherwise provided for," and on "clothing, ready-made, and wearing apparel of every description, of whatever material composed, except wool, made up or manufactured wholly or in part by the tailor, seamstress or manufacturer;" and also (p. 557) upon "manufactures not otherwise provided for, composed of mixed materials, in part of cotton, silk, wool or worsted, hemp, jute or flax."

By § 6 of the act of June 30, 1864, c. 171, (13 Stat. 208, 209,) a duty of 35 per cent *ad valorem* was imposed "on cotton shirts and drawers, woven or made on frames, and on all cotton hosiery," and "on cotton braids, insertings, lace, trimming, or bobinet, and all other manufactures of cotton, not otherwise provided for."

By § 2 of the act of June 6, 1872, c. 315, (17 Stat. 231,) it was enacted that on and after August 1, 1872, in lieu of the duties imposed by law "on all manufactures of cotton of which cotton is the component part of chief value," there should be levied, collected and paid 90 per cent of the rates of duty then imposed by law upon said articles, it being stated to be the intent of the section "to reduce existing duties on said articles ten per centum of such duties."

It is contended for the defendants that the protest is insufficient because it makes no reference to the gloves as "made on frames;" that the trial related exclusively to a classification of the goods as "made on frames;" that the protest was not distinct or specific as to such goods; and that the paper called a protest did not protest against anything.

As the importation in question was made in January, 1874, and the Revised Statutes, according to § 5595 thereof, embraced only the statutes of the United States, general and permanent in their nature, in force on December 1, 1873, as revised and consolidated by the commissioners, the question of the sufficiency of the protest arises under the statutes which existed December 1, 1873.

By the act of February 26, 1845, c. 22, (5 Stat. 727,) the right to maintain an action at law against a collector to ascertain and try the legality and validity of a demand for a payment of duties, and their payment under protest, was restored; but it was provided that such action should not be maintained unless such protest should be in writing "and signed by the claimant, at or before the time of payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." It was also provided by § 14 of the act of June 30, 1864, c. 171, (13 Stat. 214, 215,) that the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on imported goods, should be final and conclusive against all persons interested therein, unless the owner, importer, consignee or agent of the goods should, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, give notice in writing to the collector, if dis-

satisfied with his decision, "setting forth therein, distinctly and specifically, the grounds of his objection thereto."

In the present case, the entry was liquidated January 30, 1874, and the protest was filed February 6, 1874. The sole question for consideration is, whether the protest in question set forth distinctly and specifically the grounds of the objection of the importers to the decision of the collector assessing the duty of 60 per cent *ad valorem* on the gloves.

We think the protest was sufficient. The collector having assessed the duty of 60 per cent, could have assessed it only under § 8 of the act of June 30, 1864, (13 Stat. 210,) which imposes that rate of duty on silk gloves, or under § 3 of the act of March 3, 1865, (13 Stat. 493,) which imposes that rate of duty "on ready-made clothing of silk, or of which silk shall be a component material of chief value." The protest specifically states that the goods are "partly cotton gloves, mixed with silk," and are "composed of cotton and silk, cotton chief part, the duty of 60 per cent being only legal where silk is the chief part." The words "chief part," used twice in the protest, clearly mean that in the goods, composed of cotton and silk, the cotton is the component material of chief value, or the "component part of chief value," and that the silk is not the "component material of chief value." In this respect, the protest called the attention of the collector "distinctly and specifically" to the grounds of objection of the importers to his decision, namely, that he had, contrary to law, assessed a duty of 60 per cent upon the gloves, in that he had treated them as goods of which silk was the "component material of chief value," when the contrary was the fact, and the cotton, and not the silk, was the "component material of chief value" or "component part of chief value."

The protest further claimed that the gloves were liable to a duty of only 35 per cent, less 10 per cent, and were, in fact, in any event, liable to only that duty, whether liable to 30 per cent under § 22 of the act of March 2, 1861, (12 Stat. 191,) with the 5 per cent added under § 13 of the act of July 14, 1862, (12 Stat. 555, 556, 557.) or at 35 per cent, under the act of June 30, 1864, (13 Stat. 208, 209,) with the reduction, as to

all those provisions, of 10 per cent, under the act of June 6, 1872, (17 Stat. 231).

It is entirely immaterial that the protest did not specify that the gloves were made on frames. It was sufficient to state that the gloves were composed of cotton and silk, and that the cotton was the component material or part of chief value, and the silk was not the component material of chief value. The importers were bound only to state, as they did, that the duty of 60 per cent was illegal, and why it was illegal.

In *Arthur* v. *Unkart*, 96 U. S. 118, it was held by this court that gloves like those in question, made on frames, and composed of cotton and silk, in which cotton was the component part of chief value, were not dutiable at 60 per cent, under § 8 of the act of June 30, 1864, (13 Stat. 210,) but were dutiable only under § 22 of the act of March 2, 1861, (12 Stat. 191,) and § 13 of the act of July 14, 1862, (12 Stat. 555, 556, 557,) and under § 2 of the act of June 6, 1872, (17 Stat. 231).

Under the ruling of this court in *Davies* v. *Arthur*, 96 U. S. 148, 151, the objection set forth in the protest in this case, to the decision of the collector, was so distinct and specific as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

This rule was affirmed in *Greely's Administrator* v. *Burgess*, 18 How. 413, 416; *Arthur* v. *Dodge*, 101 U. S. 34, 37; *Arthur* v. *Morgan*, 112 U. S. 495, 501, and cases there cited; and *Schell's Executors* v. *Fauché*, 138 U. S. 562, 567, 568, 569.

The judgment of the Circuit Court is

Reversed, and the case is remanded to that court with an instruction to grant a new trial.

LIEBENROTH *v.* ROBERTSON.

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

No. 147. Argued March 2, 1892. — Decided March 14, 1892.

Photographic albums, made of paper, leather, metal clasps and plated clasps, imported in April, May and June, 1885, the paper being worth more than all the rest of the materials put together, were not liable to a duty of 30 per cent *ad valorem*, as "manufactures and articles of leather," under Schedule N of the act of March 3, 1883, c. 121, (22 Stat. 513,) but were liable to a duty of only 15 per cent *ad valorem*, under Schedule M of that act, (22 Stat. 510,) as a manufacture of paper, or of which paper was "a component material, not specially enumerated or provided for" in that act.

Under § 6 of that act, (p. 491,) title 33 of the Revised Statutes was abrogated after July 1, 1883, and § 2499 in that title was made to read so that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable," instead of reading that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" and that new provision was applicable to this case, although the new § 2499 also provided that "if two or more rates of duty should be applicable to any imported article it shall be classified for duty under the highest of such rates."

This last provision was not properly applicable, under § 2499, to an article "manufactured from two or more materials," and it had sufficient scope if applied to articles not manufactured from two or more materials, but still *prima facie* subject to "two or more rates of duty."

THE case is stated in the opinion.

Mr. Stephen G. Clarke for plaintiffs in error. *Mr. Edwin B. Smith* and *Mr. Charles Curie* were with him on the brief.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Superior Court of the city of New York, by Adolph Liebenroth, Iwan Von

Auw, William Graham and Herman Schliecher, composing the firm of Liebenroth, Von Auw & Co., against William H. Robertson, collector of the port of New York, to recover the sum of $552.55, as an alleged excess of duties exacted by the defendant on importations into the port of New York of photographic albums, in April, May and June, 1885, the duties assessed having been paid, protests duly filed and appeals taken to the Secretary of the Treasury. The suit was removed by the defendant, by certiorari, into the Circuit Court of the United States for the Southern District of New York. The case was tried before the court and a jury, in January, 1888, and a verdict found for the defendant by the direction of the court, followed by a judgment for him for costs. The plaintiffs have brought a writ of error.

There is a bill of exceptions, which shows that the substantive part of the protest was as follows: "We hereby protest against your decision and assessment of duties, as made by you, and the payment of more than as below claimed, on our importations below mentioned, consisting of certain bound albums or album books, claiming that, under existing laws, and section 2499 and Schedule M, act of March 3, 1883, said goods are liable to only 15% *ad val.* as a manufacture of which paper is the component material of chief value, not otherwise specially enumerated or provided for, or claiming that, under existing laws, and particularly by said section and said schedule, they are liable at only 20% *ad val.* as 'blank books,' or said goods are liable at no more than 25% *ad val.* as 'books,' under same section and schedule."

The duty was exacted and paid at the rate of 30 per cent *ad valorem* on the goods, as manufactures of articles of leather, or of which leather was a component part, they being composed of paper, leather, metal clasps and plated clasps, and of their various component materials, the paper being, in ninety-nine cases out of a hundred, worth more than all the rest of the materials put together. The examiner in the appraiser's department testified, on the trial, that he classified the goods as "manufactures of leather and paper, leather chief value," but that his classification was erroneous, because the paper

was the material of chief value. They were dutiable under the act of March 3, 1883, c. 121, (22 Stat. 488).

Neither photographic albums nor albums of any kind were specified by those names as dutiable. Schedule N of that act (p. 513) imposes a duty of 30 per cent *ad valorem* on "all manufactures and articles of leather, or of which leather shall be a component part, not specially enumerated or provided for in this act." By Schedule M of the act (p. 510) a duty of 15 per cent *ad valorem* is imposed on "paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act;" and a duty of 20 per cent *ad valorem* on "blank books, bound or unbound, and blank books for press copying," and also a duty of 25 per cent *ad valorem* on "books, pamphlets, bound or unbound, . . . not specially enumerated or provided for in this act."

By title 33 of the Revised Statutes, § 2499, it was provided as follows: "There shall be levied, collected and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates *of duty* are chargeable, there shall be levied, collected and paid, on such non-enumerated article, the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates *at which any of its component parts may be chargeable.*"

By § 6 of the act of March 3, 1883, c. 121, (22 Stat. 489, 491,) title 33 of the Revised Statutes was abrogated after July 1, 1883, and the following section was substituted as § 2499: "There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this title as chargeable with duty,

the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates are chargeable, there shall be levied, collected and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates *at which the component material of chief value may be chargeable.* If two or more rates of duty should be applicable to any imported article it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

In comparing the former and later enactments of § 2499, it is to be noted that in the later one the words "of duty," in italics, are omitted; that the words in the earlier one, "at which any of its component parts may be chargeable," in italics, are omitted, and the words in the later one, "at which the component material of chief value may be chargeable," in italics, are substituted therefor; and that the following language is added in the later enactment, which does not appear in the earlier one: "If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

At the close of the plaintiffs' testimony, the defendant, without putting in any evidence, moved the court to direct a verdict in his favor. The court did so, the plaintiffs excepted, and a verdict was rendered for the defendant.

The question is as to whether the proper rate of duty on the goods was 30 per cent *ad valorem* or only 15 per cent *ad*

valorem. Leather was a component part or material of the article, and was dutiable at 30 per cent. Paper was a component part or material of the article, and was dutiable at 15 per cent. On the view that both of those two rates of duty were applicable to the article, and that there was a provision in § 2499, as enacted by the act of March 3, 1883, that in such case the article should be classified for duty under the highest of the two rates, that is, in this case, 30 per cent, that rate of duty was assessed.

The reasons assigned by the Circuit Court for directing a verdict for the defendant are reported in 33 Fed. Rep. 457; and it would appear from them that the court gave no effect to the later provision in § 2499, as enacted by the act of March 3, 1883, that "on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable."

These albums were articles manufactured from materials two of which were paper and leather; and, as the evidence distinctly showed that the paper was the component material of chief value, the duty was assessable under Schedule M of the act of 1883, at 15 per cent, under the clause imposing that duty on "paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act."

The change, in the later enactment of § 2499, of the duty on "all articles manufactured from two or more materials," from a duty, "at the highest rates at which any of its component parts may be chargeable," to a duty, "at the highest rates at which the component material of chief value may be chargeable," is very significant, especially considered in connection with the new provision in the later § 2499, that, "if two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates." There was clearly a new classification provided for as to "all articles manufactured from two or more materials," based upon the highest rate chargeable on "the component material of chief value;" and the further new provision was

added, imposing the highest rate of duty where two or more rates of duty were applicable to an article. This last provision was not properly applicable, under § 2499, to an article "manufactured from two or more materials," and it had sufficient scope if applied to articles not manufactured from two or more materials, but still *prima facie* subject to "two or more rates of duty."

The decision by the Circuit Court in the present case was made in January, 1888. Since that date there have been three decisions by this court bearing on the question involved.

In *Arthur* v. *Butterfield*, 125 U. S. 70, 76, decided in March, 1888, it was held, under the later § 2499, that "to place articles among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles;" and that the words "manufactures of hair" were a sufficient designation to place such manufactures among the enumerated articles.

In *Hartranft* v. *Meyer*, 135 U. S. 237, 239, decided in April, 1890, attention was called to the change made by the act of 1883 in § 2499, in regard to "articles manufactured from two or more materials," assessing the duty on them "at the highest rates at which the component material of chief value may be chargeable," instead of "at the highest rates at which any of its component parts may be chargeable," as a change by which, "instead of making the duty depend on the highest rate at which any component part is chargeable, it is made to depend on the highest rate at which the component material of chief value is chargeable;" and in that case, the article being composed of silk, cotton, and wool, the silk being the component material of chief value, this court held that the duty was chargeable at the silk rate, which was higher than the rate chargeable on the other component materials of the goods.

So, too, in *Mason* v. *Robertson*, 139 U. S. 624, decided in April, 1891, § 2499, as enacted by the act of March 3, 1883, was under consideration, and *Arthur* v. *Butterfield* and *Hartranft* v. *Meyer* were cited. The question was whether bichro-

mate of soda was a non-enumerated article, within the "similitude clause" of § 2499, and thus subject to the same duty as bichromate of potash, which was specifically enumerated, or was subject to duty as a chemical compound and salt, not specially enumerated or provided for in that act. The Circuit Court had ruled that the article was a non-enumerated one, bearing a similitude in use to bichromate of potash, had declined to submit to the jury the question of similitude, and had directed a verdict for the defendant. The importer claimed that the article was liable to a duty of only 25 per cent *ad valorem*, as a chemical compound and salt not specially enumerated or provided for in the act. This court reversed the judgment of the Circuit Court, and alluded to the fact that the description "manufactures composed wholly of cotton," or even "manufactures of cotton," had been held to be a sufficient enumeration, citing *Stuart* v. *Maxwell*, 16 How. 150, and *Fisk* v. *Arthur*, 103 U. S. 431, and holding that there was nothing in its decision inconsistent with the decisions in *Stuart* v. *Maxwell*, 16 How. 150, and in *Arthur* v. *Fox*, 108 U. S. 125.

The judgment of the Circuit Court is reversed, and the case is remanded to that court with an instruction to grant a new trial.

WILSON *v.* SELIGMAN.

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

No. 177. Argued and submitted March 1, 2, 1892. — Decided March 14, 1892.

Under the statute of Missouri, authorizing execution upon a judgment against a corporation to be ordered against any of its stockholders to the extent of the unpaid balance of their stock, "upon motion in open court, after sufficient notice in writing to the persons sought to be charged," a notice served in another State upon a person alleged to be a stockholder, and who has never resided in Missouri, is insufficient to support an order charging him with personal liability.

Statement of the Case.

THIS was an action brought by Wilson, a citizen of Missouri, against Seligman, a citizen of New York, in the circuit court of the city of St. Louis, and duly removed by the defendant into the Circuit Court of the United States. The action was upon an order or judgment of the state court under section 736 of the Revised Statutes of Missouri of 1879, (which is copied in the margin,[1]) by which execution was awarded against the defendant as a stockholder in the Memphis, Carthage and Northwestern Railroad Company, a corporation of Missouri, upon a judgment recovered by the plaintiff against the corporation. The defendant answered, denying that he was a stockholder, and averring that the order or judgment against him was void, for want of jurisdiction of his person. The present case was submitted, a jury being duly waived in writing, to the court, which found the following facts:

The plaintiff's judgment against the corporation was recovered in the state court on April 2, 1883, for $72,799.38, and interest. Upon that judgment executions against the corporation were issued to the sheriffs of the several counties in Missouri through which it had built its road, and were returned unsatisfied; and the corporation was then, and has been ever since, insolvent. On July 9, 1883, the plaintiff filed a motion in the same court for an order that execution for the amount of that judgment issue against the defendant as the alleged holder of stock in the corporation on which more than the amount of the judgment against the corporation was still unpaid. Notice of this motion was served on him personally at his domicil in New York, and was posted in the clerk's

[1] 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.

office of the state court. No notice was served on him within the State of Missouri, and he never was a citizen or a resident of this State. At the hearing of the motion, on December 3, 1883, the defendant did not appear, and the court entered an order, finding that he was a stockholder as alleged, and was liable to execution for the amount of the judgment against the corporation, and granting the motion and ordering execution to issue against him accordingly. This was the order or judgment upon which the present action was brought.

Upon these facts, the court below gave judgment for the defendant. 36 Fed. Rep. 154. The plaintiff sued out this writ of error.

Mr. James S. Botsford (with whom was *Mr. Marcus T. C. Williams* on the brief) for plaintiff in error.

Mr. James O. Broadhead and *Mr. John O'Day* filed a brief for defendant in error, but the court did not desire to hear further argument.

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

The statute of Missouri, under which these proceedings were had, authorizes execution upon a judgment against a corporation to be ordered against any of its stockholders, only to the extent of the unpaid balance of their stock, and "upon motion in open court, after sufficient notice in writing to the persons sought to be charged." Missouri Gen. Stat. 1865, c. 62, § 11; Rev. Stat. 1879, § 736; Rev. Stat. 1889, § 2517. Each person sought to be charged as a stockholder is thus given the right, before execution can be awarded against him on a judgment against the corporation, to written notice and judicial investigation of the questions whether he is a stockholder, and, if he is, how much remains unpaid on his stock. Although the statute does not define the course of proceeding or the kind of notice, otherwise than by directing that the proceeding shall be summary, upon motion and "after sufficient notice in writ-

ing to the persons sought to be charged," there can be no doubt that in this, as in all other cases, in which a personal liability is sought to be enforced by judicial proceedings and after written notice, the notice must be personally served upon the defendant within the territorial jurisdiction of the court by whose order or judgment his personal liability is to be ascertained and fixed, unless he has agreed in advance to accept, or does in fact accept, some other form of service as sufficient.

The general principles applicable to this subject were clearly and exhaustively discussed by this court, speaking by Mr. Justice Field, in *Pennoyer* v. *Neff*, 95 U. S. 714, from which it will be sufficient to quote a few sentences: "Every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and "no State can exercise direct jurisdiction and authority over persons or property without its territory." p. 722. "It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits, that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property." p. 723. "Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory, and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability." p. 727. "A judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered." p. 732. "To give such proceedings any validity, there must be a tribunal competent by its

constitution, that is, by the law of its creation, to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." p. 733. See also *D'Arcy* v. *Ketchum*, 11 How. 165; *St. Clair* v. *Cox*, 106 U. S. 350; *Latimer* v. *Union Pacific Railway*, 43 Missouri, 105.

It may be admitted that any State may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicil at which, service may be made within the State, and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the State. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the State shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *Pennoyer* v. *Neff*, 95 U. S. 714, 735; *Vallee* v. *Dumergue*, 4 Exch. 290, 303; *Copin* v. *Adamson*, L. R. 9 Exch. 345, 355, 356, and 1 Ex. D. 17.

But such is not this case. Under a former statute of Missouri, any officer, holding an execution against a corporation which had been returned unsatisfied, might, without further action of the court, levy the same execution upon the property of stockholders within the State. Missouri Rev. Stat. 1855, c. 34, §§ 13, 14. In that condition of the law, the judgment and execution bound only the property of stockholders on which it was levied within the State, and created no personal liability on their part which could be enforced by suit in another State; and if the officer levied the execution on the

property of any person not a stockholder, he was liable as a trespasser. The very object of the existing statute, as manifest on its face, and as declared by the Supreme Court of Missouri, was to change the law, so as to leave nothing to the discretion of the officer, and to require the judgment creditor to apply to the court for execution against any person whom he sought to charge as a stockholder, and to have all questions affecting his relations to the corporation and its creditors investigated and determined by the court before an execution should issue against him. *Skrainka* v. *Allen*, 76 Missouri, 384, 391. And see *Holyoke Bank* v. *Goodman Co.*, 9 Cush. 576, 583.

In the case at bar, the defendant never resided in Missouri, and was not served with process within the State, either upon the original writ against the corporation, or upon the motion for execution against him. He denies that he was a stockholder, and the question whether he was one was not tried or decided in the controversy between the plaintiff and the corporation, nor involved in the judgment recovered by one of those parties against the other. Under the statute of Missouri, and upon fundamental principles of jurisprudence, he is entitled to legal notice and trial of the issue whether he is a stockholder, before he can be charged with personal liability as such; and personal service of the notice within the jurisdiction of the court is essential to support an order or judgment ascertaining and establishing such liability, unless he has voluntarily appeared, or otherwise waived his right to such service, which he has not done in this case.

These views are maintained by a very recent decision of the Supreme Court of Missouri in *Wilson* v. *St. Louis & San Francisco Railway*, 18 Southwestern Reporter, 286, as well as by the English cases expounding the St. of 8 & 9 Vict. c. 16, § 36, which was the source of the provision of the existing statute of Missouri. *Edwards* v. *Kilkenny &c. Railway*, 1 C. B. (N. S.) 409, and 14 C. B. (N. S.) 526, and note, citing words of English statute; *Ilfracombe Railway* v. *Devon & Somerset Railway*, L. R. 2 C. P. 15; *Shrimpton* v. *Sidmouth Railway Company*, L. R. 3 C. P. 80; *Skrainka* v. *Allen*, 76

Missouri, 384, 388, 389. See also *Howell* v. *Maglesdorf*, 33 Kansas, 194.

The cases in which judgments against a territorial and municipal corporation have been enforced against its inhabitants, either by direct levy of execution on their property, according to common law or ancient usage, as in New England, or by mandamus to levy a tax to pay the judgment, pursuant to express statute, as in Missouri, have no bearing upon this case. *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 129, and cases cited; *State* v. *Rainey*, 74 Missouri, 229.

Judgment affirmed.

LAU OW BEW *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1458. Argued January 14, 1892. — Decided March 14, 1892.

By section 6 of the act of March 3, 1891, establishing Circuit Courts of Appeals, 26 Stat. 828, c. 517, the appellate jurisdiction not vested in this court was vested in the court created by that act, and the entire jurisdiction was distributed.

The words "unless otherwise provided by law" in the clause in that section which provides that the Circuit Courts shall exercise appellate jurisdiction "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law" were inserted in order to guard against implied repeals, and are not to be construed as referring to prior laws only.

It is competent for this court by certiorari to direct any case to be certified by the Circuit Courts of Appeals, whether its advice is requested or not, except those which may be brought here by appeal or writ of error.

Section 6 of the Chinese Restriction act of May 6, 1882, 22 Stat. 58, c. 126, as amended by the act of July 5, 1884, 23 Stat. 115, c. 220, does not apply to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reenter it on their return to their business and their homes.

This is a writ of certiorari for the review of a judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the Circuit Court of the United States for the

Northern District of California, in a case of *habeas corpus*, which determined that Lau Ow Bew, the appellant, is a Chinese person forbidden by law to land within the United States, and has no right to be or remain therein, and ordered that he be deported out of the country, and transported to the port in China whence he came.

The proceedings in the Circuit Court are set out in the application for the certiorari, as reported in 141 U. S. 583. The case was heard and determined in that court upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed that the following are the facts herein:

"1st. That the said Lau Ow Bew is now on board the SS. Oceanic, which arrived in the port of San Francisco, State of California, on the 11th day of August, A.D. 1891, from Hong Kong, and is detained and confined thereon by Captain Smith, the master thereof.

"2d. That the said passenger is now and for seventeen years last past has been a resident of the United States and domiciled therein.

"3d. That during all of said time the said passenger has been engaged in the wholesale and importing mercantile business in the city of Portland, State of Oregon, under the firm name and style of Hop Chong & Co.

"4th. That said firm is worth $40,000, and said passenger has a one-fourth interest therein, in addition to other properties.

"5th. That said firm does a business annually of $100,000, and pays annually to the United States government large sums of money, amounting to many thousands of dollars, as duties upon imports.

"6th. That on the 30th day of September, A.D. 1890, the said passenger departed from this country temporarily on a visit to his relatives in China, with the intention of returning as soon as possible to this country, and returned to this country by the steamship Oceanic on the 11th day of August, A.D. 1891.

"7th. That at the time of his departure he procured satis-

factory evidence of his status in this country as a merchant, and on his return hereto he presented said proofs to the collector of the port of San Francisco, but said collector, while acknowledging the sufficiency of said proofs and admitting that the said passenger was a merchant domiciled herein, refused to permit the said passenger to land on the sole ground that the said passenger failed and neglected to produce the certificate of the Chinese government mentioned in section 6 of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884."

The Circuit Court rendered judgment September 14, 1891, (47 Fed. Rep. 578,) which, the case having been carried by appeal to the Circuit Court of Appeals for the Ninth Circuit, was on the 7th day of October, 1891, affirmed. (47 Fed. Rep. 641.)

On November 16, 1891, this court, upon the application of appellant, ordered that a writ of certiorari issue to the Circuit Court of Appeals requiring it to certify the case up for review and determination, under section six of the act to establish Circuit Courts of Appeals, approved March 3, 1891. (26 Stat. 826, 828, c. 517.)

The fifth article of the treaty concluded July 28, 1868, between the United States and China, known as the "Burlingame Treaty," (16 Stat. 739,) declares that:

"The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents."

Article VI of that treaty is as follows:

"Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and ex-

emptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States."

A supplementary treaty was concluded November 17, 1880, (22 Stat. 826,) which recites, among other things, in its preamble that, "whereas the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit;" and articles I and II of which are as follows:

"Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

The sixth section of the act of May 6, 1882, entitled "An

act to execute certain treaty stipulations relating to Chinese," (22 Stat. 58, c. 126,) as amended by the act of July 5, 1884, (23 Stat. 115, c. 220,) the matter inserted in amendment being italicized, and the matter stricken out being in brackets, reads as follows:

"SEC. 6. That in order to the faithful execution of [articles one and two of the treaty in] *the provisions of* this act [before mentioned,] every Chinese person, other than a laborer, who may be entitled by said treaty [and] *or* this act to come within the United States, and who shall be about to come to the United States, shall *obtain the permission of and* be identified as so entitled by the Chinese government, *or of such other foreign government of which at the time such Chinese person shall be a subject*, in each case [such identity] to be evidenced by a certificate issued [under the authority of said] *by such* government, which certificate shall be in the English language [or (if not in the English language) accompanied by a translation into English, stating such right to come] *and shall show such permission, with the name of the permitted person in his or her proper signature*, and which certificate shall state the *individual, family, and tribal* name *in full*, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, *when and where and how long pursued*, and place of residence [in China] of the person to whom the certificate is issued, and that such person is entitled [conformably to the treaty in] *by* this act [mentioned] to come within the United States. *If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant' hucksters, peddlers or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the*

United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be vised by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate *vised as aforesaid* shall be prima facie evidence of the fact set forth therein, and shall be produced to the collector of customs [or his deputy] of the port in the district in the United States at which the person named therein shall arrive, *and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.*"

On the third of July, 1890, the Treasury Department issued certain instructions regarding the reëntry into the United States of Chinese persons after a visit to China, one of which is as follows:

"Chinamen who are not laborers, and who may have heretofore resided in the United States, are not prevented by existing law or treaty from returning to the United States after visiting China or elsewhere. No certificates or other papers, however, are issued by the department, or by any of its subordinate officers, to show that they are entitled to land in the United States, but it is suggested that such persons should, before leaving the United States, provide themselves

Argument for Appellee.

with such proofs of identity as may be deemed proper, showing that they have been residents of the United States, and that they are not laborers, so that they can present the same to and be identified by, the collector of customs at the port where they may return." Syn. Treas. Dec. 1890, 253, 254.

Mr. J. Hubley Ashton for appellant. *Mr. Thomas D. Riordan* was with him on the brief.

Mr. Assistant Attorney General Parker for appellee.

The petitioner left the United States September 30, 1890, and came into the port of San Francisco August 11, 1891, having been out of the United States more than ten months. During this time he was living in the country of his birth and had resumed his domicil there, and had thus voluntarily placed himself within the operation of the statutes of the United States, excluding Chinese immigrants.

Immediately before going on board the Oceanic at Hong Kong to return to the United States, he was a "Chinese person, other than a laborer," and was entitled by the terms of the treaty "to come within the United States." So far as his purpose or intent could control, he was "about to come to the United States" from China. But he could come only in accord with our laws. Therefore, it was necessary, under the terms of the amended act, that he should, before going on board, "obtain the permission of and be identified as so entitled by the Chinese government . . . to be evidenced by a certificate, issued by such government."

It is provided that the certificate shall be in the English language, shall show such permission, the name of the permitted person in his or her proper signature; the name, family, title and rank; the physical description, the former and present occupation or profession, and when, where and how long pursued, and the place of residence of the person to whom the certificate is issued, "and that he is entitled by this act to come within the United States." And it is enacted that this certificate "shall be the sole evidence permissible on the part

of the person so producing the same to establish a right of entry into the United States." But it is argued that Congress did not intend this act to apply to Chinese persons that had been doing business in the United States. It is submitted that the phraseology of the act controverts this argument. The general phrase is plain, and its scope is indicated by the expressed exception.

The act applies in terms to "every Chinese person" "other than a laborer," except those protected by the thirteenth section. An exception that recognizes the breadth of the general application is the exception as to diplomatic and other officers and their servants mentioned in section 13 of the act. These exceptions indicate that outside of them the words "every Chinese person" were used without a restriction, and that, subject to these exceptions, the requirements of the act apply to all Chinese persons.

This broad construction seems to be recognized by the phraseology of the first clause of section 15, which says, "that the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power." The act applies in specific terms to "every Chinese person" not a Chinese laborer, or a diplomatic or other officer, or a servant of such officials. It cannot be claimed that subjects of the Emperor of China engaged in trade in this country are not "Chinese persons."

It is part of the case that Lau Ow Bew is not a Chinese laborer, a Government officer, or the servant of an official. It therefore appears plainly that he is one of the class that the law of the United States declares shall obtain and produce the certificate required by and described in section 6.

No better check to the laborer who seeks to come as a merchant, and who is ready to make his way by perjury, could be devised than to require the Chinese government to certify, in addition to the other facts required, "the nature, character, and estimated value of the business carried on by him prior to and at the time of his application."

In a case like that of *Lau Ow Bew* some hardship may arise from the law. In a case like that of *Wan Shing*, 140

U. S. 424, the fraud would be exposed and defeated at the port of shipment. It is therefore not unnatural that Congress should require of a person in China who claims to be engaged in trade in the United States, that he shall be identified and shown to be such by the Chinese government.

The whole scheme of section 6 is one to stop and turn back the multitude of Chinese laborers who pay no respect to our wishes or our laws, and who are prompt to employ fraud and perjury in order to place themselves in the ranks of competition in our labor markets. It does not prevent the coming of merchants or other entitled persons who have never been here. Neither does it preclude the return of merchants or other entitled persons domiciled here, or who have resided here.

Congress seeks by this section to execute the protective clauses of the treaty of 1880, which authorize the United States to restrict the coming of Chinese laborers. This legislation places such safeguards about the coming of all Chinese persons, not connected with diplomatic or official service, as experience has shown to be necessary to prevent the unlawful entry of large numbers of Chinese laborers. This Congress had the right to do, and having the right and power so to do, it was clothed with the right and power to determine the means that should be used to accomplish the result sought.

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

Before proceeding to dispose of this case upon the merits the question of jurisdiction, although not argued by counsel, must receive attention.

The act of Congress of March 3, 1891, establishing Circuit Courts of Appeals and defining and regulating the jurisdiction of the courts of the United States, 26 Stat. 826, c. 517, was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, which impeded the examination of cases of public concern, and operated to the delay of suitors. *In re Woods*, 143 U. S. 202.

By section 4, "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same."

By section 14, section 691 of the Revised Statutes, and section 3 of the act of February 16, 1875, c. 77, 18 Stat. c. 77, pp. 315, 316, and "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act," were repealed.

Under section 5, appeals or writs of error may be taken from the Circuit Courts directly to this court in six specified classes of cases, namely:

"[1] In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. [2] From the final sentences and decrees in prize-causes. [3] In cases of conviction of a capital or otherwise infamous crime. [4] In any case that involves the construction or application of the Constitution of the United States. [5] In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. [6] In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

By section 6, the Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error," final decisions of the Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed. *McLish* v. *Roff*, 141 U. S. 661, 666.

The words "unless otherwise provided by law" were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subse-

quent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause.

The section then provides that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instructions on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal. And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified" for its determination as if brought up by appeal or writ of error. "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

By this section judgments or decrees in the enumerated classes of cases are made final in terms by way of the exclusion of any review by writ of error or appeal, while as to cases not expressly made final by the section, appeal or writ of error may be had of right, where the money value of the matter in controversy exceeds one thousand dollars besides costs.

The case before us is one of *habeas corpus*. The jurisdiction of the Circuit Court was not in issue, nor was the construction or application of the Constitution of the United States involved, nor the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, drawn in question. It did not fall within either of the classes of cases which may be brought directly to this court under the act, and was, therefore, properly carried to the Circuit Court of Appeals. And as a case of *habeas corpus* is not one in which the matter in controversy involves a money value, no appeal lies from that court under section six. *Kurtz* v. *Moffitt*, 115 U. S. 487. But as the decree is "made final" by the effect of the section in giving the Circuit Courts of Appeals jurisdiction over that class of cases, we are of opinion that it is reviewable upon certiorari, and that this writ was providently issued.

In every case within its appellate jurisdiction, the Circuit Court of Appeals may certify to this court any questions or propositions of law in respect of which it desires instruction, and this court may then require the whole record and cause to be sent up; and so it is competent for this court by certiorari to direct any case to be certified, whether its advice is requested or not, except those which may be brought here by appeal or writ of error, and the latter are specified as those where the money value exceeds a certain amount, and which have not been made final "in this section," that is, made final in terms. And as certiorari will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision, the object of the act is thereby attained.

We are brought, therefore, to the consideration of the questions arising upon the record. Lau Ow Bew came to the United States in 1874, and has been for seventeen years a resident thereof and domiciled therein, and during that period has carried on a wholesale and importing mercantile business in the city of Portland, Oregon. On September 30, 1890, he went to China for the purpose of visiting his relatives and with the intention of returning as soon as possible, having pre-

viously procured the proper evidence of his status in this country as a merchant, in accordance with the regulations of the Treasury Department of July 3, 1890. He took passage for home at Hong Kong on the Oceanic, which reached San Francisco on August 11, 1891. Although it was admitted by the collector that appellant was a merchant domiciled in the United States, and the sufficiency of his proofs of identity was acknowledged, yet the collector refused to permit him to land on the sole ground that he failed and neglected to produce the certificate of the Chinese government mentioned in section six of the Chinese Restriction Act of May 6, 1882, as amended by the act of July 5, 1884.

Does the section apply to Chinese merchants, already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to reënter it on their return to their business and their homes?

Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *United States* v. *Kirby*, 7 Wall. 482; *Oates* v. *National Bank*, 100 U. S. 239.

In the case of *Low Yam Chow*, 13 Fed. Rep. 605, 609, it was held by the Circuit Court for the District of California, September 5, 1882, that Chinese merchants who resided, at the time of the passage of the act of Congress of May 6, 1882, in other countries than China, on arriving in a port of the United States, were not required by that act to produce certificates of the Chinese government establishing their character as merchants, as a condition of their being allowed to land, but that their character as such merchants could be established by parol evidence. And Mr. Justice Field, delivering the opinion of the court, referring to the sixth section of the act, said: "The certificate mentioned in this section is evidently designed to facilitate proof by Chinese other than laborers, coming from China and desiring to enter the United States, that they are not within the prohibited class. It is not re-

quired as a means of restricting their coming. To hold that such was its object would be to impute to Congress a purpose to disregard the stipulation of the second article of the new treaty, that they should be 'allowed to go and come of their own free will and accord.'"

And Judge Deady, in the District Court for the District of Oregon, held, January 15, 1883, that the certificate provided for in section six was not the only competent evidence that a Chinese person is not a laborer, and, therefore, entitled to come to and reside within the United States, but that the fact might be shown by any other pertinent and convincing testimony. *In re Ho King*, 14 Fed. Rep. 724.

The amendatory act of July 5, 1884, enlarged the terms of the certificate, and provided that it should be the sole evidence permissible on the part of the person producing the same to establish a right of entry into the United States. This rule of evidence was evidently prescribed by the amendment as a means of effectually preventing the violation or evasion of the prohibition against the coming of Chinese laborers. It was designed as a safeguard to prevent the unlawful entry of such laborers, under the pretence that they belonged to the merchant class or to some other of the admitted classes. But the phraseology of the section, in requiring that the certificate of identification should state not only the holder's family and tribal name in full, his title or official rank, if any, his age, height and all physical peculiarities, but also his former and present occupation or profession, when and where and how long pursued, and his place of residence, and, if a merchant, the nature, character and estimated value of the business carried on by him prior to and at the time of his application for such certificate, involves the exaction of the unreasonable and absurd condition of a foreign government certifying to the United States facts in regard to the place of abode and the business of persons residing in this country, which the foreign government cannot be assumed to know, and the means of information in regard to which exist here, unless it be construed to mean that Congress intended that the certificate should be procured only by Chinese residing in China or

some other foreign country, and about to come for the first time into the United States for travel or business or to take up their residence.

Mr. Justice Field, in the case already cited, referring to the Chinese government, said: "That government could not be expected to give, in its certificate, the particulars mentioned of persons resident — some, perhaps, for many years — out of its jurisdiction. Neither the letter nor the spirit of the act calls for a construction imputing to Congress the exaction of a condition so unreasonable. . . . We repeat what we said in the case of *Ah Tie* and other Chinese laborers, that all laws are to be so construed as to avoid an unjust or an absurd conclusion; and general terms are to be so limited in their application as not to lead to injustice, oppression or an absurd consequence."

The section by its terms declares that "every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese government, or of such other foreign government of which at the time such Chinese person shall be a subject," the permission and identification in each case to be evidenced by the certificate described.

But Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons "who shall be about to come to the United States," when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them, and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.

By general international law, foreigners who have become

domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice, or commercial domicil, is to be presumed; while by our treaty with China, Chinese merchants domiciled in the United States, have, and are entitled to exercise, the right of free egress and ingress, and all other rights, privileges and immunities enjoyed in this country by the citizens or subjects of the "most favored nation."

There can be no doubt, as was said by Mr. Justice Harlan, speaking for the court in *Chew Heong* v. *United States*, 112 U. S. 536, 549, that "since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty."

Tested by this rule it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants, having a commercial domicil here, from leaving the country for temporary purposes and then returning to and reëntering it, and yet such would be its effect, if construed as contended for on behalf of appellee.

In the case of *Ah Ping*, 23 Fed. Rep. 329, 330, it was held that the section did not apply to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure; and the late Judge Sawyer delivering the opinion of the court said: "As to those domiciled in foreign countries, there is no ready means in this country for their identification. In the countries whence they propose to come, the means of ascertaining the facts are at hand; hence the provision. As to those resident or domiciled in this country, we have ourselves the best means of identification; while as to many of them, even in their native country, and much less when they are temporarily in other foreign countries, there is no practicable means of either identification, or for procuring

the certificate prescribed. The United States statutes do not now, nor have they ever, required or provided for the issue of any certificate in this country to resident Chinese, other than laborers, who are about to depart temporarily, for business or pleasure, either to China or other foreign countries. There are many Chinese merchants in California who have been domiciled in the State from 20 to 35 years. Our own means of identification of such persons are greatly superior to those of any other country, even that of their nativity. To require such parties, every time they go to another country, to perform the required acts abroad, would be utterly impracticable, and practically tantamount to an absolute refusal to permit their return."

The question has been ruled in the same way by the Treasury Department on many occasions; by Secretary Folger, March 14, 1884, Syn. T. D. 1884, 128; by Secretary Gresham, September 25, 1884, Id. 400; by Secretary McCulloch, January 14, 1885, Id. 1885, 26; by Assistant Secretary French, December 2, 1884; by Assistant Secretary Maynard, November 7, 1888; and by Acting Secretary Batcheller, in the instructions of July 3, 1890, already given.

No other rule in this respect was laid down by Congress in the act of September 13, 1888, 25 Stat. 476, c. 1015, nor in that of October 1, 1888, 25 Stat. 504, c. 1064, when the absolute exclusion of Chinese laborers was prescribed. *Chinese Exclusion Case*, 130 U. S. 581.

We are of opinion that it was not intended that commercial domicil should be forfeited by temporary absence at the domicil of origin, nor that resident merchants should be subjected to loss of rights guaranteed by treaty, if they failed to produce from the domicil of origin that evidence which residence in the domicil of choice may have rendered it difficult if not impossible to obtain; and as we said in considering the application of this petitioner for the writ of certiorari, 141 U. S. 583, 588, we do not think that the decision of this court in *Wan Shing* v. *United States*, 140 U. S. 424, ruled anything to the contrary of the conclusions herein expressed. As there pointed out, *Wan Shing* was not a merchant, but a laborer; he had

acquired no commercial domicil in this country: and whatever domicil he had acquired, if any, he had forfeited by departure and absence for seven years with no apparent intention of returning. All the circumstances rendered it possible for him to procure and produce the specified certificate and required him to do so. We have no doubt of the correctness of the judgment then rendered and the reasons given in its support.

As Lau Ow Bew is, in our opinion, unlawfully restrained of his liberty, we reverse the judgment of the Circuit Court of Appeals for the Ninth Circuit, and, as required by § 10 of the act of March 3, 1891, remand the cause to the Circuit Court of the United States for the Northern District of California, with directions to reverse its judgment and discharge the petitioner.

BUTLER *v.* NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

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

No. 170. Argued February 29, March 1, 1892. — Decided March 14, 1892.

This action was brought by the defendant in error as plaintiff below against the plaintiff in error, defendant below, to recover a balance alleged to be due from him to the plaintiff below as its treasurer. The defendant below denied that any sum was due, and set up an accord and satisfaction. At the trial, after the plaintiff rested, the defendant opened his case at length setting forth the grounds of his defence. After some evidence had been introduced, including the books of account and the evidence of a witness who kept those books, a conversation took place between the court and the defendant respecting the introduction of evidence alleged by the court to be outside of the statements made in the opening. The defendant insisted that the evidence offered was within those statements. A further conversation resulted in the defendant's offering to show that all the moneys ever received by him as treasurer were duly accounted for and paid over. The court held this to be a mixed proposition of law and fact, and therefore not to be proved by witnesses or other evidence;

and, having excluded it, charged the jury that the question at issue was a book-keeper's puzzle or problem, which must be solved in favor of the plaintiff, although nothing had occurred in the testimony which reflected in the slightest degree upon the integrity or honesty or upright conduct of anybody who was concerned or had at any time been concerned in the transaction. *Held*,

(1) That under the rule laid down in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, it was competent for the court, if, assuming all the statements and claims made in the defendant's opening with all explanations and qualifications to be true, he had no case, to direct a verdict for the plaintiff; but

(2) That he should have been allowed, especially in view of the statement that there was no imputation upon his integrity or honesty, to offer proof to show that he had accounted for and paid over the money for which he was sued; and that if the proof, when offered, did not tend in law to establish those facts, it could have been excluded.

THE case is stated in the opinion.

Mr. E. M. Johnson and *Mr. Benjamin F. Butler* in person for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court:

The National Home for Disabled Volunteer Soldiers, a corporation existing under the laws of the United States, brought this action against the plaintiff in error in the Supreme Judicial Court of Massachusetts to recover the sum of $15,000 with interest from November 20, 1879.

The defendant denied each allegation in the declaration contained, and, also, averred that he had paid the plaintiff in full all sums he ever owed it, due accord and satisfaction having been made. He filed, in addition, a declaration in set-off, stating that he was directed by the Board of Managers and Directors of the Home to act as its treasurer, which it was not his official duty to do; that he continued to act in that capacity until the expiration of his term of office as a Manager; that

his service as such treasurer was very onerous and responsible, he having collected, invested, reinvested, taken charge of and paid out, very large sums of money, in the aggregate more than ten millions of dollars, and kept the records and accounts and examined the vouchers thereof; and that he was relieved from that duty and service at his own request after ceasing to be a member of the Board. He claimed just and proper compensation for his services in that behalf.

Upon the petition of the defendant the case was removed for trial into the Circuit Court of the United States upon the ground that the plaintiff was a corporation created by an act of Congress, and the suit was, therefore, one arising under the laws of the United States. 18 Stat. 471, c. 137; *Pacific Railroad Removal Cases*, 115 U. S. 1.

After the removal of the cause the plaintiff filed an answer to the declaration in set-off, denying that the defendant had any legal claim for services as acting treasurer or otherwise, and averring that there never was any agreement or understanding between the Board of Managers and the defendant that the latter should receive compensation for services rendered or to be rendered, or duties performed or to be performed, by him in connection with the Home; that no salary or other compensation therefor was ever determined or fixed by the Board; and that the defendant never made any claim or demand upon the plaintiff for compensation for such services prior to the filing of his declaration in set-off.

The evidence on behalf of the plaintiff tended to show the following facts: The defendant, as acting treasurer of the Home, paid, May 7, 1879, to William S. Tilton, Manager of the Eastern Branch Home, the sum of $15,000 to be used for the purchase of leather for the manufacture of boots and shoes at the Eastern Branch, and charged the same as so paid out in his accounts. In payment of that advance Tilton, October 13, 1879, sent to Butler a sight draft for $9838, drawn by the latter on his financial agent and book-keeper, George J. Carney, payable to the order of Pitkin & Thomas, and sent by the defendant, as acting treasurer, to that firm in payment for clothing furnished by it to the Home. Pitkin & Thomas en-

dorsed the draft and delivered it to Tilton in payment of boots and shoes purchased of him by them. Tilton sent it together with his receipt for $5162, to Carney. The receipt was in these words: "Togus, Me., Oct. 13, 1879. Receipt for money this day received from Gen. B. F. Butler, acting treasurer of the National Home for Disabled Volunteer Soldiers, $5162. William S. Tilton, Acting Treasurer."

The letter to Carney, containing the draft and receipt, was as follows:

"Togus, Me., October 13, 1879.

"Col. George J. Carney, Financial Agent, Lowell, Mass.

"My Dear Col.: The General has requested me to arrange for the settlement of $15,000 which he loaned me for the purchase of leather.

"I enclose Gen. Butler's draft on you at sight..... $9,838
And my treasurer's receipt..... 5,162
$15,000

"The Home owed me a balance of $5985.81 on the 30th September, '79; so the above balance (for which I send you regular treasurer's receipt in duplicate) will go far towards making us square on the ordinary Home expenditures.

"William S. Tilton, *Acting Treas'r.*"

Tilton never took up on his regular account with the Home the receipt of the $15,000 on May 7, 1879, nor entered in that account the repayment thereof, but entered both transactions in his "shoe-shop books."

It also appeared in the evidence introduced by the plaintiff that the $5162 was never in fact paid to Tilton, but that subsequently defendant gave Tilton an invoice for that sum the same as if it had been paid, and that Tilton took the same up on his regular account with the Home and accounted for it; that the defendant's accounts as acting treasurer were rendered quarterly on the last days of December, March, June and September, and in those for the quarter ending December 31, 1879, no credit was given the Home for the draft and receipt sent by Tilton, but it was therein charged, under date of November 20, 1879, with the payment to Pitkin & Thomas of

the sum of $9838, and the payment to Tilton of the $5162; and that in the defendant's account book, kept by Carney, in connection with the entry of payment by the defendant, November 20, 1879, of the sums of $9838 and $5162 to Pitkin & Thomas and Tilton, respectively, was the following memorandum in Carney's writing: "No money passes from G. J. C. to settle these; they offset an advance to Tilton."

Some letters that passed between the defendant and his successor in office, Gen. Franklin, were put in evidence, but they need not be set out.

The court having overruled a motion made at the close of the plaintiff's evidence, that a verdict be returned for the defendant — to which action of the court an exception was taken — the latter opened his defence with a speech to the jury, occupying nearly ten pages of the printed record.

The first witness introduced for the defence was Carney, who kept the accounts of the Home relating to the moneys received by the defendant as acting treasurer, from some time in 1869 down to 1880. All the entries were in his handwriting. With the accounts and account books kept by him the defendant never at any time interfered. In the progress of his examination numerous rulings as to evidence were made, to which the defendant excepted. Among other things, Judge Carpenter, before whom the case was tried, said: "I take it for granted all along that nothing is offered to be proved except what has been opened to the jury." To this the defendant replied, "Yes, sir." The Judge then said: "That being so, I shall instruct them that nothing that has been offered is relevant, and that nothing that can be offered that does not go outside of the statement which was made in the opening of the case is relevant."

Another witness was sworn on behalf of the defendant, when, according to the bill of exceptions, the following occurred:

Defendant. "Shall I go on further with Mr. Carney on the question of the book-keeping? Did I understand your honor to say that, it appearing on our books we have taken it up and charged it, we are not at liberty to show that it was accounted for to the asylum?

COURT. "No; I will repeat it. I should have been understood to say that if the testimony offered by you, and which was to be adduced in answer to the question asked by you, whatever it was, was to establish some allegation or offer of proof made by you in your opening to the jury, and went no further than that, and did not undertake to establish any allegation not offered to be proved by you in your opening to the jury, then, in that case, it is irrelevant to the issue and inadmissible.

Defendant. "I expressly opened to the jury that it had all been accounted for.

Court. "I did not so understand you.

Defendant. "I did, sir; and said that very account; and will your honor remember what I said exactly, that it had gone into the account; that the account had been audited and approved, and not a cent remained in my hands, as there would have been, or in Mr. Carney's hands, if there had been this $15,000. I said that.

Court. "I do not think such facts as that amount to a defence.

Defendant. "What — that it has been ultimately accounted for?

Court. "The statement that it is ultimately accounted for is a proposition of mixed law and fact.

Defendant. "I want to put in the facts upon that question.

Court. "You are to prove to the jury, and, of course, state in your opening, the facts which you are to prove. They are not legal conclusions. Of course, however proper it may be to advert to them as throwing light upon the nature and manner of the defence, they are not included in the propositions which you are going to sustain by proof. Legal conclusions cannot be sustained by proof or evidence offered in any case.

Defendant. "My proposition is, that I did state the fact of accounting and the fact of paying over. I remember this phrase, that I paid the balance that was found due from me upon the accounts, to my successor. If that is not opening, that I paid it and accounted for it, I don't know what it is.

Court. "I may, perhaps, be misunderstood. I mean to say

that upon all the statements of fact made in the opening, and thereby offered to be proved to the jury, assuming them to be true, there is no defence whatsoever to this action, in my judgment, and I shall pass upon the questions of testimony in that view, and shall so instruct the jury.

Defendant. "And will not permit me to come in and show that they were all accounted for?

Court. "If you wish to offer any testimony as to matters of fact beyond and outside of such matters of fact as were opened by you to the jury, I will hear a statement of what those matters of fact are and pass upon them. If there be nothing beyond that which it is now desired by you to offer, if there be nothing beyond that, then all parties have the benefit of my distinct ruling that they are irrelevant, each and all of them, to this issue, and that they constitute no defence.

Defendant. "I still do not understand, sir. I now propose, may it please your honor, to offer to show by this witness, who was a member of the auditing committee of the accounts of the asylum, who examined all the receipts and all the expenditures and the vouchers, that all the moneys ever received by me as treasurer, including these, which were upon the same account, were duly accounted for, and then by another witness that they were paid over.

Court. "I judge that to be a mixed proposition of law and fact, and, therefore, not to be proved by witnesses or other evidence.

Defendant. "In order that I may not be mistaken, I will say that I offer to prove that these very sums of money here in account were duly accounted for and paid over.

Court. "Do you propose to prove that by proving any substantive facts other than those recited by you in your opening to the jury?

Defendant. "I have only to say that I did not open every item of evidence to the jury, as at the end of forty-six years of practice I have just learned I ought to. I now presume I ought to have done so.

Court. "Then it is necessary for you now to state what sub-

stantive fact you offer to prove which was not recited in your opening to the jury.

Defendant. "I do not offer any fact except the fact which I opened to the jury, that I had accounted for and paid over every dollar of money, including this money.

Court. "Then I tell you it will be irrelevant to the issue.

Defendant. "Your honor rules that it is irrelevant?

Court. "That is irrelevant.

Defendant. "I will have to ask your honor to save us an exception on that."

At a later stage of the trial the court announced that there was nothing to be argued, except the credibility of the evidence that had been introduced on behalf of the plaintiff. The conclusion of the charge to the jury was: "I need not say to you, gentlemen, that nothing has occurred in this testimony which in the slightest degree reflects upon the integrity or honesty or upright conduct of anybody who is concerned or who has been at any time concerned in this transaction. It is, as I have said, so far as the testimony goes here, a book-keeper's puzzle or problem, which, feeling clear what the right of the matter is, I have judged it was my duty to take the responsibility of instructing you must be solved in favor of the plaintiff, the Soldiers' Home."

Defendant. "I want, at the proper time, may it please your honor, to except to everything your honor has said upon the facts to the jury under our law.

Court. "Very good, sir. I added those observations in the public interest, and, as the case is confused, in the interest of gentlemen who are concerned in the case.

Defendant. "I simply take exception.

Court. "I do not retract them. If they be ground of exception you have the benefit of it."

The jury returned a verdict in favor of the plaintiff for the sum of $16,537.

The question raised in this case as to the conduct of the trial is somewhat similar to that determined in *Oscanyan* v. *Arms Co.*, 103 U. S. 261, 263, 264. That was an action to recover from the defendant commissions alleged to have been

earned by one Oscanyan under a contract for the sale of firearms to the Turkish government. Plaintiff's counsel as preliminary to the introduction of testimony, stated to the court and to the jury the issues in the case and the facts proposed to be proved. That statement disclosed a contract that was void, as being corrupt in itself, and prohibited by morality and public policy. The defendant thereupon moved the court to direct the jury to render a verdict in its favor. The plaintiff's counsel having, in response to a direct inquiry by the court, asserted the truth of the statement so made by him to the jury, the motion for a verdict in favor of the defendant was sustained. This court said that the power to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. But it further said: "Of course, in all such proceedings nothing should be taken, without full consideration, against the party making the statement or admission. He should be allowed to explain or qualify it, so far as the truth will permit; but if, with such explanation and qualification, it should clearly appear that there could be no recovery, the court should not hesitate to so declare and give such direction as will dispose of the action."

The manner in which the trial below was conducted did not comport with the spirit of this rule. While, as to some matters, the bill of exceptions is obscure, it is clear that the court below was of opinion that the facts stated by the defendant in his opening to the jury did not constitute a defence to the action. But this opinion was based upon the belief that the defendant did not state that he had accounted for and paid over to the asylum the sums for which he was sued. When, however, the defendant assured the court that it was under a misapprehension as to what he had stated, and that he had claimed, in his opening, to have fully accounted for and paid over every dollar of the amount charged against him, he should have been allowed to introduce proof of such facts. If the proof, when formally offered, would not have tended, in law, to establish those facts, it could have been excluded. Such facts were clearly admissible under the answer of the defendant, and if they were not, strictly, included in the words of his opening

to the jury, it was error, under the circumstances, to have denied him the privilege of showing that he had, in fact, accounted for and paid over all the moneys for which he was sued. We are the more inclined to so hold because the court below observed to the jury that nothing had occurred in the testimony which in the slightest degree reflected upon the integrity or upright conduct of any one who was then or had been concerned at any time in this transaction. And if, as the court observed, the case was "confused," and the matter a "bookkeeper's puzzle or problem," there was so much the more reason why the defendant should have been allowed the benefit of his assurance that his opening proceeded upon the distinct ground that he had accounted for and paid over to the asylum the sums which he was charged to have improperly withheld.

We are of opinion that the case was not fully tried, and as, for that reason, it must go back for another trial, we forbear any expression of opinion upon the questions of law raised by the record now before us.

The judgment is reversed, with directions to grant a new trial.

Mr. Justice Brown dissenting.

I am unable to see wherein the court failed to give the defendant a proper opportunity of putting his case before the jury. After the plaintiff had rested its case, defendant moved for an instruction that a verdict be returned in his favor, which was denied. The defendant thereupon made a long and elaborate opening to the jury, claiming in substance two defences: first, that he had duly accounted for the money; and, second, that he was entitled by way of set-off to compensation for his services as Treasurer of the Home. In support of his first defence he made a statement of facts which, as I understand, were not disputed, but which had no tendency to show that he had duly accounted for the money, and put a witness upon the stand to give testimony which the court held was not relevant to the issue, and made out no defence. The court thereupon ruled that the statement of facts made in the opening to the jury, assuming them to be true, did not consti-

tute a defence to the action, and suggested that, if the defendant wished to offer any testimony as to matters of fact beyond and outside of the opening, he would hear his statement of what those facts were, and pass upon them; but if there were nothing beyond that which had already been offered, he would hold that they were irrelevant and constituted no defence. In reply to this, defendant stated that he proposed to show that the moneys charged against him were duly accounted for and paid over; and in reply to a suggestion of the court that he ought to state what substantial facts he expected to prove, which were not recited in his opening, said: "I do not offer any fact except the fact which I opened to the jury, that I had accounted for and paid over every dollar of money, including this money." This the court held, under the facts above set forth, to be irrelevant, and then stated that the only question for the jury was as to the credibility of the plaintiff's testimony.

It was held by this court in *Oscanyan* v. *Arms Co.* that where it is shown by the opening statement of the plaintiff's counsel that he has no case, the court may direct the jury to find a verdict for the defendant without going into the evidence. I know of no reason why the same rule should not apply to the defendant, who assumes in his opening to state a defence. If the facts stated in such opening do not constitute a defence, the court is at liberty to rule out the evidence, and either direct a verdict for the plaintiff or submit the case to the jury upon the plaintiff's testimony. In this case the defendant offered simply to show that he had accounted for the money. This was clearly not a statement of fact, but of a legal conclusion. It was as if, in an action of ejectment, the defendant should state that he proposed to show that he had the title to the lands in question; or, in an action for breach of contract, that he had not broken the contract. In such case, while the defendant may elect whether to make an opening or not, if he does make a statement of facts upon which he relies, and such facts are not, in the opinion of the court, relevant, I think the court may properly call upon him to state any further facts that he intends to prove, and if he de-

clines to make a statement other than he has already made, it may lawfully assume that these constitute his entire defence. The facts stated by the defendant in this case in support of his defence that he had accounted for the money, were simply calculated to confuse the jury, without tending in any way to show that he should not be charged with the sum in controversy.

I am wholly unable to see that any injustice was done to the defendant upon this trial, and think the judgment should be affirmed.

THE CHIEF JUSTICE and MR. JUSTICE GRAY took no part in the decision of this case.

KENT *v.* LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON COMPANY.

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

No. 149. Argued January 8, 1892. — Decided March 14, 1892.

Remedy for error in a decree for the foreclosure and sale of property mortgaged to a trustee for the benefit of holders of bonds issued under the mortgage, or in the sale under the decree, must be sought in the court which rendered the decree and confirmed the sale.

A canal company which had issued several series of bonds, secured by mortgages on its property, defaulted in the payment of interest on all. Bills were filed to foreclose the several trust deeds, and a receiver was appointed. On due notice to all parties receiver's certificates were issued to a large amount for the benefit of the property, which certificates were made a first lien upon it. The property was sold under a decree of foreclosure and sale, and the purchasers paid for the same in receiver's certificates, the amount of the bid being less than the amount of the issue of such certificates. On a bill filed by a holder of bonds issued under one of the mortgages foreclosed, *Held*,

(1) That his remedy should have been sought in the court which rendered the decree;

Statement of the Case.

(2) That the paramount lien of the receiver's certificates having been recognized by the trustee of the mortgage under which the bonds were issued, his action in that respect was, so far as appeared, within the discretion reposed in him by his deed.

This was a bill in equity brought in the Supreme Court in and for the county of Kings, New York, February 7, 1884, by Andrew Kent as executor and trustee of the last will and testament of Jonathan T. Wells, deceased, against the Lake Superior Ship Canal, Railway and Iron Company; Theodore M. Davis; Theodore M. Davis as receiver of the Ocean National Bank of New York; J. Boorman Johnston, Isaac H. Knox and Gordon Norrie, being the surviving partners of the firm of J. Boorman Johnston & Co.; Frederick Ayer, sole surviving partner of the firm of J. C. Ayer & Co.; Frederick F. Ayer, Josephine Ayer and Benjamin Dean, administrators, with the will annexed, of the estate of James C. Ayer, deceased; and Thomas N. McCarter; and subsequently removed into the Circuit Court of the United States for the Eastern District of New York.

The bill alleged that July 6, 1864, the Portage Lake and Lake Superior Ship Canal Company was organized as a corporation under the laws of Michigan for the purpose of constructing a ship canal to connect the waters of Portage Lake and Lake Superior; that by an act of Congress, approved March 3, 1865, two hundred thousand acres of public land were granted to the State of Michigan "to aid in building a harbor and ship canal at Portage Lake, Keweenaw Point, Lake Superior," subject to the condition, among others, that they should revert to the United States in case the said canal and harbor should not be completed in two years from the passage of the act; that by an act entitled "A bill to accept a grant of land by act of Congress to aid in the construction of the ship canal at the head of Portage Lake with Lake Superior, and to provide for the construction of the same," passed March 16, 1865, by the legislature of Michigan, the grant was accepted and conferred upon said Portage Lake and Lake Superior Ship Canal Company, subject to the condition "that none of said lands shall be sold or otherwise disposed of, except

for the purposes of hypothecation, until said canal shall be completed as therein provided;" and that July 1, 1865, the company executed a deed of trust conveying to C. C. Douglas and his successors its canal and franchises and the two hundred thousand acres of land to secure the payment of one thousand bonds of five hundred dollars each, John L. Sutherland being thereafter substituted as trustee.

The bill further averred that by act of Congress, approved July 3, 1866, a second two hundred thousand acres of land were granted to the State of Michigan for the above purposes, and it was provided by the act that this second grant should enure to the use and benefit of the company in accordance with the act of the Michigan legislature of March 16, 1865; that July 1, 1868, the company executed a deed of trust of the second land grant, together with the equity in the canal and other property already conveyed to Douglas in trust, to Martin and Davis, to whom Lucien Birdseye subsequently succeeded as trustee, to secure one thousand other bonds of five hundred dollars each; and that Jonathan T. Wells purchased eighty of these last-named bonds, and paid cash therefor, which money was applied by the company in the construction of the harbor and canal. It was further alleged that July 1, 1870, the company made its third deed of trust, conveying its canal and the two land grants to Charles L. Frost, to secure twelve hundred and fifty bonds of one thousand dollars each, two hundred and fifty of which were paid, redeemed and cancelled by the company by bonds of a subsequent issue, known as the "Union Trust bonds;" that Thomas N. McCarter succeeded Frost as trustee, July 1, 1872; and that Wells became the holder and owner of forty of the bonds secured by this third trust deed. The bill continued that on or about April 29, 1871, the name of the company was changed to "The Lake Superior Ship Canal, Railroad and Iron Company," which on May 1, 1871, became seized and possessed by purchase of the entrance canal by way of Portage River into Portage Lake with the franchises appertaining thereto, and also acquired title to two hundred thousand acres of land or thereabouts, situated in the State of Michigan, and known as the "Wagon

Road Lands;" that May 1, 1871, the company executed a deed of trust to the Union Trust Company of New York as trustee, conveying the canal with all rights and franchises thereunto appertaining, and the six hundred thousand acres of land, to secure the payment of bonds which the company proposed to issue to the number of thirty-five hundred at one thousand dollars each, of which there were afterwards issued and negotiated thirteen hundred and no more.

It was further averred that between 1865 and 1872 the company hypothecated certain of the bonds issued under the first three deeds of trust, and during the years 1871 and 1872 hypothecated certain of the bonds issued under the fourth deed of trust, and only a small proportion of the bonds of each issue was ever sold outright by the company; that in November, 1871, and on January 18, 1872, the company defaulted in the payment of the interest then due upon these bonds; and that at that time large amounts of them were held by the Ocean National Bank, Johnston & Co. and Ayer & Co. as collateral to certain loans, which plaintiff charges were of doubtful legality, made by the parties to the canal company at different times before the default, and it was claimed by the company that the bonds pledged as security for the loans were issued unlawfully, and in violation of the law of Michigan.

That in December, 1871, the Ocean National Bank failed, and T. M. Davis was appointed its receiver; and among the assets of the bank were bonds under all the aforesaid deeds of trust, but most of them were under the McCarter and Union Trust Company deeds; and that some of the bonds in the possession of the bank were owned by it, but by far the larger part were held as collateral.

That prior to the default the company had selected with care and at much expense the lands it was entitled to, and they were regarded as of great prospective value, and those selected under the act of Congress of July 3, 1866, were especially valuable.

That early in 1872, Davis, receiver, Johnston & Co. and Ayer & Co. retained an attorney at Detroit to protect their interests as creditors and bondholders of the company, and to act for and represent them in prospective legal proceedings in

the United States courts for the Eastern District of Michigan for the foreclosure of the deeds of trust, who was afterwards retained and employed by Sutherland, Birdseye and McCarter, and the Union Trust Company, trustees, as their solicitor to foreclose the several trust deeds, which employment was by Davis, receiver, Johnston & Co. and Ayer & Co., and upon their retainer and in their interest, without reference to the interests of the other bondholders; and it was agreed between them and the trustees that the foreclosure suits were to be prosecuted under their direction and for their special benefit; and to this end they indemnified the trustees against all loss and damage by reason of anything which Davis, Johnston and Ayer might do in the premises.

That on or about May 25, 1872, a bill was filed in the Circuit Court of the United States for the Eastern District of Michigan in the name of Sutherland, trustee, by said solicitor, to foreclose the trust deed of July 1, 1865, and the company, Birdseye, Frost and the Union Trust Company, as trustees, were made parties defendant. As Birdseye was a citizen of New York, it was alleged that Sutherland, who was also a citizen of New York, was a citizen of New Jersey; that on or about June 13, 1872, one Knox was appointed receiver, and it was admitted by Birdseye's solicitors that Sutherland was a citizen and resident of New Jersey, though plaintiff charges that the admission extended only to the order appointing the receiver, and that the Circuit Court was afterwards shown by the pleadings and proofs to have no jurisdiction therein, and had none in fact; that on June 17, 1872, an order was made empowering the receiver to execute an instrument to F. D. Tappan, as trustee, to secure certificates of indebtedness authorized to be issued for the purpose of completing the construction of the canal, and certificates were issued to the amount of about $640,000, which were purchased by Johnston & Co. and Ayer & Co., $500,000 of the issue being sold at the rate of seventy-five cents on the dollar, and the remainder at the rate of sixty cents on the dollar, though twenty-five per cent discount was the limitation prescribed; and that all this was in the interest of Davis, Johnston and Ayer.

The bill further averred that on August 27, 1872, the company was adjudicated a bankrupt by the Michigan District Court, and Jerome and Beaman were appointed assignees, who on January 3, 1873, by supplemental bill, were made parties to the Sutherland suit, as was McCarter, trustee. It was further stated that on July 3, 1872, a bill was filed in the Circuit Court in the name of McCarter, trustee, by the same solicitor, to foreclose the trust deed of July 1, 1870, and the company and the Union Trust Company were made parties defendant, as were the assignees, January 13, 1873.

The bill also alleged that on July 5, 1872, a bill was filed in the Circuit Court in the name of Birdseye, trustee, by the same solicitor, to foreclose the trust deed of July 1, 1868, and the company, McCarter, trustee, and the Union Trust Company were made parties defendant. This bill set up the appointment of Knox as receiver, his taking possession of the property, the issue by him of certificates of indebtedness to the amount of $500,000, and that the certificates were made, by order of court, a paramount lien upon the canal and all the property of the company; and prayed that the certificates might first be ratably paid from the proceeds of the sales of the lands acquired by the Sutherland and Birdseye deeds of trust; and plaintiff charged that this recognition of the certificates was entirely unauthorized and never ratified by Wells.

It was further alleged that on August 5, 1872, Birdseye, trustee, filed an answer in the Sutherland suit in which he set up the defence of want of jurisdiction, in that Sutherland was not a citizen of New Jersey, but of New York, and it was stated that this was shown in 1874 by the testimony of Sutherland.

The bill then charged that the Circuit Court did not obtain jurisdiction or power over the Birdseye lands or the bondholders secured thereby, so as to enable the court to extend the lien of the receiver's certificates over those lands, or make them a prior or paramount lien thereon; that neither Wells nor any other of the Birdseye bondholders, except those represented by the aforesaid solicitor, were parties to the Sutherland suit, and Birdseye was not authorized nor empowered to represent them in respect thereto; that Birdseye allowed the

paramouut lien to be apparently imposed upon the lands he represented, but failed to apprise the bondholders of the action of the court, although he knew such action was to be brought about in the interest of some bondholders to the sacrifice of that of the others; and that the nominal amount of the certificates was illegally increased for the purpose of making the indebtedness as large as possible, so as to obtain the entire property of the company and destroy the interest of the other bondholders; and that, although the accounts of the receiver were afterwards audited and confirmed by the court, Wells was not bound thereby.

That the Birdseye and McCarter trust deeds provided for the release of lands upon the delivery of bonds for cancellation at the rate of five dollars per acre; that on or about August 11, 1873, Wells deposited forty bonds secured by the McCarter trust deed for one thousand dollars each, with Birdseye, as trustee, and at the same time tendered to him for cancellation eighty bonds for five hundred dollars each, secured by the Birdseye trust deed, and received from him a release of eight thousand acres of land from the incumbrance and operation of that trust deed, except only a lien to the amount of the bonds tendered, or that the amount of said bonds became immediately due and payable; and that eight thousand acres became released from the lien of any other of the deeds of trust, and the remainder of the property became discharged from any lien for the eighty thousand dollars.

It was further alleged that in September, 1873, the assignees in bankruptcy filed a bill in the Circuit Court against Sutherland, Birdseye, trustee, McCarter and the Union Trust Company, as trustees, Wells, F. D. Tappan and others, which set forth in detail the matters relating to the release of August 11, 1873, and prayed that it might be declared valid and of the legal effect charged in the bill; that the proceedings in the foreclosure suits might be stayed; and that the Sutherland suit, with this bill treated as a supplemental bill or cross-bill, might proceed regularly to a decree, containing the manner in which the property covered by the several trust deeds should be offered for sale, etc.

That Sutherland, McCarter and Tappan, trustees, appeared in this last-mentioned suit by the same solicitor and answered; that Birdseye, trustee, also appeared, and, in his answer, admitted and realleged the allegations contained in the bill relating to the claims of Wells under the release; that defendant Wells appeared, and on or about December 30, 1874, his solicitor stipulated that the bill filed by the assignees be taken *pro confesso* against him; that issue was joined and a large amount of testimony was taken and filed in the several suits referred to; but that none of the testimony had any bearing on the effect of the release, and its validity was admitted upon the record.

It was then charged that during the latter part of 1876 and the early part of 1877 the solicitor of Davis, Johnston and Ayer, and other parties interested with them, "entered into a fraudulent conspiracy for the purpose of procuring from said Circuit Court the entry of a decree, by means of which the interest of said Jonathan T. Wells in said eight thousand acres of land should be divested, and the value of his said bonds destroyed, and the entire property and assets of said the Lake Superior Ship Canal, Railroad and Iron Company vested in the parties in this article mentioned to the exclusion of said Wells;" that it was agreed, upon the sale of the property, to be made in pursuance of the proposed decree, that it should be purchased by Wilson and Man, as trustees, for the benefit of the parties to the said fraudulent decree; that a company should be organized, under the laws of Michigan, for the purpose of taking and holding the property formerly held by the canal company; and that, upon the completion of said transfer the parties to said agreement would endeavor to sell the property to English capitalists, and, failing in this, the stock should be divided between the parties to the agreement.

That in pursuance of this scheme, the solicitor represented to the Circuit Judge that an arrangement had been made to sell the whole property of the canal company to English capitalists for a sum sufficient to pay the entire debts of that company, and that to carry out this agreement it was necessary to sell the whole property of the company under a decree

of the court, and that such decree would be satisfactory to all parties interested; that by these representations, without any notice to Wells or his solicitor, an order was obtained from the judge, at his house, February 12, 1877, that the bill filed by Jerome and Beaman be treated as a cross-bill in the Sutherland, the Birdseye and the Union Trust Company foreclosure suits, and that the four causes be heard together upon the pleadings and proofs in all, and at the same time and place a decree was signed by Judge Emmons, entitled in the four suits, which contained the following clause:

"*Twenty-first.* It is hereby ordered, adjudged and decreed, that the attempt of the defendant, Jonathan T. Wells, to redeem or obtain release of certain lands from the lien of the mortgage of the first of July, 1868, and the alleged release of said land by Lucien Birdseye, trustee, as set forth in said cross-complaint, having taken place after the institution of the suit for the foreclosure of said mortgage, were and are ineffectual and void."

That the decree further adjudged that the receiver's certificates for the amount of $934,478 — principal and interest — were a first lien upon the canal and the first and second land grants, but not a lien upon the third land grant, and required that the lands covered by the Birdseye mortgage should be sold separately, and gave various directions as to the method to be adopted by the master for distributing the proceeds; that the sale was advertised under the decree in but one paper, and that a village newspaper of limited circulation, and the parties refused to advertise more extensively; that they gave no notice of the terms of sale; that they required at the sale the whole amount of the purchase money to be paid at once, without giving the purchaser any opportunity to examine the title, and refused to sell the second land grant separately; that at the sale thus conducted, Man and Wilson bought the entire property of the canal company for $550,000, which they paid in receiver's certificates; that the master's report was confirmed before the expiration of the usual time, upon a representation to the solicitors of the other parties that this was necessary to the consummation of a sale to the English

capitalists; that they then, in combination with the other members of the party, formed a new company, which is one of the demurring defendants; and that they conveyed all the property of the old company to the new corporation, which had notice of the fraud, paid no new consideration and took title subject to the rights of Wells.

It was also alleged that Wells died in Brooklyn, New York, on October 16, 1881, at the age of about eighty-two years, and that "for three years and upwards immediately preceding his death he was feeble in body and mind, and by reason thereof was unable to travel to Michigan, where the litigation hereinbefore referred to was carried on, or to give his personal attention to his interests therein;" that in March, 1879, Wells transferred his property to James H. Gilbert for the benefit of himself and his legal representatives, and "knowledge of the making and entry of said decree was first acquired by said Jonathan Tremaine Wells and by said James H. Gilbert, trustee as aforesaid, during the month of May, 1879; that it has been exceedingly difficult and has required much time to ascertain the facts in relation to the proceedings herein related on account not only of the many and protracted litigations," but especially of the efforts "made by the parties to the fraud aforesaid to suppress everything tending to throw light upon their transactions and to hamper and impede investigation by withholding or concealing whatever might give information to Wells or his representatives."

The bill also set forth that on March 10, 1882, a petition was filed in the Circuit Court of the United States for the Eastern District of Michigan, on behalf of Gilbert, trustee, as aforesaid, and an application for relief against said last-mentioned decree was made thereon; and that this application was heard by the Honorable Stanley Matthews, one of the judges of the Circuit Court, and an order made denying it, "but without prejudice to the merits of the application or proceedings to be taken thereafter in the interest of the estate of said Jonathan Tremaine Wells."

The forty-first paragraph of the bill alleged that after the execution of the Birdseye release McCarter became seized of

the eight thousand acres described in the release, in fee simple, in trust for Wells, and in further trust to sell said lands and pay Wells the eighty thousand dollars and interest; that it was his duty, as trustee, to cause the said lands to be suitably advertised, and to use diligence to prevent the creation of any lien prior to that of Wells; that Davis, Johnston and Ayer took upon themselves the performance of the duties of said trust; that said land at the time of the sale was worth at least $150,000, and that amount could have been realized with reasonable diligence; that they became trustees for Wells and had no right to buy said lands; that they did buy them and caused them to be conveyed to the company, and have sold a portion of said lands to *bona fide* purchasers for value and received the purchase money; and "that they and said company have thus become and are liable to pay to this plaintiff the full amount due upon the bonds aforesaid, to wit, the sum of eighty thousand dollars, with interest as aforesaid."

The forty-second paragraph stated that the plaintiff was without remedy unless he could set aside the alleged fradulent decree.

The bill prayed that the decree of February 12, 1877, might be adjudged void so far as the release to Wells was concerned, and so far as the receiver's certificates were made a paramount lien or given any right of prior payment, or any validity as payment, as against Wells's bonds and release; that the eight thousand acres released be adjudged to be held in trust for Wells; that plaintiff be declared to succeed to all of Wells's rights, and be decreed a paramount lien on the eight thousand acres for eighty thousand dollars and interest; for an account of profits in dealing with the property held in trust for Wells; for an injunction; and for a money decree against the defendants for said sum of eighty thousand dollars and interest; and for general relief.

Copies of the various trust deeds, of the release, of the orders and decree of the Circuit Court of the United States for the Eastern District of Michigan, and of agreements in relation to the purchase of the lands, etc., were attached.

The cause was heard on demurrer to the bill before Mr.

Justice Blatchford, holding the Circuit Court, who sustained the demurrers and dismissed the bill, whereupon the cause was brought to this court on appeal.

Mr. Everett P. Wheeler (with whom was *Mr. John Cummins* on the brief) for appellant.

The facts alleged in the complaint charged a fraudulent conspiracy, carried to a conclusion by certain legal forms, the parties contriving and benefiting by the conspiracy being bondholders who, by a series of fraudulent manœuvres in the Circuit Court for the Eastern District of Michigan, succeeded in depriving the plaintiff of the general and specific liens given him under the Birdseye and McCarter mortgages. They obtained the mortgaged property themselves by the familiar device of issuing receiver's certificates at a ruinous discount, selling the mortgaged property on foreclosure, and buying it and paying for it in such receiver's certificates. As part of this conspiracy the plaintiff charges that these bondholders were acting in the name of Birdseye, who was trustee under the first mortgage on the second land grant, that they therefore owed a duty to Wells to protect his interest, that they violated this duty by admitting the validity and priority of the receiver's certificates as a lien on the second land grant, and by obtaining a decree against Wells from the Circuit Court for the Eastern District of Michigan. This decree was in contradiction of the admissions in the cross-bill, was not based upon or in any way supported by any testimony taken in any of the actions, was in fraud of the plaintiff's rights, and obtained secretly, collusively, by misrepresentation to the court, and without notice to the plaintiff, though he was a party to the action.

The complainant's remedy grows out of the fraud. His right arises out of the errors committed to his prejudice. His complaint asks that so much of this decree so obtained as adjudged that the release by Birdseye was invalid, and that the receiver's certificates were a prior lien, be adjudged fraudulent and void, and that the title acquired under it by defend-

ants be adjudged to be in trust for plaintiff and that they account, etc. The demurrers admit that the allegations of the complaint are true. If they be true, there can be no question but that at some time and in some proceeding, they constituted a cause of action, and entitled the plaintiff to relief from the said decree. The only question is now whether at this time and in this proceeding, the facts set forth entitle the plaintiff to the relief he seeks; or to any relief.

An original bill to impeach the judgment was the proper form of proceeding. The decree was fraudulent and erroneous. The plaintiff's only remedy was by original bill to impeach it. The term at which the decree was entered expired before the fraud and error were discovered. Under these circumstances the remedy was by original bill. *Wright* v. *Miller*, 1 Sandf. Ch. (N. Y.) 103; *Evans* v. *Bacon*, 99 Mass. 213; *Johnson* v. *Johnson*, 30 Illinois, 215; *Sanford* v. *Head*, 5 California, 297; *Bradish* v. *Gee*, 1 Ambler, 229; *Pemberton's Case*, 40 N. J. Eq. (13 Stewart) 520. This bill need not be filed in the same court which rendered the decree complained of. A court of equity has jurisdiction of a suit to impeach for fraud a decree rendered by another court. *Arrowsmith* v. *Gleason*, 129 U. S. 86; *Gaines* v. *Fuentes*, 92 U. S. 10, 20; *DeForest* v. *Thompson*, 40 Fed. Rep. 375; *Wilmore* v. *Flack*, 96 N. Y. 512; *Dobson* v. *Pearce*, 12 N. Y. 156; *S. C.* 62 Am. Dec. 152.

The true reason for this rule is that the court of equity, in reference to actions of this description, does not sit as a court of review. Its acts *in personam*, and wherever it can find the parties guilty of fraud, takes from them benefits which they have procured thereby. The jurisdiction to do this rests on the solid foundation that fraud vitiates all proceedings, whether apparently judicial or otherwise, and that a fraudulent judgment is really no judgment at all. *Earl of Bandon* v. *Becher*, 3 Cl. & Fin. 479.

So in *Johnson* v. *Waters*, 111 U. S. 640, 667, Mr. Justice Bradley says: "The most solemn transactions and judgments may at the instance of the parties be set aside for fraud. . . . In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding

in another court; but it will scrutinize the acts of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree it will deprive them of the benefit of it and of any inequitable advantage which they have derived under it." See also *Gaines* v. *Fuentes*, 92 U. S. 10, 22; *Barrow* v. *Hunton*, 99 U. S. 80, 83; *Metropolitan El. R'y Co.* v. *Manhattan R'y Co.*, 14 Abb. N. C. 103, 216; *Kennedy* v. *Daly*, 1 Sch. & Lef. 355, 374.

This is especially true where parties have misled the court by false statements. *Vadala* v. *Lawes*, 25 Q. B. D. 310; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

Mr. John E. Parsons for appellees.

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

By this bill plaintiff, as succeeding to the rights of Wells, seeks relief in respect of so much of the decree of the Circuit Court of the United States for the Eastern District of Michigan of February 12, 1877, as adjudged that the release by Birdseye was invalid, and the receiver's certificates a prior lien.

It appears that the canal company defaulted in the payment of interest due upon its several issues of bonds; that bills were filed to foreclose the trust deeds securing them; that receiver's certificates were issued by order of court; that a decree was entered in all the causes heard as one cause; and that the property was advertised and sold under the decree.

The right to a decree and sale cannot be controverted, and at the sale any or all the bondholders had the right to buy. If there was error in the decree, or in the sale, the remedy of plaintiff was in the court which rendered the decree and confirmed the sale. *Blossom* v. *Milwaukee Railroad Co.*, 1 Wall. 655; *Christmas* v. *Russell*, 5 Wall. 290, 305; *Michaels* v. *Post*, 21 Wall. 398, 427; *Robinson* v. *Iron Railway Co.*, 135 U. S. 522, 531. Application was made to that court and was denied, but no further step was taken.

Opinion of the Court.

Suit to foreclose was commenced by Sutherland, May 25, 1872, the trustees in the other trust deed, Birdseye, Frost and the Trust Company being parties defendant. The receiver was appointed in this suit June 13, 1872, and on June 17 the order was entered for the issue of the certificates for the purpose of completing the construction of the canal. This order declared "that the indebtedness created by said receiver's certificates shall constitute a first and paramount lien over all other liens and incumbrances upon the ship canal, real and personal property, and franchises of said defendant corporation, and on all the future earnings and income thereof, and shall be entitled to priority and payment over all other claims out of said real and personal property, earnings and income, etc.; and in case said canal, real and personal estate, and franchises or any part thereof shall be sold under and in pursuance of any judicial decree said certificates of indebtedness remaining unpaid shall first be paid out of the proceeds of sale," etc.

"Under the provisions of the acts of Congress granting the lands covered by the mortgages," said Mr. Justice Strong, speaking for the court in *Jerome* v. *McCarter*, 94 U. S. 734, 738, "the lands reverted to the United States, unless the ship canal should be finished within a fixed period, and that period was passing away when the order was granted to the receiver to raise money for completing the canal by the issue of certificates secured by his mortgage. The canal was unfinished, and there were in the receiver's hands no funds to finish it. Hence there was a necessity for making the order which the court made — a necessity attending the administration of the trust the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors. Whether the action of the court could make the receiver's mortgage superior in right to the mortgages which existed when it was made, it is needless to inquire. None of the creditors secured by those other mortgages objected to the order when it was made, though they were all then in court. None of them object to its lien or its priority now."

Johnston & Co. and Ayer & Co. purchased the certificates thus issued for the construction of the canal.

On July 5, 1872, Birdseye, trustee, filed a bill to foreclose his trust deed. August 11, 1873, Birdseye executed the release to Wells. Neither Johnston & Co. nor Ayer & Co. nor the receiver were in any way parties or assented to this release. It was given a year after the order for the issue of the certificates was entered, as we have said, in a suit to which Birdseye, trustee, and Frost, trustee, (succeeded by McCarter,) were parties.

In *Richter* v. *Jerome*, 123 U. S. 233, 246, a bill was filed by Richter as the holder of two hundred and thirty of the bonds issued under the fourth trust deed, and it was charged that other bondholders had conspired to obtain the mortgaged premises, and that the solicitor who foreclosed was their attorney. This court said, Mr. Chief Justice Waite delivering the opinion: "All the rights the bondholders have or ever had in the mortgage, legal or equitable, they got through the Trust Company, to which the conveyance was made for their security. As bondholders claiming under the mortgage, they can have no interest in the security except that which the trustee holds and represents. If the trustee acts in good faith, whatever binds it in any legal proceedings it begins and carries on to enforce the trust, to which they are not actual parties binds them. *Kerrison* v. *Stewart*, 93 U. S. 155, 160; *Corcoran* v. *Chesapeake &c. Canal Co.*, 94 U. S. 741, 745; *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611. Whatever forecloses the trustee, in the absence of fraud or bad faith, forecloses them."

The paramount lien of the certificates was recognized by Birdseye in the bill exhibited by him, and his action, so far as appears, was within the discretion reposed in him by his deed.

August 27, 1872, the company was adjudicated a bankrupt, and in September, 1873, its assignees filed their bill, setting up the facts relating to the Birdseye release and praying to have it declared valid, to which Wells appeared and stipulated that the bill might be taken *pro confesso* against him; but Birdseye, trustee, McCarter, trustee, the Union Trust Company, trustee, Tappan, trustee for the certificate holders, and others, were parties, and Wells could not cut off their rights or create

rights in his own favor, by admission. The decree complained of covered this suit as well as the others, and the question of the operation and effect of the release was raised upon the pleadings.

Upon what ground can another court rescind the decree, or set aside the sale, because either is erroneous?

Wells clearly could not insist upon matters which he had or could have insisted upon, prior to the decree, or upon the motion to confirm the sale. If the confirmation were without notice, he should have applied to the court which entered the order.

Neither Birdseye nor McCarter, the trustees under whose deeds the bonds were issued which Wells held, are charged with fraud or any conduct in bad faith, and neither is a party to this bill.

The matters alleged to be fraudulent are the steps taken to have the property foreclosed and the purchase thereon ensuing, and what is charged is that the holders of large amounts of the bonds and of all the receiver's certificates combined to bring about the foreclosure and to make the purchase.

Epithets do not make out fraud, and the averments are substantially of legal conclusions not admitted by the demurrers, *Fogg* v. *Blair*, 139 U. S. 118, 127, and in themselves insufficient as stating a case of fraud practised directly upon Wells and preventing him from seeking redress in the premises. The case attempted to be made was not a new one arising upon new facts, but one involving matters which the court was, or might have been, called upon to determine. And if, as asserted by his counsel, appellant's "remedy grows out of the fraud, his right arises out of the errors committed to his prejudice," then the remedy ought to have been sought in the court which rendered the decree and confirmed the sale. This, if there were error in respect of the certificates and the release, (which forms the basis of plaintiff's claim;) but if none were committed, then relief through the enforcement of a lien upon eight thousand acres, and adjudging the same or the profits therefrom to be held in trust for Wells, or through a money decree in lieu thereof, could not be awarded.

Nor do we think that plaintiff has any better standing by reason of the allegation that the Circuit Court for the Eastern District of Michigan had no jurisdiction of the Sutherland suit, because Sutherland was not a citizen of New Jersey, but was a citizen of the same State as Birdseye. This defence was interposed by Birdseye, in his answer, and was determined against him. That determination cannot be questioned here. Moreover, to the consolidated suit, Wells was himself a party as were the trustees named in the various trust deeds, and all were bound by the decree and the subsequent proceedings thereunder.

Suggestion is made in argument that plaintiff was entitled, under the prayer for general relief, to invoke the aid of the court to let him in to share in the benefits of defendants' purchase, but it is sufficient to say that such relief would not be conformable to the case made by the bill.

The demurrers were properly sustained, and the decree is

Affirmed.

In re HEATH, Petitioner.

ORIGINAL.

No Number. Argued February 1, 1892. — Decided March 21, 1892.

This court has no appellate jurisdiction over judgments of the Supreme Court of the District of Columbia in criminal cases.

THOMAS H. HEATH was convicted of manslaughter at a special criminal term of the Supreme Court of the District of Columbia, and sentenced to be confined in the penitentiary at Albany, New York. Upon appeal to the general term of that court the judgment was affirmed, whereupon he applied for a writ of error from this court.

The petition was originally presented to the Chief Justice; and, by order duly made, referred to the court in session for the consideration and determination of the question of jurisdiction arising thereon.

Mr. John Lyon for the petitioner.

Mr. Assistant Attorney General Maury opposing.

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

By section five of the Judiciary Act of March 3, 1891, (26 Stat. 826, c. 517,) it was provided that appeals and writs of error might be taken "from the District Courts or from the existing Circuit Courts" directly to this court "in cases of conviction of a capital or otherwise infamous crime." And although this case is not embraced in terms within the appellate jurisdiction conferred by the provision, yet it is contended that it falls within it, when taken in connection with section 846 of the Revised Statutes of the District of Columbia. That section is as follows: "Any final judgment, order or decree of the Supreme Court of the District may be reëxamined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the Circuit Court of the United States."

The argument is, that the phrase "as provided by law" should be construed as if it read "as is, or has been, or may be provided by law." But when we consider the general rule that the affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases, it will be seen that to give to this local legislation extending the appellate jurisdiction of this court to the District of Columbia, the construction contended for, so as to make it include all subsequent legislation touching our jurisdiction over Circuit Courts of the United States, is quite inadmissible.

Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication. And the adoption in a local law of the

provisions of a general law does not carry with it the adoption of changes afterwards made in the general law. This was so ruled in *Kendall* v. *United States*, 12 Pet. 524, 625. One of the questions there was whether the then Circuit Court of this District had power to issue the writ of mandamus to a public officer. That court was established by the act of Congress of February 27, 1801, (2 Stat. 103, c. 15,) which provided by section 3: "That there shall be a court in said District, which shall be called the Circuit Court of the District of Columbia; and the said court and the judges thereof shall have all the powers by law vested in the Circuit Courts and the judges of the Circuit Courts of the United States." At the time this law went into effect, the powers of the Circuit Courts of the United States were prescribed by the act of February 13, 1801, (2 Stat. 89, c. 4,) which act was repealed by the act of March 8, 1802, (2 Stat. 132, c. 8). This court held that the Circuit Court of the District possessed the powers vested under the act of February 13, 1801, notwithstanding its repeal, and Mr. Justice Thompson, delivering the opinion of the court, said:

"It was not an uncommon course of legislation in the States, at an early day, to adopt, by reference, British statutes; and this has been the course of legislation by Congress in many instances where state practice and state process have been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law, and would be adopting prospectively all changes that might be made in the law. And this has been the light in which this court has viewed such legislation. In the case of *Cathcart* v. *Robinson*, 5 Pet. 280, the court, in speaking of the adoption of certain English statutes, say, by adopting them, they become our own as entirely as if they had been enacted by the legislature. We are then to construe this third section of the act of 27th of February, 1801, as if the eleventh section of the act of 13th of February, 1801, had been incorporated at full length; and by this section it is de-

clared that the Circuit Courts shall have cognizance of all cases in law or equity, arising under the Constitution and laws of the United States, and treaties made, or which shall be made under their authority; which are the very words of the Constitution, and which is, of course, a delegation of the whole judicial power, in cases arising under the Constitution and laws, etc.; which meets and supplies the precise want of delegation of power which prevented the exercise of jurisdiction in the cases of *McIntire* v. *Wood*, 7 Cranch, 504, and *McClung* v. *Silliman*, 6 Wheat. 598; and must, on the principles which governed the decision of the court in those cases, be sufficient to vest the power in the Circuit Court of this District."

We do not consider the weight of this decision, as authority, weakened by anything that fell from the court in *Wales* v. *Whitney*, 114 U. S. 564. That was an appeal from the judgment of the Supreme Court of the District denying an application for a writ of *habeas corpus*. Upon the judgment being announced, an original application was made to this court for the writ, but, as stated by Mr. Justice Miller in the opinion, "on a suggestion from the court that an act of Congress, at its session just closed, had restored the appellate jurisdiction of this court in *habeas corpus* cases over decisions of the Circuit Courts, and that this necessarily included jurisdiction over similar judgments of the Supreme Court of the District of Columbia, counsel, on due consideration, withdrew their application," and brought up the record on appeal; and it was added that section 846 of the Revised Statutes of the District "justifies the exercise of our appellate jurisdiction in the present case."

The act of March 3, 1885, "amending section seven hundred and sixty-four of the Revised Statutes," (23 Stat. 437; Supp. R. S. 485, 2d ed.,) was referred to in the margin of *Wales* v. *Whitney*. The Revised Statutes of the United States and the Revised Statutes of the District were approved June 22, 1874, and section 764 of the former provided for an appeal to the Supreme Court "in the cases described in the last clause of the preceding section." The words "in the last clause" operated as a limitation and by the amendatory act were stricken out. By the acts

of August 29, 1842, (c. 257, 5 Stat. 539,) and of February 5, 1867, (c. 28, 14 Stat. 385,) an appeal from the judgments of the Circuit Courts in *habeas corpus* cases was allowed to this court, and by section 11 of the act of March 3, 1863, (c. 91, 12 Stat. 764), the same provision was made in relation to the judgments, orders or decrees of the Supreme Court of the District, as is now contained in section 846 of the District Revised Statutes. And as section 764 of the Revised Statutes and said section 846 were contemporaneously enacted, it was assumed that striking out the restrictive words from section 764 should be allowed like effect upon section 846. The question of jurisdiction was not argued, and no reference was made to the act of March 3, 1885, regulating appeals from the Supreme Court of the District, (23 Stat. 443,) and providing that no appeal or writ of error should be allowed from its judgments or decrees unless the matter in dispute exclusive of costs should exceed the sum of five thousand dollars, except in cases involving the validity of any patent or copyright, or in which the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question.

The act of March 3, 1891, was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation by the creation of the Circuit Courts of Appeals and the distribution of the appellate jurisdiction. By sections five and six, cases of conviction of a capital or otherwise infamous crime are to be taken directly to this court, and all other cases arising under the criminal laws to the Circuit Courts of Appeals. Sections thirteen and fifteen refer to appeals and writs of error from the decisions of the United States Court in the Indian Territory and the judgments, orders and decrees of the Supreme Courts of the Territories. No mention is made of the Supreme Court of the District of Columbia, and we perceive no ground for holding that the judgments of that court in criminal cases were intended to be embraced by its provisions.

The conclusion is that we have no jurisdiction to grant the writ applied for, and the petition is, therefore,

Denied.

GORDON v. THIRD NATIONAL BANK OF CHATTANOOGA.

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

No. 176. Submitted February 29, 1892. — Decided March 21, 1892.

In an action brought in the Circuit Court of the United States in Alabama the complaint described the plaintiff as a bank organized in accordance with the laws of the United States and as doing business in Tennessee, and the defendant as residing in the State of Alabama. The summons described the plaintiff as "a citizen of the State of Tennessee," and the defendant "as a citizen of the State of Alabama." The question of jurisdiction was raised for the first time in this court. *Held*, that although greater care should have been exercised, by plaintiffs in the averments, the diverse citizenship of the parties appeared affirmatively and with sufficient distinctness in the record.

A promissory note payable to the order of the maker, being endorsed by him, was endorsed and delivered to another for his accommodation. The latter endorsed it and borrowed money upon it, waiving demand and protest. The waiver was stamped upon the back of the note by mistake over both endorsements. *Held*, that the liability of the maker was not affected thereby.

The evidence in this case does not tend to show a contract of extension for a valid consideration, and for a definite and certain time, binding upon the parties, and changing the nature of the contract to the prejudice of the maker of the note.

THE court stated the case as follows:

This was an action by the Third National Bank of Chattanooga, Tennessee, against Eugene C. Gordon upon two promissory notes executed by Gordon and made payable to his own order, and endorsed by him and also by D. G. Crudup & Co. Gordon pleaded the general issue, and special pleas by setting up, first, that the notes were merely accommodation paper for the use and benefit of D. G. Crudup & Co., and that the bank, after notice of that fact and with Gordon's consent, for a valuable consideration, agreed with Crudup & Co. to extend the time of payment of the notes to September 2, 1887, and

thence to September 2, 1888, in consideration of a mortgage on certain lots in Chattanooga together with some land company stock; second, that he did not endorse the notes in manner and form as the bank set forth in its declaration; third, that long after the maturity of the notes, which were executed without other consideration than that of accommodation paper for the use of Crudup & Co., of which the bank then and there had notice, Crudup & Co., by deed of general assignment for the benefit of all their creditors and for the payment of the notes, conveyed a large amount of personal and real property to trustees, with full and ample power to collect, settle and dispose of the property and pay off all their indebtedness, including the notes, and that thereafter the bank, with notice aforesaid and without the knowledge or consent of Gordon, agreed with Crudup & Co., in consideration, among other things, of enabling Crudup & Co. to effect a general compromise with all their creditors, to waive its right to have the payment of the notes made by the trustees under the general deed of assignment, notwithstanding the property conveyed was of sufficient value, and could have been disposed of by the trustees for an amount in excess of what would have been necessary, to settle and discharge all of their indebtedness, including the notes sued on.

The complaint alleged the plaintiff to be "a corporation duly and legally organized, in accordance with the laws of the government of the United States of America, under the style and name of 'The Third National Bank of Chattanooga,' in the State of Tennessee, doing business as bankers in the city of Chattanooga in the State of Tennessee," and averred that plaintiff "claims of the defendant, E. C. Gordon, who resides in the county of Limestone, State of Alabama, in the northern division of the Northern District of the State of Alabama, the sum of five thousand dollars with interest," etc. This complaint was filed February 16, 1888, and thereupon a summons issued, whereby the marshal of the district was "commanded to summon E. C. Gordon, who is a citizen of the State of Alabama, to appear before the Hon. Circuit Court aforesaid, at the place of holding said court, at Huntsville on the first

Monday of April next, to answer the complaint of the Third National Bank of Chattanooga, who is a citizen of the State of Tennessee."

There was evidence that the bank did "business at Chattanooga, Tennessee;" and that the defendant "lived" or "resided" at Decatur, Alabama.

The notes sued on were as follows:

"$2500.00. CHATTANOOGA, TENN., *Feb'ry* 15, 1887.

"Sixty days after date I promise to pay to the order of myself twenty-five hundred dollars at 3rd Nat'n'l Bank, Chattanooga, Tenn., value received.

"E. C. GORDON."

Upon the back of this were the following words:

"Demand, protest and notice of protest waived and payment guaranteed within five days from date of maturity.

"E. C. GORDON,
"D. G. CRUDUP & Co."

"$2500.00. CHATTANOOGA, TENN., *Feb'ry* 15, 1887.

"Ninety days after date I promise to pay to the order of myself twenty-five hundred dollars at 3rd Nat'n'l Bank, Chattanooga, Tenn., value received.

"E. C. GORDON."

Upon the back of this note were endorsed the names "E. C. Gordon" and "D. G. Crudup & Co.," and below the endorsement "E. C. Gordon" and above the endorsement "D. G. Crudup & Co.," was stamped in printed letters the following words: "Demand, protest and notice of protest waived, and payment guaranteed within five days from date of maturity."

It appeared from the testimony that the words on the back of the notes besides the signatures were stamped thereon when the notes fell due, at the request of Crudup & Co., to save protest fees and costs; that Crudup & Co. agreed to the waiver and guarantee so expressed, but defendant had nothing to do with that agreement; that it was intended to stamp the words over the name of D. G. Crudup & Co. alone, but in

stamping one of the notes the words were put on upside down, (as the note showed;) and that, in restamping, they were put over defendant's name also.

The defendant objected to the introduction of the notes in evidence, and also moved to exclude the first one, but the court overruled the objection and motion, and defendant excepted.

It further appeared that the notes were discounted by the bank in the due course of business, and that the bank had no notice that Gordon signed them for the accommodation of D. G. Crudup & Co., and was not informed thereof until about a month after the notes matured, (demand of payment having been previously made and refused,) when, in reply to one of several letters urging payment, Gordon wrote that he signed the notes for Crudup & Co.'s accommodation. The evidence showed that July 30, 1887, D. G. Crudup & Co., Tabler, Crudup & Co., and the Tabler Crudup Coal and Coke Co., the two partnerships being composed of D. G. Crudup and J. H. Tabler, and the other a corporation created under the laws of Tennessee, Crudup and Tabler owning nearly the entire stock, made general assignments in one instrument for the benefit of their respective creditors, the indebtedness to the Third National Bank, (including Gordon's notes,) placed at $11,600, being scheduled among the liabilities of the Tabler, Crudup Coal and Coke Co.

On September 2, 1887, a deed was given by Crudup's father, of certain lots in Chattanooga, to one Richmond, who gave back a defeasance declaring the property to be conveyed in trust to secure an indebtedness to the Third National Bank of Chattanooga of about $11,600 and interest, due from the Tabler, Crudup Coal and Coke Co., and D. G. Crudup & Co., and that it was agreed that the real estate should be held for twelve months, unless sooner sold by direction of D. G. Crudup, and that, if the bank's debt was not then paid, the lots should be sold in such manner as should be agreed on by the bank and Crudup. Another assignment by D. G. Crudup, D. G. Crudup & Co., and the Tabler Crudup Coal and Coke Co., dated October 1, 1887, was also offered in evidence. This

referred to the first assignment and recited that "neither of the assignees had taken charge of the property assigned to them, nor assumed to execute the trusts." The bank was not included in the schedule of creditors. The trustees named in the first assignment were Ewing and Baskett, and Ewing died shortly after, while Baskett, who was the bank's cashier, declined to act as assignee. After the first assignment was made the creditors had several meetings at which the bank was represented, either by Hart, its president, or Baskett, its cashier.

The court sustained an objection to testimony as to what was done by the creditors at these meetings, and to an offer to prove that the creditors, including the bank, agreed that, as the property conveyed by the assignment of July 30 was more than sufficient to pay all the debts, and as they desired to save the assignors all unnecessary expense, the property conveyed by that assignment should be reconveyed to the assignors, and that the latter should make other arrangements for securing their creditors, which they did; and also excluded all evidence as to what was done by the creditors under the assignment of July 30, and as to a reconveyance by Baskett to the assignors of the property conveyed by the assignment; and also excluded the assignment of October 1, 1887. The court ruled that what was said and done by the plaintiff in connection with the other creditors in regard to the general assignment, and in regard to reconveying the property and agreeing to take other security, could not be proved in defence unless it was shown, or could be shown, that the plaintiff either agreed to extend the payment of the notes sued on or to forbear the enforcement of such payment for some period of time.

Crudup testified to a conversation with Hart in regard to securing the indebtedness and that Hart agreed to accept the security of the three lots in Chattanooga, and to give twelve months' time, and that he handed a copy of the defeasance of Richmond to Hart or Baskett; that in the interview with Hart the Gordon notes were not specifically referred to in speaking of the matter of securing the indebtedness, and no part of the indebtedness was; that there was no agreement

made with the bank other than as shown by the Richmond defeasance; and that plaintiff had not sued Crudup & Co.

Hart testified that he never saw the deed to Richmond or the defeasance until two days before the trial; that Crudup said he would secure the bank with three lots for their indebtedness of $6500 or $6700, which did not include the Gordon notes; that the bank never agreed to extend the Gordon notes or any other notes of Crudup & Co. for twelve months, nor did witness have any understanding or agreement with Crudup or his attorney for the extension of the Gordon notes; that the indebtedness of Crudup & Co., Tabler, Crudup & Co. and the Coal and Coke Co., to the bank, amounted to $6500 or $6700, not including the Gordon notes, which notes did not appear on the books of the bank as part of the indebtedness of the two firms and the corporation; that witness had no idea that the Richmond transaction secured anything more than the $6500 indebtedness; that Crudup did not deliver the deed or defeasance to witness nor to Baskett; and that the bank looked alone, as to the notes sued on, to their maker, Gordon.

The defendant requested the court to give to the jury the following instruction: "The circumstance that no suit has been brought by plaintiff against Crudup & Co., is such a circumstance as should be considered by the jury, in connection with all the other evidence in the case, in determining whether an agreement was made between the plaintiff and Crudup & Co., by which an extension of time of payment of said notes was given them." This instruction the court refused to give, and the defendant duly excepted.

The jury found a verdict for plaintiff for the full amount of the notes and interest, judgment was entered thereon, and the cause brought to this court by writ of error.

Mr. T. D. Young and *Mr. Milton Humes* for plaintiff in error.

Mr. William Richardson, *Mr. George T. White*, *Mr. Francis Martin* and *Mr. David D. Shelby* for defendant in error.

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

Opinion of the Court.

Seventeen errors are assigned, of which those in relation to the jurisdiction of the Circuit Court, to the admission of the notes in evidence and to the rulings of the court in the exclusion of testimony, are relied on.

The question of jurisdiction is raised for the first time in this court, and as we are of opinion that the diverse citizenship of the parties appears affirmatively and with sufficient distinctness from the record, of which the summons forms a part, we must decline to reverse the judgment on this ground, although greater care should have been exercised by the plaintiff in the averments upon that subject.

Nor do we regard the stamping of the waiver and guarantee upon the back of the notes as altering them, so far as Gordon was concerned, in a material particular, and thereby rendering them inadmissible in evidence. Gordon was the maker of the notes and had endorsed them simply to give them negotiability. No waiver of demand or protest was necessary to hold him liable. It was put on the notes on account of Crudup & Co., the endorsers, and at their request, and the mere inadvertence in placing the words above the name of Gordon, as well as above that of Crudup & Co., on the back of one of the notes, had no effect upon Gordon's rights.

This brings us to consider the main position taken in the argument of counsel for plaintiff in error, that the court erred in excluding evidence offered on his behalf. The contention is that although the bank took the notes for value in ignorance that they were accommodation paper, yet, after they matured, the bank was informed that such was the fact, and then extended the time of payment by agreement with Crudup & Co. without Gordon's knowledge or consent, and also waived its right to have the notes paid out of the property conveyed under the deed of general assignment; and that this constituted a defence, which the excluded evidence tended to make out. It is a sufficient answer to this contention, that there was no evidence tending to show a contract of extension for a valid consideration and for a definite and certain time, binding in law upon the parties and changing the nature of the

contract to the prejudice of Gordon. *McLemore* v. *Powell*, 12 Wheat. 554; *Creath's Administrator* v. *Sims*, 5 How. 192. The hands of the bank were not tied by anything it had done, and Gordon could have paid the notes and sought his remedy against Crudup & Co. at any moment. The bank did not know that the transaction with Richmond was made to include these notes; but even were this otherwise, the defeasance did not amount to a contract of extension on its part. Nor did the evidence tend to show any agreement between Gordon and the bank that the latter would look to the assets of the Crudup concerns for payment, and a loss by reason of laches on the bank's part.

The second assignment provided that the proceeds of the property should be to a considerable extent differently applied than under the first one, and the bank was not a party to it. Crudup & Co. could not resume the title to their property, and the first assignment was operative, notwithstanding the death of one trustee and the declination of the other. And in any view, there was no legal suspension of the right to proceed upon the notes which would have prevented Gordon, on taking them up, from enforcing them. The evidence was clearly immaterial and irrelevant and properly excluded; and, as there was no error in the rulings of the court, the judgment must be *Affirmed.*

CAMDEN *v.* STUART.

STUART *v.* GREENBRIER WHITE SULPHUR SPRINGS COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Nos. 159, 643. Submitted January 18, 1892. — Decided March 21, 1892.

The trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such sub-

scription, nor by any device short of an actual payment in good faith; and it was not intended, by anything said in *Clark* v. *Bever*, 139 U. S. 96; *Fogg* v. *Blair*, 139 U. S. 118; or *Handley* v. *Stutz*, 139 U. S. 417, to overrule this principle, or qualify it in any way, but only to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands.

Applying this rule to the testimony and mass of figures in this case, the court affirms the judgments of the court below against stockholders in these cases, whose subscriptions for their stock in the corporation, defendant in error in No. 643, were shown to be in part unpaid.

There is always a presumption of the correctness of a master's report; and in view of the fact that no exception was taken to it by the plaintiff in error in No. 159, as required by Rule 21, the court does not feel bound to examine into the minor details of the report in this case, and holds that that presumption overrides any effort that has been made to show an error in this particular.

While the good-will of a business may be the subject of barter and sale, it must be something substantial, and capable of pecuniary estimation, and not shadowy.

THE court stated the case as follows:

These were appeals from a decree requiring the appellant Stuart to pay the sum of $18,937.08, and appellant Camden the sum of $9495.12, these being the amounts unpaid upon certain subscriptions made by them to the stock of the Greenbrier White Sulphur Springs Company.

The facts of the case were substantially as follows: On January 30, 1880, appellants Stuart and Camden and one George L. Peyton agreed to organize the Greenbrier White Sulphur Springs Company for the purchase of the White Sulphur Springs property, consisting of 7000 acres of land in West Virginia, and an interest in 2800 acres adjoining in Virginia, all of which was about to be sold under a judicial decree, rendered by the District Court of West Virginia. It was agreed that Stuart should purchase the property individually at a price not to exceed $310,000, (subsequently increased by agreement to $340,000,) and should sell the same to the corporation, when formed, for the sum of $390,000 and the expenses of the sale, ($16,000,) making an increase over the purchase price of $66,000. Camden was to take one-half

interest in the corporation, with the privilege of disposing of a part of his interest to other parties, and Peyton and Stuart each one-fourth interest. Stuart bought the property at the judicial sale for $340,000, and a charter was applied for and granted; but as the capital stock was put at $500,000, the company was not organized under this charter. The parties, however, took possession of the property and operated it as a watering place during the season of 1880, under the name of the Greenbrier White Sulphur Springs Company. On December 3, 1880, a new corporation was formed under the same name, with a capital stock of $150,000. A certificate was filed, reciting that the incorporators had paid in on their subscriptions $50,000, and desired the privilege of increasing the said capital by sales of additional shares to $1,000,000 in all. The capital so subscribed was divided into shares of $100 each, and held as follows; By Stuart, Peyton, and Henry M. Mathews, each 375 shares; by Camden, 188 shares; and by William P. Thompson, 187 shares.

On December 29, 1880, the incorporators met at the city of Baltimore; the certificate of incorporation was accepted as the charter of the company; the five stockholders elected directors, of whom Stuart was elected president; and by-laws were adopted for the government of the company. On the same day it was unanimously resolved to increase the capital stock of the company from $150,000 to $300,000, the certificates of said increase to be sold at par value, for the purpose of creating an improvement fund.

Immediately after this meeting of stockholders, they met as a board of directors, and "the stockholders were called upon to pay in their respective proportions of the $4000 heretofore agreed to be paid, and which when paid will be in full of the capital stock of $150,000 provided as full paid-up stock." On motion, "the president and secretary were authorized to issue to the various stockholders certificates to the amount of $150,000, of the capital stock of this company, in proportion to their respective subscriptions, and as in full payment of the same." The resolution adopted at the stockholders' meeting to increase the capital stock from $150,000 to $300,000 was

also adopted at this meeting. Several months afterwards the capital stock was by another resolution increased from $300,000 to $400,000.

The Springs property was turned over to the corporation by Stuart, though it was never formally conveyed to the corporation until March 17, 1882, when a deed was executed by Stuart and his wife for the expressed consideration of $390,194.44. It was expressly covenanted in this deed that a lien should be retained upon the property conveyed to secure the payment of the balance of the purchase money remaining unpaid. The corporation assumed the obligations of the copartnership, and continued the business as though no change had been made.

During the season of 1880 the copartnership claimed to have made $56,000 of profits, but the statement of the expert employed by the commissioner to whom the case was referred showed a net profit in that year of but $4251.68, and this without taking into consideration a large number of outstanding notes of the company. During the season of 1881 the balance sheet of the company showed a profit of a little less than $10,000, while on December 1, 1881, there were outstanding notes of the company to the amount of $114,294.39. This sum did not include the open accounts of the company. On April 15, 1882, there were notes outstanding to the amount of $172,046.18. The season of 1882 was a failure, and early in the fall of that year the company collapsed, owing, including the vendor's lien, $891,862.16, as reported by the commissioner.

On February 9, 1882, at a meeting of the board of directors, it was ordered that coupon bonds to the amount of $200,000 be sold at not less than fifty cents on the dollar, and also $100,000 of stock be sold at par, the two, stock and bonds, to be sold together; that is, each purchaser of $100 worth of stock at par to take bonds to the amount of $200, at not less than fifty cents on the dollar; and that said bonds be secured by a deed of trust on all the property of the company, with the exception of a lot of not more than two acres near the depot. It was further ordered that the president take the necessary steps to get in the legal title of the company to the real estate; and that "the present stockholders shall have the privilege of

taking said stock and bonds in amounts proportioned to the stock now held by them, and should any of the stockholders decline to buy, then the others shall have the right to take their shares, and only in the event that any of said stock and bonds are not taken by the present stockholders they shall be sold to outside parties."

On April 6 the stockholders met at White Sulphur Springs and confirmed this action of the board; directed the president to execute a deed of trust to secure the bonds and interest to William W. Gordon and Isaac H. Carrington, trustees; and also fixed upon May 1, 1882, as the date when the option to take the stock and bonds reserved to the stockholders should expire. At a further meeting of the board of directors on April 25 this option was further extended to May 15. At a meeting on the following day it was further resolved that the president at his earliest convenience place in the hands of John P. Branch $50,000 of the coupon bonds of the company, and $25,000 of stock of the company, and that "he deliver to W. A. Stuart a like amount of the stock and bonds of the company, to be placed or disposed of by them in accordance with resolutions heretofore adopted." Stuart received his $50,000 of bonds and $25,000 of stock, and paid for them with $50,000 of the obligations of the company, upon which he was individually bound as endorser, and which he had purchased at fifty cents on the dollar.

This litigation began on April 10, 1883, by a bill filed by Stuart against the Sulphur Springs Company and Gordon and Carrington, trustees, to enforce a sale of the property covered by the trust deed, in satisfaction both of his own claim, as holder of fifty thousand dollars of the bonds secured by such deed, and of such other claims and demands against the company as might be proved, in the order of their priority. He prayed for a reference to a commissioner to take an account of all the property of the company and the liens thereon, their amounts, character and priority, the names of the stockholders, the number of shares owned by each, the par value of the same, and the amount due and unpaid by each of the stockholders. He further prayed for a report of all the unsecured

claims and demands against the company, for a sale of the property, and that the proceeds be applied to the satisfaction of the liens thereon, and for a receiver.

Subsequently, and on September 3, 1885, William Knabe & Co. intervened in this suit by petition, claiming an indebtedness against the company of $518.63, and prayed to be allowed to contest the validity of the deed of trust, and have the property thereby conveyed subjected to the payment of all the debts of the company without preference, except for the debt due for the purchase money of the real estate, and that proper orders be made for the purpose of securing the rights of the creditors against the stockholders in respect to their subscriptions to the stock of the company. Petitioner also prayed that the trust deed be declared null and void, and the property subjected to the payment of the debts of the company.

By consent of parties the two cases were heard together, the deed of trust was decreed to be null and void, and the bill filed by Stuart dismissed. No appeal was taken from this order of dismissal. The court further ordered, upon the report of the special commissioner, the payment by Camden of $9495.12, and by Stuart of $18,937.08, as of December 30, 1880, to the Sulphur Springs Company, as the unpaid subscriptions to the capital stock of such company. From this decree both parties appealed to this court.

Mr. J. Holdsworth Gordon for Camden.

Mr. Alexander F. Mathews for Stuart.

Mr. Tazewell Ellett, *Mr. H. H. Marshall* and *Mr. Assistant Attorney General Maury* for the Greenbrier White Sulphur Springs Company.

Mr. Justice Brown delivered the opinion of the court.

The single question involved in these appeals is whether the defendants Stuart and Camden can be called upon to pay in their proportions of unpaid subscriptions to the capital stock of the White Sulphur Springs Company.

The capital stock of this company was fixed at $150,000, and the certificate of incorporation of December 3, 1880, stated that $50,000 had been "paid in on said subscriptions."

(1) As to defendant Stuart.

Stuart's answer, in this connection, avers that "it is true, as stated in the application for the charter, that $50,000 of said capital stock had then been paid in, but in making said statement it was not intended to say that no more than that amount had been paid in, the fact being that prior to the date of said application (3d December, 1880) there had been paid up in cash, on account of the subscriptions to said capital stock, at least the sum of $70,000. Your respondent is under the impression that it was from $75,000 to $80,000. He knows that he had himself paid at least $17,500 on account of his own subscription, and the same amount on account of the subscription of his co-defendant, George L. Peyton, for whom he advanced the money, and he has no reason to doubt that the other stockholders put in like proportion on account of their subscriptions." He denied that any part of the subscription remained unpaid, and averred that full-paid shares had been legally and properly issued to the subscribers.

Mr. Gallaher, the master, to whom the case was first referred, reported upon this point as follows:

"Mr. Stuart states that between $75,000 and $80,000 had been paid in. Mr. Peyton states that on each ¼ there had been paid in about $17,500, or $70,000 in all. Mr. Stuart and Mr. Peyton state that the profits of the season of 1880 were, as shown upon the books, to have been $56,000. The theory was, these amounts having been paid in, together with the $4000, making in all cash $130,000 according to Mr. Peyton's calculation, and about $140,000 according to Mr. Stuart, the incorporators considered that they had a property with a paying and earning capacity of $56,000 the first year of their venture. The property had been improved, enlarged and was enhanced in value and reputation as a springs resort. They estimated that their time, labor and talents were worth something, and they determined to increase the stock $150,000 more, making it in all $300,000, and, as the witness Stuart states, were negotiat-

ing for such increased stock. They estimated another element of value, viz.: the long time their vendor had given them on the deferred payments. They estimated their assets as worth $150,000 and started business. It seems to me it was worth it at the time. The creditors seem also to have thought so when they dealt with them. Without further comment I report that all of the $150,000 original stock was paid up."

Upon the argument of exceptions to this report, it was ordered that it be referred to Mr. Leake, another master residing at Richmond, who reported upon the same subject as follows:

"Prior to the formation of the company the corporators had paid into the business of the 'Greenbrier White Sulphur Springs Company,' as it did business in 1880, the sum of $50,000, and this money had been expended in permanent improvements and furniture, etc., and composed a part of the assets of the concern at the end of the year 1880. . . . On December 30, 1880, a call was made for $5000 from Stuart, Peyton, Mathews, Thompson and Camden jointly, and they paid these calls at once, except as to H. M. Mathews, who only paid $4000, thus making in all $69,000, or money, or money's worth, actually paid in on account of said stock subscription."

He then recites the resolution of December 30, calling upon the stockholders to pay in their proportions of the $4000, heretofore agreed to be paid in full of the capital stock of $150,000, and that authorizing the president and secretary to issue certificates for that amount, and says:

"These resolutions were based upon an erroneous balance sheet or statement of the business of the parties called the Greenbrier White S. S. Co. for the year 1880, by which it was made to appear that there had been made a profit of $80,000 by said business during that year, which with the $70,000 paid in said business and to be paid in to the company, would have made an input of $150,000, the amount of said stock.

"But said statement was far from correct. Instead of a profit of $80,000, the real profit for the said year 1880 was only $4251.68.

"I report, therefore, that the original subscribers to the stock have paid in and owe still the following sums:

"1. Wm. A. Stuart subscribed for 375 shares			$37,500 00
Paid in old business	$12,500 00		
" company	5,000 00		
His fourth of profits	1,062 92		
		18,562 92	
"Balance due by him			$18,937 08
"2. Geo. L. Peyton for like sum			18,937 08
"3. H. M. Mathews for like sum and an additional $1,000, as he only paid $4,000 on the $5,000 called			19,937 08
"4. J. N. Camden on his 180 shares paid in like proportion and owes in like manner			9,495 12
"5. W. P. Thompson on his 187 shares paid in like manner and owes in like manner			9,441 96
"Total indebtedness			$76,748 32

"And this should bear interest from Dec. 30, 1880, when it was held out to the world as having been paid in.

"Each of the original subscribers is bound for the unpaid part of his subscription. The capital stock was afterwards increased under the resolutions under which the deed of trust of April 6, 1882, to Carrington and Gordon, trustees, was executed; but I have already reported in regard to the stock issued thereunder."

It will be observed in connection with these reports that the two masters to whom these cases were referred agreed substantially in holding that about $70,000 was paid in on the capital stock, Stuart's proportion of which would be $17,500, and that their divergence of opinion arose over the alleged subsequent payments. Mr. Gallaher reported in regard to these that the $56,000 of profits of the season of 1880 should be treated as a part of the capital stock, and this, with the $4000 and the $70,000 originally paid in, would make $130,000 cash subscriptions, and upon that theory found that

the entire capital stock had been paid in. Before the second report was made the question of this $56,000 of profits was referred to an expert accountant, who reported that the real profits of the year 1880 were only $4251.68, Stuart's proportion of which was $1062.92.

It is very difficult to ascertain from the mass of figures and testimony upon this subject the exact status of this company at the close of the year 1880, when the corporation was organized. It does, however, appear very clear that, conceding that $70,000 in money had been paid into the capital stock of the company, and $56,000 of profits had also been realized, there was less than $1200 in money remaining December 31, and in addition thereto there was a large increase of indebtedness during that year. Indeed from the beginning of the business in the spring of 1880, to its close in the autumn of 1882, there was a constantly increasing indebtedness.

Assuming that there was $70,000 paid in before the corporation was formed, which is $20,000 more than was claimed in the articles of incorporation to have been paid in, it is evident that, if it were paid in cash, it was immediately paid out for furniture, permanent improvements, etc., and that there was little, if any, money left at the end of the season. There is, then, a *prima facie* liability on the part of the defendants to pay each his proportion of the remaining $80,000 and the real question in this case is whether this has ever been paid or accounted for in such a manner as to operate as a satisfaction of the claim. In view of our decisions in *Sawyer* v. *Hoag*, 17 Wall. 610; *Scovill* v. *Thayer*, 105 U. S. 143, and the numerous cases arising out of the failure of the Great Western Insurance Company, it is manifest that the resolution adopted at the directors' meeting of December 29, 1880, that upon payment of $4000, or their proportions of the same, the capital stock of $150,000 should be deemed to be fully paid, was wholly ineffectual as against the creditors of the company. It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And

while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark* v. *Bever*, 139 U. S. 96; *Fogg* v. *Blair*, 139 U. S. 118; or *Handley* v. *Stutz*, 139 U. S. 417, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands.

It is, however, claimed that during the season of 1880, in addition to the real estate already purchased, there was furniture contributed to the amount of $53,834.78, and permanent improvements made to the amount of $42,000, making a total of over $95,000, which should be added to the $50,000 represented by the certificate of incorporation to have been paid into the company. No claim of this kind is made in Stuart's answer, and in view of the $70,000 which is said to have been paid in cash, it may be safely assumed that, if this money were paid at all, of which there seems to be some doubt, it went in this direction, and that, having been once credited to the subscribers in the form of money, it cannot be credited again in the form of assets for which this money was paid.

So far as concerns the profits of $56,000 claimed to have been made during the season of 1880, the evidence is very unsatisfactory. These profits were stated at this sum by the book-keeper of the concern under an instruction of the manager, to make out as good a showing as he could for them, to aid in the appreciation of the stock of the new corporation — a method of estimating profits which throws very considerable doubt upon the accuracy of the result. An expert accountant acting under the direction of the commissioner, after a careful examination of the books, found these profits to amount to $4251.68, which was allowed by the master in computing the amount due by the several parties upon their subscriptions.

A suggestion is made in the brief of Mr. Camden's counsel that the expert erred in charging certain items to the account of expenses, but in view of Rule 21 of this court, which requires that "when the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it," we do not feel called upon to examine into the minor details of this report. There is a presumption of its correctness which overrides any effort that has been made to show an error in this particular.

The experience and good-will of the partners, which it is claimed were transferred to the corporation, are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation in this connection. It is not denied that the good-will of a business may be the subject of barter and sale as between the parties to it, but in a case of this kind there is no proper basis for ascertaining its value, and the claim is evidently an afterthought. The same remark may be made with regard to the contract of January 30, and the loss of time and trouble to which the parties were subjected, which are now claimed to be elements of value in the property contributed to the corporation, but of which no account was made at the time.

(2) As to defendant Camden.

The answer of Camden to the bill or petition of Knabe & Co. averred that "the total cost of improvement, betterments and new furniture amounted to a large sum, of which there was paid in cash by the parties interested in said purchase about $70,000;" that the business yielded a net profit of about $56,000 for the season, which amount was also appropriated and devoted to the improvement and enhancement in value of the said property, the parties in interest having all given largely of their time and attention to the development of the said property without charge for the time, expenses and labor in connection with the same; "that the whole transaction was made in good faith, and, as he considered, a plain, legitimate business transaction; that the parties had full right to sell the property to the corporation at a fair and reasonable price to be agreed upon by respondent, and his co-purchasers

under the said contract were so advised by able counsel, and the resolution passed by the board of directors of said company making such purchase was prepared by John K. Cowen, their legal adviser, and was adopted and ratified by the said company in full directors' meeting, and ordered to be spread upon the records of said company." Annexed to his answer was a copy of this resolution, the original of which, he said, was filed with his deposition in a chancery suit in the Circuit Court of Augusta County, Va. By this instrument it appears to have been resolved:

"1. That in consideration of the transfer to this company of the contract with said W. A. Stuart, and also of all the improvements, furniture and personal property of all descriptions placed by said J. N. Camden and his associates upon said premises, this company do agree for the consideration aforesaid to accept the same in full payment of the unpaid balances by said J. N. Camden and on their several subscriptions to the capital stock of this company as set forth in the certificate of incorporation.

"2. Resolved, that when said transfer of the contract and property aforesaid is duly made to this company, there shall be issued to the parties named in the foregoing resolution certificates of fully paid up stock for the amount which they have respectively subscribed, as set forth in the certificate of incorporation aforesaid."

This resolution was annexed to the sworn answer of Camden, but is not shown to have been actually passed, is not made an exhibit in the case, and does not appear in the additional record stipulated into the case, which purports to contain a copy of the minutes of all the meetings of said company, and of the board of directors thereof.

It is somewhat singular, too, that this resolution, which Camden avers to have been adopted at the directors' meeting at Barnum's Hotel, in Baltimore, was not set up or proved by Stuart, to whom it was equally available, and did not make its appearance until December, 1887, more than four years after this suit was begun, after all the testimony had been taken, and within a few days before the case was finally sub-

mitted to the court for adjudication. It is absolutely inconsistent with the resolution adopted by the board on the same day, December 29, 1880, calling upon the stockholders to pay in their proportions of the $4000 agreed to be paid in full of the capital stock, and under the circumstances nothing can be claimed in virtue of it.

Defendant Camden also claims the right to set off as against his indebtedness upon the stock the sum of $10,284.56, paid by him in a suit against him and Stuart to recover the price of furniture in the hotel, of which the company received the benefit, and which furniture is a part of the property contributed to the corporation. This payment, however, added nothing to the assets of the company. The furniture itself was a part of such assets, and was taken into consideration when the valuation of December 3, 1880, was made, and it was held correctly by the court below that, "as he has already been allowed the value of that furniture in his original payment, to allow this claim would be to credit him twice for the same thing." If a person should buy upon credit a certain piece of property, such, for instance, as a steamboat, and should turn it over to a corporation and receive certificates of stock representing its value, it would scarcely be claimed that when he paid his original vendor he should receive additional stock to the amount of such payment. In this case Camden purchased the furniture, turned it over to the company, and is presumed to have received stock proportioned to his contribution.

We have been much embarrassed in the consideration of this case by the want of the assignment of errors required by Rev. Stat. sec. 997, and the twenty-first rule of this court, and should have felt ourselves justified upon that ground in refusing to take cognizance of the case. We have, however, examined the evidence so far as it bears upon the question of these defendants' liability upon their stock subscriptions, and have found it confusing and unsatisfactory. Indeed, the vital question whether the capital stock of this corporation was ever paid in money or money's worth is so covered up and obscured by a multiplication of figures and an entanglement of details that it is almost impossible to arrive at

the exact truth. From this testimony, however, one thing clearly appears, viz.: that the company was incorporated with a capital stock of $150,000, and that the stockholders were content to put a valuation of $50,000 upon what had been put in at the time the company was formed. As there was apparently no motive for underestimating this value, in the absence of clear proof to the contrary, the court would be justified in accepting it as the correct valuation of the property turned over to the company. *Coit* v. *Gold Amalgamating Co.*, 119 U. S. 343. But, in view of the finding of the masters that $70,000 had been paid in we are content to accept this as the true amount. As no further assessments or calls appear by the minutes of the corporation to have been made, except the $4000 which was to be in full of the balance of the subscription, the burden of proof is upon the defendants to show how, if at all, the residue of this subscription was paid. The other fact, that the call of $4000 was made for the purpose of completing the subscription of $100,000, and to be in full thereof, indicates that the directors considered their entire duty in regard to the payment of the capital stock to have been discharged. We have already held that this payment of $4000 was unavailing as against the creditors' claims. If any further payments were made, defendants should make it appear clearly and satisfactorily. They failed to satisfy the master, to whom the case was referred. They failed to satisfy the court below. They have failed to convince us. In lieu of the evidence which the nature of the case required, they have presented us a complicated mass of testimony, and have asked us to evolve from it sufficient to support their theory that, in some manner, of which apparently they have no clear comprehension, these subscriptions were paid.

In cases of this kind, referred to a master to state an account, depending, as they do, upon an examination of books, upon the oral testimony of witnesses, and, perhaps, as in this case, upon the opinions of an expert, "his conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." This was the rule laid down

by this court in *Tilghman* v. *Proctor*, 125 U. S. 136, and approved in *Callaghan* v. *Myers*, 128 U. S. 617, 666, and in *Kimberly* v. *Arms*, 129 U. S. 512. See also *Dean* v. *Emerson*, 102 Mass. 480; *McDonough* v. *O'Neil*, 113 Mass. 92. We see no reason for departing from it, and think this is a proper case for its application.

Upon the whole, we agree with the Circuit Court upon the points involved in these appeals, and the decree of that court is therefore

Affirmed.

LACASSAGNE *v.* CHAPUIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

No. 188. Submitted March 1, 1892. — Decided March 21, 1892.

Under a writ of possession, on a judgment entered in January, 1886, in a suit brought in a Circuit Court of the United States by C. against M. in March, 1884, L. was evicted from land, and the agent of C. was put in possession. L. was in possession under a sheriff's deed made in August, 1885, under proceedings in another suit against M. L. brought a suit in equity, in the same Circuit Court, in April, 1886, against F. as testamentary executor of C. and individually, to have the suit of C. declared a nullity, for want of jurisdiction, and because L. was not a party to it, and for an injunction restraining F. and the agent of C. from molesting L. in the possession of the land. On demurrer to the bill: *Held*,

(1) The case was not one for a suit in equity;

(2) The possession of L. was that of M.; and L. as a purchaser *pendente lite*, was subject to the operation of the writ of possession;

(3) The proper decree was to dismiss the bill, without prejudice to an action at law.

THE case is stated in the opinion.

Mr. Alfred Goldthwaite for appellant.

Mr. A. H. Leonard and *Mr. Morris Marks* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity brought by a bill filed April 15, 1886, in the Circuit Court of the United States for the Western

District of Louisiana, by Laurent Lacassagne, a citizen of France, against François Chapuis, a citizen of Switzerland, in his capacity of testamentary executor of Jeanne Caroline Cavé Cavailhez (hereinafter called the widow Cavé) and in his individual capacity. The subpœna was served on the defendant in person, at New Orleans, Louisiana, May 5, 1886, and he, as such testamentary executor and individually, appeared and put in a demurrer to the bill. The demurrer was sustained, and a decree was entered dismissing the bill, from which decree the plaintiff has appealed to this court.

The contents of the bill are as follows: The plaintiff is the owner of a plantation situated in the parish of Vermilion, Louisiana, on the east side of Bayou Vermilion, having a front of 10 arpents by 40 arpents in depth, with the buildings and improvements thereon, and the plantation equipment. He acquired the ownership of the property, with Albert G. Maxwell, in judicial proceedings prosecuted in the District Court for the parish of Vermilion, in the suit of *Albert G. Maxwell* v. *Marceline Cavailhez*, and by sheriff's deed signed by the sheriff of the parish, dated August 15, 1885. The plaintiff acquired the interest of Maxwell in the property by act of sale, October 22, 1885, and thereby the whole of the plantation became his property. The widow Cavé, alleging herself to be a citizen of France, and to be the widow of Baptiste Cavailhez, deceased, on or about March 5, 1884, instituted a suit in equity in the same Circuit Court of the United States, wherein she was complainant, and Marceline Cavailhez, widow of C. H. Remick, in her own right and as tutrix of her four minor children, named Remick, and as tutrix administering the estate of said C. H. Remick, was defendant. In that suit, the widow Cavé claimed, as the widow in community of Baptiste Cavailhez, to be the owner of one undivided half interest in said plantation, and that the other undivided one-half interest therein was burdened with a tacit mortgage to secure $5310 paraphernal property, due her by the succession of Baptiste Cavailhez. The prayer of the bill in that suit was, that the plantation be decreed to be still the property "in indivision" of the estate of Baptiste Cavailhez; that the widow Cavé be recognized as

the owner of one undivided half of the plantation, and as a mortgage creditor of Baptiste Cavailhez, in the sum of $5310, with legal interest from judicial demand, on the undivided half of the plantation belonging to Baptiste Cavailhez; and that process issue against Marceline Cavailhez, widow of C. H. Remick, in her individual capacity, and as tutrix of her minor children, and as tutrix administering the estate of said Remick; but the bill in the suit by the widow Cavé nowhere averred that Marceline Cavailhez was in possession of the plantation when the suit was brought, either for herself individually, or as tutrix as aforesaid, or by agent or employé.

The plaintiff and Maxwell were mortgage creditors of Marceline Cavailhez, and their mortgage was duly recorded in the mortgage office of the parish of Vermilion at the time, and before the suit brought by the widow Cavé against Marceline Cavailhez was instituted; the recording operated as notice to the widow Cavé and all the world; and no right or interest of the plaintiff or of Maxwell could be passed on in that suit, or be affected by the decree therein made, without their being made parties to the suit.

The court was without jurisdiction to entertain that suit; the widow Cavé was not a citizen of France, as she falsely alleged herself to be, to give the court jurisdiction of the parties, but was a citizen of Louisiana, residing at New Orleans; a fraud was practised on the court; and the proceedings were null and void, and should be so decreed to be.

The judgment rendered in that suit, on January 11, 1886, decreed that the widow Cavé be "recognized as the lawful widow of Baptiste Cavailhez," and as such "entitled to and decreed to be the owner of the undivided half of all the property above described," including with other property the said plantation and its paraphernalia; that she have judgment against the estate of Baptiste Cavailhez in the sum of $5310, with legal interest from February 25, 1884; and that her mortgage to secure said sum and interest, on the property of Baptiste Cavailhez, to take effect from April 13, 1863, be recognized and enforced. On the 2d of February, 1886, a petition was presented to the court for a writ of possession under

said decree, and was granted, and a writ of possession was issued to the marshal, by which he was ordered to eject Marceline Cavailhez and those who might be holding said property under her, "by private deed of transfer or otherwise, since the institution of the aforesaid suit, to wit, March 5, 1884, and during the pendency of said suit," and to put the widow Cavé in full possession of said property. Said writ was not warranted by the decree, was issued improvidently and upon a wrongful suggestion, and was null and void. It was executed on February 5, 1886, "by serving the writ and copy of judgment" on one Armintor, "who was living in the house and had charge of the property, and he being a major," and the return of the marshal, filed February 10, 1886, states that he took possession of the plantation and improvements, and then placed them in the possession of one Brulard, as the agent of the widow Cavé.

The plaintiff Lacassagne was in possession of the plantation, as owner, by his laborers, servants, and employés, when the marshal pretended to execute the writ. Brulard came upon the plantation, and now occupies a portion of the dwelling thereon, but the carpenters and laborers thereon have been continuously and still are in the service and pay of the plaintiff. He is deterred from going upon the plantation and exercising his rights of ownership, by the violence and threats of Brulard. The plaintiff claims to be in possession, though his possession is disturbed and interfered with by Brulard, acting under direction of, and advice from, the defendant.

The plaintiff has not been a party to any suit, and is not bound by any order of a court until he has an opportunity to be heard. Though the acts were in the name of the widow Cavé, yet the plaintiff charges that she was instigated to do all that she did by the defendant. Brulard is an agent, and under the control of the defendant, and of the court. The whole proceeding was void for want of jurisdiction of the parties. The plantation is deteriorating in value, and the season for planting and preparing for crops is passing, and irreparable injury is being done to the plaintiff. An injunction *pendente lite* is necessary to restrain the defendant, as testamentary

executor and individually, and his agents and employés, from interfering with the possession of the plaintiff or molesting him or his agents and servants on the plantation. A restraining order ought to issue, pending the motion for an injunction, and the injunction be made perpetual on a final hearing. The plaintiff is without a full, complete and adequate remedy at law, and must resort to a court of equity to have his rights determined and secured.

The prayer of the bill is, that the suit so brought by the widow Cavé be declared an absolute nullity, because there was no jurisdiction in the court over the parties; that, in case said suit was properly brought between the parties thereto, it be decreed to have no force or effect against the plaintiff herein, he not having been a party to it, and the decree not operating against him; that the writ of possession be decreed to be void; and the possession of Brulard illegal, and Brulard advised to vacate the premises occupied by him on the plantation; that an injunction issue, to be made perpetual at the final hearing, commanding the defendant, testamentary executor and individually, his agents, servants and employés generally, and Brulard in particular, to desist from interfering with or molesting the plaintiff in the possession of the plantation, or his laborers, servants and employés; that a restraining order issue, pending the motion for an injunction; and for general relief and process.

The demurrer of the defendant, as testamentary executor and individually, alleges, as cause of demurrer, a want of equity in the bill.

We are of opinion that the decree must be affirmed. The suit by the widow Cavé was brought in March, 1884. The deed of the plantation from the sheriff to the plaintiff and Maxwell was dated August 15, 1885. That deed was given in judicial proceedings brought by Maxwell against Marceline Cavailhez, widow of C. H. Remick. The title of Maxwell and the plaintiff was acquired during the pendency of the suit brought by the widow Cavé. The marshal properly executed the writ of possession and put the property into the possession of Brulard, as the agent of the widow Cavé, and such possession

was held by Brulard when the present suit was instituted by the plaintiff. The plaintiff was out of possession when he instituted this suit; and by the prayer of this bill he attempts to regain possession by means of the injunction asked for. In other words, the effort is to restore the plaintiff, by injunction, to rights of which he had been deprived. The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already. An injunction will not be used to take property out of the possession of one party and put it into that of another. 1 High on Injunctions, 2d ed. § 355.

The question here involved is a dispute about title. The plaintiff has a full, adequate and complete remedy at law, and the case is not one for the jurisdiction of a court of equity. If the plaintiff was in the possession of the plantation when the judgment in favor of the widow Cavé was rendered, on January 11, 1886, and when the marshal executed the writ of possession on February 5, 1886, it does not follow that the fact that he was not a party to the suit in which it was issued, could prevent his being evicted under the writ of possession. A pending suit in regard to real estate is notice to all the world. During the pendency of the suit brought by the widow Cavé against Marceline Cavailhez, the plaintiff undertook to acquire rights in the plantation under Marceline Cavailhez, by the sheriff's deed, to the prejudice of the widow Cavé; and his possession, so far as it affected the latter, was the possession of Marceline Cavailhez, and the writ was properly issued and executed. It is provided as follows by the civil code of Louisiana, (art. 2453:) "The thing claimed as the property of the claimant cannot be alienated pending the action, so as to prejudice his right. If judgment be rendered for him, the case is considered as a sale of another's property and does not prevent him from being put in possession by virtue of such judgment."

As the plaintiff was evicted and the plantation was put into the possession of the widow Cavé, a court of equity cannot give the plaintiff any relief, until he has established his title by an action at law. Under the jurisprudence of Louisiana, the

claim of the plaintiff is a "third opposition." By the Code of Practice of Louisiana, (art. 401,) a third opposition is defined as "a demand brought by a person not originally a party in the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him." It is a suit at law, a short, summary proceeding, and not a formal one in chancery. Code of Practice, art. 298; *Van Norden* v. *Morton*, 99 U. S. 378, 381.

It is well settled, in regard to land, that, when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of a writ of possession if one is finally issued on a judgment in the suit. *Walden* v. *Bodley*, 9 How. 34, 49; *Terrell* v. *Allison*, 21 Wall. 289; *Tilton* v. *Cofield*, 93 U. S. 163; *County of Warren* v. *Marcy*, 97 U. S. 96, 105; *Union Trust Co.* v. *Southern Navigation Co.*, 130 U. S. 565, 570, 571; *Mellen* v. *Moline Iron Works*, 131 U. S. 352, 371.

The fact that the plaintiff and Maxwell were mortgage creditors of Marceline Cavailhez, and that their mortgage was duly recorded in the mortgage office of the parish, before the suit brought by the widow Cavé was instituted, is of no consequence, so far as the present suit is concerned. If the rights of the plaintiff or those of Maxwell under that mortgage could not be affected by the decree made in the suit brought by the widow Cavé, because they were not made parties to that suit, the result is simply that the decree in that suit had no effect upon their rights under the mortgage. But that fact has no bearing upon the matters sought to be litigated in the present suit. The mortgage, if valid, still remains valid, and lawful proceedings can be had upon it, subject to such defences as may be interposed in regard to it. If the title of the widow Cavé to the plantation, under the suit brought by her, is subject to the rights of the plaintiff under the mortgage executed by Marceline Cavailhez, this bill in the nature of a bill of review is not the proper mode of enforcing the rights under that mortgage. The widow Cavé was not bound to make the plaintiff or Maxwell, as mortgage creditors of Marceline

Cavailhez, parties to the suit she brought, and their rights as such creditors were not affected by the decree in that suit.

As to the allegation in the bill that the court was without jurisdiction of the suit brought by the widow Cavé, because she alleged falsely therein that she was a citizen of France, when in fact she was a citizen of Louisiana, and thus the court had no jurisdiction of the suit as between her and Marceline Cavailhez, that question cannot be raised and adjudicated in this suit. By the record of the former suit, there appeared to be jurisdiction, and the plaintiff cannot question it by means of this suit, when the question is not raised by Marceline Cavailhez, who was the defendant in the former suit.

Although the present suit is one between two aliens, yet inasmuch as it is brought in the same Circuit Court in which the former decree was rendered, and to impeach that decree, we think that the court had jurisdiction. That being so, it had authority to make a decree on the merits.

The decree dismissing the bill absolutely must be so modified as to declare that it is without prejudice to an action at law, and, as so modified, it is affirmed, with costs. *Horsburg* v. *Baker*, 1 Pet. 232; *Barney* v. *Baltimore City*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423; *Rogers* v. *Durant*, 106 U. S. 644; *Scott* v. *Neely*, 140 U. S. 106, 117.

Decree affirmed as modified.

TRIPP *v.* SANTA ROSA STREET RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 197. — Submitted March 9, 1892. — Decided March 21, 1892.

Service of citation by a plaintiff in error upon the defendant in error by depositing in the post-office a copy of the same, postage paid, addressed to the attorney of the defendant in error at his place of abode, is an insufficient service.

The decision of the Supreme Court of a State in a case in which applica-

tion for removal to the Circuit Court of the United States had been made in the trial court and denied, that, as no appeal was prosecuted from the final judgment, the order denying the application to remove was not open to review, and its judgment thereupon dismissing the appeal from the orders refusing to set aside the judgment of the court below, rest upon grounds of state procedure, and present no Federal question.

THE case is stated in the opinion.

Mr. Philip G. Galpin for plaintiff in error.

No appearance for defendants in error.

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

We gather from the record that this was an action of ejectment commenced March 9, 1881, in the Superior Court in and for the county of Sonoma, California, against some one thousand defendants, of whom two or three hundred, having filed separate answers to the complaint, were awarded separate trials which were set down for December 13, 1881, and by the court continued until the 14th. On that day a motion by plaintiff for a continuance, on affidavit, was made and overruled, whereupon a petition and bond for the removal of the cause to the Circuit Court of the United States for the Northern District of California were filed by the plaintiff. This application, after argument and consideration, was denied December 15, 1881, as to each of the defendants who had obtained separate trials, on the ground that it was made too late, and the cases as to them, being called for trial, were severally dismissed for want of prosecution.

Upon the third of January, 1882, plaintiff filed motions to set aside the several orders of dismissal, and to vacate the orders denying the application for removal, and these motions were heard and denied on February 13, 1882. Plaintiff thereupon gave notice of appeal to the Supreme Court of California from the orders of the Superior Court made on February 13, and the appeals, having been prosecuted, were dismissed by

that court on May 26, 1886, and to review that judgment this writ of error was sued out.

The Supreme Court held that plaintiff should have appealed from the judgments of the Superior Court dismissing the suit, and that had such appeal been taken the order of refusal to transfer to the Circuit Court of the United States might have been considered, but as there was no appeal from the final judgments the court could not review that order. The writ of error from this court was allowed February 24, 1888, by the chief justice of the state Supreme Court by whom a citation was signed.

The only proof of service of this citation is an affidavit that notice of citation was given to defendants' attorneys, "by depositing in the post-office at San Francisco, Cal., a copy of said citation, postage paid, addressed to said attorneys at their respective places, to wit: [Here follow names of the attorneys as residing at Santa Rosa,] all of the county of Sonoma, on the 29th day of September, A.D. 1888; that on the day of said service there was a regular communication by mail between San Francisco and Santa Rosa."

The appearance of none of the defendants in error has been entered in this court, nor does the record disclose any notice of the pendency of the writ, or waiver thereof.

Assuming the sufficiency of the affidavit, and that it established what would be a proper service under the laws of California, (Cal. Code Civ. Proc. §§ 1012, 1013; 3 Deering Codes and Statutes, 416,) in respect of which we express no opinion, the question presents itself whether such a service of citation to this court can be sustained. The statute provides that "the adverse party shall have at least thirty days' notice," Rev. Stat. § 999; and the citation is a summons to bring him in, which, under subdivision five of rule eight, must be served before the return day. Service may be had upon his attorney or counsel with like effect as upon the party himself, but when counsel of record is dead, it cannot be served on his personal representative, nor even on his partner if not regularly appearing on the record as counsel in the cause. *Bacon* v. *Hart*, 1 Black, 38. No attorney or solicitor can withdraw

his name after he has once entered it upon the record, without the leave of the court; and while his name continues there the opposite party has a right to treat him as the authorized attorney or solicitor and the service of notice upon him is valid. *United States* v. *Curry*, 6 How. 106. In *Fairfax* v. *Fairfax*, 5 Cranch, 19, 21, where the defendant below intermarried after the judgment and before the service of the writ of error, the service of the citation upon the husband was held sufficient.

The necessity of the actual issue and actual service of citation, except in cases of appeals allowed in open court, and in the absence of equivalent notice or waiver, is reiterated in many cases, while much liberality is exercised in permitting service to be made during the return term, or a new citation to be issued, where the circumstances invoke the discretion of the court. *Hewitt* v. *Filbert*, 116 U. S. 142; *Dayton* v. *Lash*, 94 U. S. 112.

The citation may be waived by a general appearance, *Villabolos* v. *United States*, 6 How. 81, 90; or by the acceptance of service of a defective citation, *Bigler* v. *Waller*, 12 Wall. 142; or by action equivalent to the acknowledgment of notice, *Goodwin* v. *Fox*, 120 U. S. 775.

But none of the cases give color to the view that the service or acknowledgment or waiver can be other than personal on or by the party or his attorney.

By the thirteenth equity rule it is provided that "the service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family;" and service of citation upon parties in this way would doubtless be sufficient. But we cannot be governed in the matter of our own process by the varying laws of the States and Territories upon the subject, and actual notice, or notice directed by rule or special order, must be shown before we can treat parties as properly in court.

This case has been upon our docket since October 9, 1888,

and been reached for argument and submitted upon a brief filed for plaintiff in error. It is now too late to assert jurisdiction over defendants in error, and the writ of error must therefore be dismissed.

We should add that the same result would follow if the citation had been duly served, as the record presents no Federal question upon which to maintain our jurisdiction. The decision of the Supreme Court of California that, as no appeal was prosecuted from the final judgments, the order denying the application to remove was not open to review, and its judgment thereupon dismissing the appeal from the orders refusing to set aside the judgments of the court below rest upon grounds of state procedure with which it is not our province to interfere. *Writ of error dismissed.*

HALEY *v.* BREEZE.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 211. Submitted March 15, 1892. — Decided March 21, 1892.

This writ of error is dismissed because the record presents no Federal question properly raised, and because the judgment of the state court rests upon an independent ground, broad enough to maintain it, and involving no Federal question.

The plaintiff in error, as plaintiff below, filed a bill in a District Court in a county in Colorado, to restrain the collection of taxes which had been assessed against him. An injunction being refused, he filed a second bill, in another court in another county, seeking the same remedy. An injunction being issued there, the cause was taken to the Supreme Court of the State, where the decree was reversed and the injunction dissolved. The following extracts from the opinion of the court, found in the record, show the grounds upon which that decree, to which this writ of error was sued out, rested.

"The record discloses that the appellee, Haley, has instituted

and prosecuted two injunction suits against the appellant for the accomplishment of the same purpose, to wit: to prevent him from enforcing, as county treasurer of Routt County, the collection of taxes assessed against the personal property of the appellee therein for the year 1884 by distraint and sale of a portion of the same. The first suit was brought and prosecuted in the District Court of Clear Creek County and the present action in the District Court of Pitkin County. The complaint in the former case stated substantially the same grounds for enjoining the collection of these taxes as that filed in the latter case, the principal ground being the invalidity of the assessment. Additional grounds for equitable relief are alleged in the present complaint, but they all existed at the time of the former action, and it is not even alleged that they were unknown to the appellee at the time the original suit was pending.

"The doctrine of the authorities is that, when a complainant in equity brings his suit, he must present to the court all the grounds then existing for its support. He is not at liberty to present a portion of the grounds upon which his claim for equitable relief depends in one suit and, if that fail, to present the rest in another action. The former adjudication is held to be conclusive in a subsequent proceeding between the same parties as to every matter properly involved and which might have been raised and determined in it. *Ruegger* v. *Indianapolis & St. Louis Railroad*, 103 Illinois, 449, 456; *Kurtz* v. *Carr*, 105 Indiana, 574; *Stark* v. *Starr*, 94 U. S. 477.

"A copy of the complaint filed by said Haley in the former suit was set out in the answer in this cause, showing the identity of the causes of action, of the relief sought, of the parties, and that they prosecuted and defended in the same character; and it is therein averred that this court, by its opinion and judgment of April 30th, 1887, pronounced in that case, held the said assessment to be valid, and that the injunction proceedings could not be maintained, which former adjudication is alleged to be a complete bar to the present action. This answer stands untraversed; and the fact, therefore, of a

former adjudication of the same subject matter between the same parties is decisive not only of this appeal, but of this action. It appears from the record that there was a full and complete adjudication in the original suit of the validity of these taxes, and that the authority of the appellant, as treasurer of Routt County, to enforce their collection was therein sustained. There was, therefore, no warrant of law for granting this second injunction to restrain him from the performance of that duty."

And in denying a petition for a rehearing the court said: "The grounds of the decision rendered in April are plain and simple and cannot be questioned. The plaintiff failed to return to the assessor a list of his taxable property as required by statute, and his property was listed by the assessor as was his duty under the statute. If he was assessed too high or for too much property it was his duty to apply to the board of equalization for correction of these errors, which he failed to do either of his own accord or at the repeated solicitation of the board of county commissioners. Having neglected all the means and modes provided by the statutes for the correction of errors in his assessment, he cannot correct them by an appeal to the chancery jurisdiction of the courts; and to these plain propositions the opinion cites abundant and well-considered authorities."

The counsel for defendant in error moved to dismiss the writ of error on the ground that "This cause and the matters and things therein involved no questions under the Constitution or laws of the United States of America."

Mr. Daniel E. Parks for the motion.

Mr. W. T. Hughes opposing.

The Chief Justice: The writ of error is dismissed because the record presents no Federal question properly raised, and the judgment of the Supreme Court of the State proceeded upon an independent ground not involving a Federal question and broad enough to maintain the judgment.

SOUTHERN KANSAS RAILWAY COMPANY *v.* BRISCOE.

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

No. 869. Submitted February 1, 1892. — Decided March 28, 1892.

Under the provisions of the act of July 4, 1884, 23 Stat. 73, c. 179, the United States Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas, and the District of Kansas have concurrent jurisdiction, without reference to the amount in controversy, and without distinction as to citizenship of the parties, over all controversies arising between the Southern Kansas Railway Company and the inhabitants of the Indian nations and tribes through whose territory that railway is constructed.

THIS was a motion "to dismiss the writ of error herein, because the court has no jurisdiction to hear and determine the same; or to affirm the judgment, it being manifest, that even if the court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument." The case is stated in the opinion.

Mr. A. H. Garland and *Mr. H. J. May* in support of the motion.

Mr. George R. Peck, *Mr. A. T. Britton* and *Mr. A. B. Browne* opposing.

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

Briscoe brought suit as an inhabitant of the Chickasaw Nation, Indian Territory, in the District Court of the United States for the Western District of Arkansas, against the Southern Kansas Railway Company, to recover damages for the wrongful killing of certain live stock by one of the defendant's trains, which was tried in the Circuit Court for that district after the passage of the act of February 6, 1889, 25

Stat. 655, c. 113, and judgment rendered for $896.75. The case was brought to this court under the act of February 25, 1889, 25 Stat. 693, c. 236, on the question of the jurisdiction of the court below.

By the act of July 4, 1884, 23 Stat. 73, c. 179, Congress granted the right of way through the Indian Territory to the Southern Kansas Railway Company. The act defined the route and the extent of the right of way; provided for compensation for property taken or damage done by reason of the construction of the road; for regulating the rates for freight, passenger and mail service; for the filing of maps showing the routes of the located lines through the Territory, in the office of the Secretary of the Interior, and also in the office of the principal chief of the nations or tribes through which the lines might run; for the construction of prescribed mileage within three years; for the recording of all mortgages executed by the company in the Department of the Interior; and that the right of way should be accepted upon the express condition that the company would neither aid, advise nor assist in any effort looking towards the changing or extinguishing the tenure of the Indians in their lands, and not attempt to secure from the Indian nation any further grant of land or occupancy than as provided, under penalty of forfeiture of all the rights and privileges of the company under the act.

The eighth section reads as follows:

"That the United States Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas, and the District of Kansas, and such other courts as may be authorized by Congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railway Company and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits

of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this act."

It was contended on behalf of defendant, before Judge Parker, holding the Circuit Court, that the last clause of this section, to wit, "so far as may be necessary to carry out the provisions of this act," operated to limit the jurisdiction conferred to such controversies as might arise between the nations or inhabitants and the company, in respect of the construction of the railroad, as pertaining to the right of way, damages for land improvements or occupancy rights thereby injured or disturbed, etc.

The Circuit Court held otherwise, and that the courts named in the section were properly given jurisdiction over the suit, because as there was no remedy for a tort such as that in question at the place where the same was committed, there was no remedy anywhere, until given by the law under consideration, and that this constituted a right or privilege thereunder; and upon the further ground that as the act conferred upon the corporation the right to build and run its road through the Indian country, and to exercise the ordinary powers incident thereto, this rendered the suit one arising under the laws of the United States. 40 Fed. Rep. 273.

That Briscoe was at the time mentioned an inhabitant of the Chickasaw Nation, where the property destroyed was, must be assumed. The answer did not specifically put this fact in issue, but denied any liability generally, and defendant requested the court to instruct the jury that Briscoe was not an inhabitant, which the court refused to do, as there was evidence tending to show that he was. This left the question as one of fact to the jury, and it was determined, in effect, in Briscoe's favor by their verdict.

As the defendant acquired all its rights in the matter of the construction and operation of its road within the Indian Territory under and by virtue of a law of the United States, enacted by Congress in the exercise of its power over the Territories, controversies arising by reason of the exercise of its powers therein were necessarily controversies arising under

the laws of the United States, and this being so, it was competent for Congress to give the enumerated courts jurisdiction over not only controversies immediately relating to or growing out of the construction of the road, but over all controversies between the nations and tribes or the inhabitants thereof, through whose territory the railroad might be constructed, and the company.

And as the civil jurisdiction of these courts was extended within the limits of the Territory, without distinction as to the citizenship of the parties, "so far as may be necessary to carry out the provisions of this act," and that might embrace all controversies arising between the inhabitants or the nations and tribes and the railway company, we do not regard the addition of these words as intended to operate as a limitation of the controversies to those growing out of the construction of the road merely, since the section in terms applies to "all controversies."

It is true that apart from jurisdiction over the subject matter, a citizen of a Territory cannot sue a citizen of a State in the courts of the United States, nor an Indian tribe or nation sue a State or its citizens, but the judicial power extends to all cases in law and equity arising under the laws of the United States, and this case falls within that category, and therefore the jurisdiction in question could be conferred, as we hold that it was.

The decision of the Circuit Court was right and its judgment is

Affirmed.

DILLMAN *v.* HASTINGS.

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

No. 201. Argued March 9, 1892. — Decided March 28, 1892.

From March, 1875, to May, 1881, D. sent to H. from time to time various sums of money, to be lent by him for complainant at interest, H. being

instructed and agreeing to reinvest the interest in the same way. The money was at first invested at 10 per cent, but early in 1881 H. informed D. that the rate was reduced to 8 per cent. H. died in 1886. D. filed a bill in equity against his executors for an account and payment of what might be found due. They answered and the cause was referred to a master. The executors produced at the hearing no books of accounts or papers of H. and no statements by him of his investments. In the account stated by the master interest was included up to April 1, 1881, at 10 per cent, and at 8 per cent thereafter with annual rests, and a decree was entered accordingly. *Held,*

(1) That a trust relation between the parties was disclosed, which entitled the complainant to an account;

(2) That it was the duty of H. to keep an account and that in its absence it must be presumed that he reinvested interest moneys, as received, at the rates named in the correspondence;

(3) That after his death his executors should be charged at the legal rate of 6 per cent;

(4) That certain claims set up by the executors for taxes paid were not sustained by the proof.

THE case is stated in the opinion.

Mr. A. S. Worthington for appellant.

No appearance for appellees.

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

This was a bill filed by Jared W. Dillman, November 8, 1886, against the administrators of Joseph Hastings, deceased, in the Circuit Court of the United States for the Northern District of Ohio, which set forth that from and including the month of March, 1875, to and including the month of May, 1881, complainant sent to Hastings from time to time various sums of money to be lent by him for complainant at interest, Hastings being instructed and agreeing to reinvest the interest in the same way. The money was first invested at ten per cent annual interest, but early in 1881 Hastings informed Dillman that the rate of interest was reduced to eight per cent. Hastings died on February 12, 1886.

The administrators answered, alleging ignorance of the

transactions or agreements between Hastings and Dillman except that they admitted that at the time of his death Hastings had of Dillman's money the sum of $1875. They also averred that an agreement to account for interest at ten per cent was illegal and void; and set up the statute of limitations as to that part of the account which accrued prior to December 25, 1879.

Replication was duly filed and depositions taken, and on January 10, 1888, by agreement of parties the cause was referred to the clerk of the court "because of his skill in matters of accounting," as a special master, "to hear and from the testimony determine and report to the court, what, if anything, is due complainant herein from the defendants herein on account of the matters set forth in complainant's bill filed herein and what relief be granted to said complainant; and for the purposes of this reference the said special master is hereby vested with all the power and authority conferred upon masters in chancery by the equity rules of the Supreme Court and by the practice of this court. He is authorized to hear testimony, and he will report his findings of law and fact, together with the evidence taken, and also state an account, based upon such facts, between said parties, at the earliest practicable day."

On April 28, 1888, the master filed his report, finding due to the complainant the sum of $14,394.50, with interest thereon at the rate of six per cent from February 12, 1886. This total was arrived at by charging Hastings with the cash received by him, with interest on each item at ten per cent, with annual rests, to April 1, 1881, and at eight per cent thereafter, making an aggregate of $15,694.50, and deducting therefrom a credit by cash paid on February 2, 1886, of $700, and also the sum of $600 for compensation allowed Hastings, leaving a balance of $14,394.50.

Complainant's counsel filed three exceptions to the master's report, of which the first and second alone were relied on, which were: (1) That the master allowed interest at the rate of only six per cent from the time of the death of Joseph Hastings, whereas he should have allowed eight per cent:

(2) That the master allowed a compensation of $600 for services of Hastings, whereas no compensation should have been awarded. The defendants filed ten exceptions, but they have not appealed, and therefore these need not be considered, except so far as they were sustained by the court.

The case having come on to be heard on the report and the exceptions on both sides, was argued by counsel, and the court disallowed complainant's exceptions, and also defendants' exceptions, except that the court found "that the master erred in the method of computing interest on the amounts in his report set forth; that the taxes set out in the evidence in the case should have been allowed the respondents, and that the respondents should have been allowed the sum of one thousand and eighty dollars for compensation for services in the agency." And the court, except as above specified, confirmed and approved the report, and, after making the allowances indicated, found that there was due complainant from the administrators of the estate the sum of $12,172.59, with interest from June 5, 1888, the first day of the term, and decreed accordingly. The case was thereupon appealed to this court by the complainant.

In the account stated by the master, interest was included up to April 1, 1881, at the rate of ten per cent, and at eight per cent thereafter, with annual rests. This was upon the view that Hastings had invested complainant's remittances at these rates, and received and reinvested the interest in the same way, as shown by the correspondence between the parties. We concur with the master that this is a fair deduction from the evidence, which leaves no reasonable doubt that such was the fact, and if not, that complainant believed it to be so upon the strength of Hastings' assurances to that effect, and left the money in his hands under that conviction.

Not only did the correspondence sustain the master's conclusion, but the administrators did not testify, and produced no books or papers showing the state of accounts between the decedent and the complainant, notwithstanding notice to do so, and although the letters tended to establish that Hastings kept a book containing an account of his investments for

complainant. The trust relation between the parties was fully disclosed and entitled complainant to a complete accounting; and, as the master held, it was clearly Hastings' duty to keep accounts as between him and complainant, and whatever data existed in Hastings' papers, calculated to throw light upon the transactions, should of course have been furnished. In the absence of such data and upon a careful examination of the evidence, we hold that the master was right in the course he pursued.

On the second of April, 1881, complainant wrote Hastings that, according to his account, if he had calculated correctly, the sum in Hastings' hands on April 1 amounted to about $10,500; and this does not appear to have been questioned by Hastings. According to the master's report the sum at that time, interest being included at ten per cent, with annual rests, was $10,495.18, and interest after that was calculated at eight per cent with which rate complainant wrote he should be entirely satisfied, but wished his money returned to him so far as that rate could not be obtained.

Defendants' third exception questioned the allowance of interest upon the ground that an agreement to account to plaintiff at such rates would be illegal and void, and because it was not shown that such interest was received by the deceased. But it was not contended that if the interest were received, defendants were not obliged to account therefor, and we think for the reasons given that this exception should not have been sustained. The Circuit Court does not seem to have delivered any opinion, and there is nothing in the decree giving a sufficient basis to ascertain, with precision, in what respect the court held that the master erred in the method of computing interest. But this is not material, inasmuch as we are of opinion that the master's report was correct in this regard.

After the death of Hastings, which occurred, as already stated, on February 12, 1886, his administrators should not be held to respond at a greater rate of interest than six per cent, which was the legal rate in Ohio, in the absence of special agreement, it not sufficiently appearing that they themselves

received interest at a higher rate, and therefore the complainant's first exception was properly overruled.

The master allowed six hundred dollars compensation, which was raised by the court to one thousand and eighty dollars. A portion of this increase, we presume, was for interest upon the proper compensation from time to time during the period covered by the transactions. At all events, while the proof is not satisfactory that Hastings was to obtain his compensation from complainant rather than from the borrowers, we are not inclined to modify the decision of the court upon this point, and this disposes of the second exception.

It was found by the court that the taxes set out in the evidence as paid by Hastings should have been allowed the defendants. As we understand the record, these taxes amounted with the interest thereon, calculated at ten per cent and eight per cent up to February 12, 1886, to $770.45, and we agree with the master that it does not appear for whom these taxes were paid. It was provided by the statute of Ohio that "every person required to list property on behalf of others . . . shall list it separately from his own, specifying in each case the name of the person, company or corporation to whom it belongs." Rev. Stats. Ohio, 1890, § 2735. No such listing of Dillman's money is shown.

The evidence established the payment of certain taxes by Hastings, but not that they were paid on account of Dillman or of anybody other than himself. It appeared that Hastings had money of his own, and that he received money from other persons than Dillman, which he loaned for them, taking the securities in his own name. If Dillman could have been taxed in respect of his moneys in Ohio, it is enough that the record does not show that these taxes were levied as against such moneys, and paid on his account. And here again the absence of evidence on defendants' behalf should be borne in mind, for, we repeat, it was Hastings' duty to have kept accounts, and the case made justifies the inference that there were such. The bill avers that when complainant presented his claim against the estate he credited these taxes, with interest, upon the faith of a memorandum furnished by defendants,

but, finding that the credit was unfounded, he insisted that he should not be charged therewith. In our judgment the court ought not to have allowed the taxes under the circumstances.

We notice that interest should have been allowed at the rate of eight per cent on the $700 paid by Hastings to Dillman, February 2, 1886, from that date to February 12, being $1.55, as shown by the account annexed to the bill.

The amount found due by the master was $15,694.50, from which he deducted $700 in cash, paid February 2, 1886, and $600 for compensation. We think from the $15,694.50 there should be deducted $701.55, and also $1080 as compensation, as found by the court. This leaves a balance of $13,912.95, and to that extent the decree is modified.

The result is that the decree will be reversed with costs, and the cause remanded with a direction to enter a decree for $13,912.95, with interest at six per cent from February 12, 1886, to the date of the decree.

Decree reversed.

BEDON *v.* DAVIE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

No. 210. Argued March 16, 1892. — Decided March 28, 1892.

A judgment for the plaintiffs was rendered in August, 1873, in a United States Court in South Carolina, in an action at law in ejectment, in which a minor was defendant, and appeared and answered by a guardian *ad litem*, and which minor became of age in December, 1885, and brought a writ of error from this court, under § 1008 of the Revised Statutes, within two years after the entry of the judgment, exclusive of the term of the disability of the minor. The case involved the title to land in South Carolina under a will made in 1819, the testator dying in 1820. In June, 1850, a suit in equity was brought in a state court of South Carolina, which set up that the title to the land, under the will, was either in the grandmother of the minor or in her sons, one of whom was the father of the minor, the grandmother and the father of the minor being parties defendant to the suit, and the bill having been taken *pro confesso*

against all the defendants, and dismissed by a decree made in March, 1851, which remained unreversed, an appeal taken therefrom having been abandoned. The only title set up by the plaintiff in error was alleged to be derived through his father and his grandmother. In September, 1854, an action of trespass to try title to the land was brought in a state court of South Carolina, and which resulted in a judgment for the plaintiff therein, but to which the plaintiffs in the ejectment suit were not parties or privies. *Held*, that, as the decree in the equity suit was prior to the judgment in the trespass suit, and as the plaintiffs in the ejectment suit were not parties to the trespass suit, the judgment in the last named suit was of no force or effect in favor of the plaintiff in error, as against the decree in the equity suit.

THE case is stated in the opinion.

Mr. S. P. Hamilton and *Mr. Mills Dean* for plaintiff in error.

Mr. Edward McCrady, Jr., for W. R. Davie, defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, in ejectment, brought in the District Court of the United States for the Western District of South Carolina, in June, 1873, by Doctor William Richardson Davie and others against James B. Heyward, the younger, and others, to recover a plantation situated in Chester district, in South Carolina, on the Catawba River, and known as Landsford.

Both the plaintiffs and the defendants respectively claimed the property under the will of General William Richardson Davie, the elder, made in September, 1819. The testator died in November, 1820. His will was duly executed to pass real estate, and was duly admitted to probate in the proper court. The plaintiffs were great-grandchildren of the testator, and were four in number. They were the children, and only heirs at law, of William Richardson Davie, doctor of medicine, who was the eldest male issue of Allen Jones Davie, who was a son of the testator.

The defendants were James B. Heyward, the younger, and

Sarah B., his wife; Mary Wysong and her husband, Dr. R. Wysong; Alice Bedon and Josiah Bedon, minor children of the late Josiah Bedon and Mary, his wife, now the said Mary Wysong; Hyder D. Bedon; William Z. Bedon; Julia Izard and her husband, Allen C. Izard; Jeannie B. Farrow and her husband, T. Stobo Farrow; A. Stobo Bedon; Richard Bedon; and Robin Carr Bedon, a minor.

Sarah B. Heyward, the wife of James B. Heyward, the younger, was called Sarah Bedon before she was married, and was the daughter of Julia A. Davie and her husband, Richard S. Bedon, the said Julia A. being the only daughter of Hyder Alli Davie, who was a son of the testator.

Mary Wysong, the wife of Dr. R. Wysong, was the widow of Josiah Bedon, who was a son of Richard S. Bedon and his wife, the said Julia A. Davie. Alice Bedon and Josiah Bedon were the children of the said Josiah Bedon and Mary, his wife. Hyder D. Bedon, William Z. Bedon, Julia Izard, Jeannie B. Farrow, A. Stobo Bedon, Richard Bedon and Robin Carr Bedon were children of the said Richard S. Bedon and Julia A., his wife. The defendant Josiah Bedon was a minor when this suit was brought, and during the entire time of its pendency, to a final judgment.

The clause of the will of the testator under which the title was claimed by both parties is set forth in the margin.[1]

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[1] Item I give and devise all the rest and residue of my lands and real estate in the State of South Carolina to my son Frederick William Davie to him and his heirs forever, subject however to the incumbrances mentioned in this will. And it is my will and I do hereby devise that in case of the death of my said son Frederick William, without issue male living at the time of his death, then in that case I give and devise the lands and real estate, so devised as above to the said Frederick William to his brother Hyder Alli Davie to him and to his heirs forever, subject however to the incumbrances in this will mentioned. And in case the said Hyder Alli Davie die without issue male living at the time of his death, then in that case I give and devise the said lands and real estate to the eldest issue male of my son Allen Jones Davie then living when such event shall take place; that is of the sons he may have living at my death, to him and his heirs forever, subject to the incumbrances, directed in this will. And should my said son Frederick William have issue male, and such issue male of my said son Frederick William should, or shall die without issue male living at

Frederick William Davie, named in the will, died in April, 1850, leaving no issue surviving him. He left a last will and testament, duly executed, appointing as his executors Frederick G. Fraser and William Davie DeSaussure.

Hyder Alli Davie, named in the will, died in June, 1848, before the death of Frederick William Davie. He left no male children, but only a daughter, the said Julia A., who, after the death of General William Richardson Davie, married the said Richard S. Bedon.

Allen Jones Davie, named in the will, was the eldest son and the eldest child of the testator, and when the testator died had three sons and a daughter, the eldest of which sons was Dr. William Richardson Davie, father of the four plaintiffs.

Frederick William Davie, under the will, entered into possession of the plantation and held the same during his lifetime. At his death, Dr. William Richardson Davie entered into the possession of it, and held it until he died, in January, 1854, intestate. In January, 1873, the defendant Heyward and his wife entered into possession of the plantation.

In July, 1873, on the petition of the defendant James B. Heyward for the appointment of a guardian *ad litem* for the infant defendants Alice Bedon and Josiah Bedon, as minor children of the late Josiah Bedon and Mary, his wife, then Mary Wysong, the said infants residing in the State of Mary-

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the time of his death, then in that case it is my will and I do devise the lands and real estate, so devised and described above first to my son Hyder Alli Davie and his heirs, and then to the eldest issue male living at the time, of Allen Jones Davie, under the same limitations, and on the same contingencies, and in the same order and manner, as above directed, and devised, should my son Frederick William die without any issue male living at the time of his death, to them and their heirs forever. And should my son Hyder Alli Davie have issue male living at the time of his death and such issue male shall die without leaving issue male living at his death then in that case I give and devise the said lands and real estate so described and devised above should they so have vested under the above contingencies in such issue male to the eldest issue male then living of my son Allen Jones Davie being of his sons living at my death to him his heirs and assigns forever.

land, an order was made by the Circuit Court appointing said Heyward their guardian *ad litem* in this cause, and authorizing and directing him to appear and defend the action on their behalf. On August 1, 1873, Heyward, as their guardian *ad litem*, filed an answer for them, stating that, by reason of their tender years, they were wholly ignorant of the facts and statements set forth in the complaint, and, therefore, not able to admit or deny the same, but that they submitted their case to the discretion of the court and prayed its judgment for their costs and disbursements.

The defendants Heyward and wife, Dr. and Mrs. Wysong, Hyder D. Bedon, William Z. Bedon, Julia Izard and her husband, Jeannie B. Farrow and her husband, A. Stobo Bedon, and Richard Bedon, answered the complaint, in July, 1873, setting up, as a special defence, that Dr. William Richardson Davie, in his lifetime, while in possession of the plantation, executed to Frederick G. Fraser, as executor of Frederick William Davie, deceased, a lease of the plantation; that afterwards, Dr. William Richardson Davie and said Fraser both of them died, and William Davie DeSaussure became the sole executor of Frederick William Davie; that, as such executor, the said DeSaussure, being in possession of the plantation under said lease, was impleaded in the court of common pleas for Chester district, to answer to Lewis A. Beckham and William F. DeSaussure, survivors of themselves and Frederick William Davie, trustees under the will of Hyder Alli Davie, in an action of trespass for breaking and entering the premises in question; that said defendant pleaded not guilty, and the cause was tried before a jury at the fall term, 1855, and the jury found a verdict for the plaintiffs; that the defendant appealed, and the case was heard upon exceptions, in the Constitutional Court of Errors, the highest court of the State of South Carolina, at May term, 1856; that the appeal and motion of the defendant for a new trial were dismissed, and a judgment was entered in favor of the plaintiffs in that action, September 29, 1856, reciting a special verdict in the court of common pleas, which found certain facts set forth therein, and concluded by stating that if, upon those facts, the court should

be of opinion that the plaintiffs were entitled to the land, then the jury found for the plaintiffs, with $5 damages, but if upon those facts the court should be of opinion that the plaintiffs had no title to the land, then the jury found for the defendants; and that the judgment of the court thereupon was, that the plaintiffs were entitled to the land in question, and that they recover them against the defendants, with $5 damages and costs. The answer set up that by said judgment of the court of common pleas, and by the adjudication of the questions in litigation therein between the parties, by the Constitutional Court of Errors of the State, the rights of the plaintiffs in the present suit were fully and finally determined and adjudged, and they were barred thereby of all right of recovery against the defendants.

The plaintiffs filed a reply to that answer of Heyward and others, denying that the rights of the plaintiffs were determined and adjudged or in any way affected by the judgment in the case of *Beckham* v. *DeSaussure*, and alleging that the proceedings and judgment were not had between the same parties as the parties to the present cause, and did not involve the same subject matter; that the plaintiffs herein were not privies in blood or estate to any party or parties in that cause; and that the plaintiffs were not bound by the judgment therein. The reply also denied that the defendant in the case of *Beckham* v. *DeSaussure* was in possession of the premises in question, at the time of the commencement of that suit, or at any other time. It alleged that, before the institution of proceedings in that cause, to wit, on June 28, 1850, a bill in equity was filed by said Fraser, as executor of Frederick William Davie, wherein Dr. William Richardson Davie, (the father of the plaintiffs,) Richard S. Bedon and Julia A. Bedon, his wife, (the father and mother of the defendants Hyder D. Bedon, William Z. Bedon, Julia Izard, Jeannie B. Farrow, Sarah B. Heyward, Richard Bedon and Robin C. Bedon,) Josiah Bedon, (the father of the infant defendants Alice Bedon and Josiah Bedon,) Hyder D. Bedon and William Z. Bedon, defendants in this suit, and the said Beckham and William F. DeSaussure, surviving trustees under the will of Hyder Alli

Davie, (and plaintiffs in the suit mentioned in the answer of Heyward and others,) were impleaded as defendants, the subject matter of which action was the title of Dr. William Richardson Davie (the plaintiffs' father) to the said premises, under the will of General William Richardson Davie; that, the said cause having been heard, a decree of the court was duly entered, at Columbia, for the District of Richland, on March 19, 1851, whereby the title in fee of the said father of the plaintiffs in the land was confirmed and he was declared to be in rightful possession thereof; that that decree stands as the judgment of the court, unreversed and of force; and that the respective defendants in this cause, as parties, or privies to parties, in the cause of *Frederick G. Fraser, Executor* v. *Dr. William Richardson Davie* and the other defendants therein, were bound, concluded and determined by the decree therein, confirming the title of the said father of the plaintiffs in this cause to the premises in question.

The present case was tried before a jury. It found, on August 8, 1873, a special verdict, which is set forth in full in the margin.[1] Upon that special verdict, the District Court

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[1] Special Verdict.

We find:

First. That the plantation at Landsford, the subject of this suit, was the property of General William Richardson Davie at his death, which occurred on the fifth day of November, 1820, and that General Davie devised the plantation under the residuary clause in his will, dated the 17th September, 1819.

Second. That the family of the testator at the time of his death consisted of the following persons:

1. Allen Jones, (son,) born 16th February, 1785, (who resided out of the State of South Carolina,) married, and who then had issue, three sons and one daughter, the eldest of whom was William Richardson, the father of the plaintiffs in this case, which son, Allen Jones, by a second marriage had issue, five daughters and another son.

2. Hyder Alli, (son,) born 29th October, 1786, (who resided near, but not with the testator,) married, and who then had issue, one daughter, Julia A., then a minor unmarried, but who afterwards married Richard S. Bedon and was mother of the defendants, as hereinafter mentioned.

3. Mary Haynes, (daughter,) born 25th June, 1790, then unmarried, residing with the testator; afterwards the wife of John Crockett, with issue, two sons and two daughters.

entered a judgment, on the 16th of August, 1873. That judgment recited service of process on the various defendants,

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4. Sarah Jones, (daughter,) born 12th March, 1793, then the wife of William F. DeSaussure, with issue then born, two daughters, and a son who was born — December, 1819, and was called after the testator, William Davie DeSaussure, and which daughter afterwards had issue, another daughter and two sons.

5. Martha Rebecca, (daughter,) born 13th October, 1796, then unmarried, residing with the testator; afterwards the wife of Churchill B. Jones, with issue, a son and daughter.

6. Frederick William, (son,) born 11th April, 1800, then residing with the testator, an infant and unmarried.

Third. That upon the death of General Davie, Frederick William entered into and took possession of the said plantation under the devise in his father's will, and held the same until his death, which took place on the 29th April, 1850, he having had but one child, a son, who died in infancy before his father's death, to wit, in 1832.

Fourth. That Hyder Alli died before Frederick William, to wit, 13th June, 1848, having had issue but one child, a daughter, before mentioned, to wit, Julia A., who after General Davie's death had intermarried with Richard S. Bedon, by whom she had issue as follows: 1, Josiah Bedon, now deceased, leaving a widow, Mary, now the wife of Doctor R. Wysong, and two children, Josiah and Alice Bedon, minors; 2, Hyder Davie Bedon; 3, William Z. Bedon; 4, Julia, wife of Allen C. Izard; 5, Jeannie B., wife of T. Stobo Farrow; 6, Sarah B., wife of James B. Heyward, the younger, (the said James B. Heyward and Sarah B., his wife, being now the true tenants of the lands in question;) 7, A. Stobo Bedon; 8, Richard Bedon; and 9, Robin Carr Bedon; the last of whom is still a minor, and all of whom now living are defendants in this cause, and of whom Josiah, Hyder D. and William Z. were living at the death of their grandfather, Hyder Alli, and A. Stobo born after his death and before the death of Frederick William Davie.

Fifth. That Hyder Alli, by his last will and testament, a copy of which is made part of this verdict, devised and bequeathed his whole estate, real and personal, to Frederick William Davie, Lewis A. Beckham and William F. DeSaussure, in trust for his daughter, Mrs. Bedon, and her children.

Sixth. That Frederick William, during his last illness, sent for Dr. William R. Davie, then a resident of Alabama, to come to him at Landsford to arrange with him for the continued occupation of the lands by the widow of Frederick William after his death; that Dr. William R. Davie did accordingly make a journey to South Carolina, but did not reach Landsford until after his uncle's death; that upon the arrival of the said Dr. William R. Davie from Alabama, after the death of the said Frederick William, he entered upon and took possession of the said lands and, in compliance with his uncle's wishes, leased the same to Frederick G. Fraser, the brother of

and among others on the infant defendants, Alice Bedon and Josiah Bedon, minor children of the late Josiah Bedon and

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the widow and the qualified executor of Frederick William, for a term of ten years, at an annual rent of twenty thousand pounds of ginned cotton; that Frederick G. Fraser, as executor, having thus, in compliance with the wish of Frederick William Davie, secured a lease of the place for a number of years, placed Churchill B. Jones, son of Martha Rebecca Jones and nephew of the said Frederick William, in charge of the place, and the widow, with the said Churchill B. Jones, continued to reside upon the said lands, and, with the said Churchill B. Jones, worked the said plantation in the interest of the estate of Frederick William until dispossessed under the proceedings in the case of Beckham and DeSaussure against DeSaussure.

That on the 28th of June, 1850, Frederick G. Fraser, brother of the said widow and the said executor of Frederick William Davie, filed a bill in equity in Richland district, praying to be relieved from the said lease on the ground of mistake, as he had since been advised that the title to the said lands was not in the said William R. Davie, but either in the heir general of Hyder Alli or in the grandsons of Hyder Alli, the sons of Mrs. Julia A. Bedon; that to this suit William R. Davie, Richard S. Bedon and Mrs. Julia A. Bedon and their sons, Josiah Bedon, Hyder D. Bedon, and William Z. Bedon, and Lewis A. Beckham and William F. DeSaussure, trustees under the will of Hyder A. Davie, were made parties and the bill taken *pro confesso* against all the defendants.

That the cause came on to be heard before Chancellor Johnston, who, on the 19th March, 1851, by decree dismissed the said bill; that notice of appeal from this decree was given, but the appeal was not prosecuted and finally abandoned, and the decree remains unreversed; copies of which lease, bill and decree are made part of this verdict.

That William R. Davie, then residing in Alabama, remained in possession of the lands by his tenants under the lease until his death, which took place on the 4th January, 1854.

Seventh. That some time after the death of Dr. William R. Davie, to wit, on the 9th September, 1854, an action of trespass to try title was brought by Lewis A. Beckham and William F. DeSaussure, as survivors of Frederick William Davie, Lewis A. Beckham and William F. DeSaussure, trustees under the will of Hyder Alli Davie, against William D. DeSaussure, in the court of common pleas for Chester district, and upon a special verdict found it was adjudged that the said plaintiffs, Lewis A. Beckham and William F. DeSaussure had right and were entitled to the said lands, and that the said plaintiffs should recover against the said defendant, William F. DeSaussure, the said lands; which judgment was, upon appeal, confirmed by the court of errors for the State of South Carolina, a copy of the record in which case is made part of this verdict; that under this judgment the said Lewis A. Beckham and William F. DeSaussure obtained possession of the said lands in the year 1856.

Mary, his wife, then Mary Wysong, by publication and mailing through the post-office, and the appearance of said Alice

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Eighth. That Frederick G. Fraser, executor of Frederick William Davie, departed this life on or about the 1st February, 1852, and that thereupon William D. DeSaussure, who had been named as executor in the will of Frederick William Davie, qualified thereon.

Ninth. That some time after the decision of the court of errors of the State of South Carolina of the case of Beckham and DeSaussure against DeSaussure, and final judgment entered thereon in the court of common plea for Chester district, proceedings were had in the court of equity for Chester district, by and among the children of Mrs. Julia Bedon, for a partition of the Landsford plantation among said children; that under said proceedings the said Landsford plantation was sold by the commissioner in equity for Chester district, and that Churchill B. Jones became the purchaser, paying a portion of the purchase money in cash and giving his bond, with a mortgage of the premises, for the balance; that thereafter Churchill B. Jones conveyed a considerable portion of said Landsford plantation to Cadwalader Rives and W. D. Fudge and remained in possession of the remainder himself; that thereafter the commissioner in equity for Chester district filed his bill in the court of equity for Chester district against said Churchill B. Jones, C. Rives and W. D. Fudge for a foreclosure of the mortgage given to said commissioner in equity to secure the purchase money; that under said proceedings a decree of foreclosure was had, a sale ordered, and the premises sold by said commissioner in equity, and that at said sale T. Stobo Farrow, as the agent of the children of Mrs. Julia Bedon, became the purchaser, and that under said title the defendants now hold, and that the defendant James B. Heyward, the younger, is now in possession under a lease from T. Stobo Farrow, as said agent of said heirs.

Tenth. That the said plaintiffs, William R. Davie, Mary Fraser, wife of Stephen McPherson Woolf, John McKenzie Davie and Allen Jones Davie, are the only surviving heirs at law of the said Dr. William R. Davie, who died intestate, and that the said plaintiffs are citizens of the State of Texas, and are of the ages following, to wit: William R. Davie, born 15th June, 1843; Mary Fraser Woolf, born 5th September, 1845; John McKenzie Davie, born 24th October, 1847; and Allen Jones Davie, born 31st July, 1850.

If upon the facts thus found the court shall be of opinion that the plaintiffs are entitled to the land, then we find for the plaintiffs the land described in the plat made by Charles Boyd, dated 17th May, 1813, as mentioned in the plaintiffs' complaint, and which lands are designated and contained within the lines indicated in the said plat by the numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, and the islands opposite, and five dollars damages; but if upon the facts found the court shall be of opinion that the plaintiffs have no title, then we find for the defendants.

Bedon and Josiah Bedon, by James B. Heyward, their guardian *ad litem*, appointed by order of the court on July 28, 1873, and the service of their answer, and the service of the other answer and of the reply. The judgment also set forth at length the special verdict, and stated that the questions of law reserved for argument had been argued, and that it was adjudged that the plaintiffs recover of the defendants (including Alice Bedon and Josiah Bedon, minor children of Josiah Bedon and Mary, his wife, then Mary Wysong) the possession of the real property mentioned in the complaint, and the sum of five dollars for the withholding thereof, and the costs of the action.

The infant defendant Josiah Bedon, having become of age on December 21, 1885, sued out a writ of error from this court, on December 9, 1887, to review the said judgment. The writ was allowed by Judge Simonton, under § 1008 of the Revised Statutes, having been brought within two years after the judgment was entered, exclusive of the term of the disability of Josiah Bedon as an infant. 33 Fed. Rep. 93.

We are of opinion that the judgment must be affirmed, on the ground that the question raised by the plaintiff in error was adjudicated conclusively, so far as he is concerned, by the decree in the suit in equity of *Fraser* v. *Davie*. To that suit Josiah Bedon, the father of the plaintiff in error, and Mrs. Julia A. Bedon, the grandmother of the plaintiff in error, and her husband, Richard S. Bedon, were made defendants. The only title set up by the plaintiff in error is one alleged to be derived through his father and his grandmother. The decree in the suit of *Fraser* v. *Davie*, is found by the special verdict in this case to have been entered March 19, 1851, and to have been a decree dismissing the bill. The bill was taken *pro confesso* against all the defendants. Notice of an appeal from that decree was given, but the appeal was not prosecuted and was finally abandoned, and the decree remains unreversed.

The reply in this suit states that a decree in the case of *Fraser* v. *Davie* was duly entered on March 19, 1851, whereby the title in fee of Dr. William Richardson Davie, the father of the plaintiffs herein, in the premises in question, was con-

firmed, and he was declared to be in rightful possession of said premises. The special verdict finds that the bill in the suit of *Fraser* v. *Davie* claimed that the title to the land was not in Dr. William Richardson Davie, but was either in the heir general of Hyder Alli Davie, (namely, Mrs. Julia A. Bedon,) or in the grandsons of Hyder Alli Davie, the sons of Mrs. Julia A. Bedon, and that the said bill was taken *pro confesso* against all the defendants, including Dr. William Richardson Davie, Richard S. Bedon and his wife, Julia A. Bedon, and their sons, Josiah Bedon, Hyder D. Bedon, and William Z. Bedon, and Lewis A. Beckham, and William F. DeSaussure, trustees under the will of Hyder Alli Davie.

It is claimed by the plaintiff in error, that the court below erred in not finding that the plaintiffs in this suit were concluded by the case of *Beckham* v. *DeSaussure;* and in not finding that Hyder Alli Davie took an estate in fee in the plantation; and in finding that Josiah Bedon, Hyder D. Bedon and William Z. Bedon were not issue male of Hyder Alli Davie living at his death, through their mother, Julia A. Bedon; and in not finding that Josiah Bedon, senior, the father of the plaintiff in error, died leaving issue male in the person of the plaintiff in error, and that the title to the plantation became vested in the father absolutely, in fee, on the birth of the plaintiff in error; and in finding that, as to the plaintiff in error, the decree in *Fraser* v. *Davie* determined the right of the possession of the plantation, and was *res adjudicata.*

The bill of complaint in *Fraser* v. *Davie* alleged that, by the will of the testator, the plantation, on the death of Frederick William Davie without male issue, passed to the heirs of Hyder Alli Davie, he having left, as male issue, the sons of his daughter, Julia A. Bedon, who were alive at the time of his death. The prayer of that bill was for the rescission of the lease from Dr. William Richardson Davie to Fraser, on the grounds set forth in the bill.

It is objected by the plaintiff in error, that the bill in *Fraser* v. *Davie* was filed in Richland district while the plantation was in Chester district. We perceive no force in that objection.

Syllabus.

The case of *Fraser* v. *Davie* is reported in 9 Rich. Law, 568, note, and that of *Beckham* v. *DeSaussure*, in 9 Rich. Law, 531.

The decree of March 19, 1851, in the suit of *Fraser* v. *Davie*, was prior to the judgment of September 29, 1856, in the suit of Beckham and DeSaussure, as trustees against DeSaussure, executor of Frederick William Davie, and as the plaintiffs in the present suit, the heirs at law of Dr. William Richardson Davie, were not parties to the suit of Beckham against DeSaussure, the judgment in that suit was of no force or effect in favor of the plaintiff in error, as against the decree in the suit of *Fraser* v. *Davie*.

The plaintiff in error, therefore, has no case, and the judgment is

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

UNITED STATES *v.* BUDD.

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

No. 1391. Argued February 1, 1892. — Decided March 28, 1892.

When, in a court of equity, it is proposed to set aside, annul or correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and not a bare preponderance of evidence; and this rule, well established in private litigations, has additional force when the object of the suit is to annul a patent issued by the United States.

The Maxwell Land Grant Case, 121 U. S. 325, is affirmed, and is quoted from and applied.

When the defendant in a suit in equity appears and answers under oath, denying specifically the frauds charged, no presumptions arise against him if he fails to offer himself as a witness as to the alleged frauds, inasmuch as the plaintiff can call him and cross-examine him.

Statement of the Case.

"Public lands . . . valuable chiefly for timber, but unfit for cultivation," within the meaning of the timber and stone act of June 3, 1878, 20 Stat. 89, c. 151, include lands covered with timber but which may be made fit for cultivation by removing the timber and working the lands.

B. entered a quarter section of timber land in Washington under the act of June 3, 1878, 20 Stat. 89, c. 151, and after receiving a patent for it transferred it to M. M. purchased quite a number of lots of timber lands in that vicinity, the title to 21 of which was obtained from the government within a year by various parties, but with the same two witnesses in each case, the deeds to M. reciting only a nominal consideration. These purchases were made shortly after, or in some cases immediately before the payment to the government. B. and M. were both residents in Portland, Oregon. One of the two witnesses to the application was examining the lands in that vicinity and reporting to M. *Held,*

(1) That all that the act of June 3, 1878, denounces is a prior agreement by which the patentee acts for another in the purchase;

(2) That M. might rightfully go or send into that vicinity, and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and that a person knowing of that offer might rightfully go to the land office and purchase a timber lot from the government, and transfer it to M. for the stated excess, without violating the act of June 3, 1878.

THE court stated the case as follows.

On July 23, 1882, the defendant, David E. Budd, applied at the United States land office at Vancouver, Washington Territory, for the purchase as timber land of the southeast quarter of section 12, township 9, range 1 west, Willamette meridian. On November 10, 1882, he paid the purchase price, $2.50 per acre, and received the receiver's certificate, and on the 5th day of May, 1883, a patent was duly issued to him. On December 4, 1882, he conveyed the land to the other defendant, James B. Montgomery. His entry and purchase were made under the "timber and stone" act of June 3, 1878, 20 Stat. 89, c. 151. Section 1 of this act provides:

"That surveyed public lands . . . valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law may be sold . . . in quantities not exceeding one hundred and sixty acres to any one . . . at the minimum price of two dollars and

fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands."

Section 2, so far as it is applicable to the case at bar, is as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act, shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; . . . that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

The third section of said act, so far as here applicable, is as follows:

"Sec. 3. That upon the filing of said statement . . . the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises for a like period of time; and after the expiration of said sixty days, if no adverse claim shall

have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, . . . and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

On March 15, 1886, the government filed this bill in the District Court of the Second Judicial District of Washington Territory, making Budd the patentee and Montgomery his grantee parties defendant, the purpose of which was to set aside the patent and the title by it conveyed, on the ground that the land was not timber land within the meaning of the act, and that the title to it was obtained wrongfully and fraudulently, and in defiance of the restrictions of the statute. The defendants appeared and answered under oath denying the charges, proofs were taken, and on final hearing a decree was entered in their favor dismissing the bill, 43 Fed. Rep. 630, from which decree the United States appealed to this court.

Mr. Assistant Attorney General Parker for appellant.

The two principal questions arising in the case are:

First. Is there such a combination or conspiracy shown to have existed to obtain this, or this and other timber lands for the defendant, Montgomery, as authorizes the annulment of the patent issued to defendant Budd?

Second. Is land of the character and description of this quarter section subject to entry and purchase under the "timber and stone act" of 1878?

I. The evidence shows that the lands in controversy, with

other lands were entered under the act of 1878, as part of a project then existing to transfer the title from the United States to Montgomery.

James B. Montgomery and Edward W. Bingham of Multnomah County, Oregon, made, respectively, August 21, 1882, timber entries under the act of 1878 upon portions of said township No. 9, the witnesses in each case being George F. White and George W. Taylor. The acknowledgment of all the deeds mentioned in the schedule as running to defendant Montgomery took place in Multnomah County, Oregon, and in all cases but two the acknowledgments were before E. W. Bingham, or Ed. W. Bingham, as the notarial officer. All of the lands mentioned in the schedule, except the lot deeded to Montgomery by William D. O'Regan, are portions of township No. 9, and said Regan lot is a portion of township No. 10.

The following is a schedule of lands obtained under the act of 1878, in the names of divers individuals specified, and conveyed by deed to defendant Montgomery as shown by the record. All these individuals except Harmans, Mangs and Taylor are stated to be residents of Multnomah County, Oregon.

Name.	Date of statement under act.	Names of witnesses.	Date of payment to U. S.	Date of deed to Montgomery.
	1882.		1882.	1882.
David E. Budd	Aug. 23	George F. White and Robert Rockwell.	Nov. 10	Dec. 4
				1883.
John W. Steffen	"	"	"	Feb. 27
				1882.
Alvin B. Hastings	"	"	"	Nov. 17
Charles C. Carnell	"	"	"	Dec. 11
Charles H. Harmans	Sept. 29	"	Dec. 13	Dec. 15
John Mangs	"	"	"	"
George W. Taylor	"	"	Dec. 14	Dec. 13
	1883.		1883.	1883.
Allen A. Unkless	Jan. 10	"	Mar. 17	May 1
James K. Misner	"	"	"	"
George M. Misner	"	"	"	"

Argument for Appellant.

Name.	Date of statement under act.	Name of witnesses.	Date of payment to U. S.	Date of deed to Montgomery.
Hamilton Knott	Mar. 24	"	June 2	June 27
Zeba M. LaRue	"	"	"	June 14
James L. Jewett	"	"	"	June 27
William A. Freeman	Mar. 22	"	June 15	June 22
Michael H. McManus	"	"	June 16	June 26
Mark Woods	"	"	"	June 23
Alexander Lothian	"	"	"	"
Robert Dooling	Mar. 27	"	"	"
Joseph Hughs	"	"	"	"
William D. O'Regan	Mar. 22	"	June 20	June 27
Joseph J. Meagher	Mar. 28	"	"	"
Martin Conroy	Apr. 16	Nicholas Klein and Alexander Miller.	July 2	June 26

The land in question is west of the Cascade Mountains, and is about a mile and a half from Silver Lake, or Toutle Lake, as the same is called on government maps.

Budd and Montgomery were both residents of Portland, Oregon.

Budd carried on a stock stable there.

In September, 1885, Budd said to the United States special agent of the General Land Office (witness Mundy) that he had taken up the land for his own benefit; that he had not sold it to anybody, but still held it; that he was not sure he had ever seen this tract of land, but he had once gone to the neighborhood for that purpose; said that the land was "in soak."

Witness Mundy claims that defendant Montgomery had caused to be entered of the timber lands around Silver Lake over 10,000 acres.

It will be noted that Budd paid for the land $2.50 per acre, and that his deed to Montgomery shows its conveyance for a nominal sum, while the affidavit of value upon this appeal shows it to be worth $5000, or over $31 per acre. It is respectfully submitted that the obtaining of timber lands thus shown is in contravention of the spirit and the letter of the act of June 3, 1878.

It will be noted that Montgomery, Budd, White, Rockwell and Bingham all fail to take the witness stand, and refrain from making any denial or explanation of the charges and inferences arising against them upon the trial.

Budd did not know that he had ever seen the land, while Montgomery was active in contending for the titles which he was securing.

While the proofs of conspiracy and combination involving the two defendants is not so direct and full as a complainant might desire to establish, it is yet believed that the judicial judgment upon the facts shown may fairly be that the obtaining of the lands by Montgomery, as shown in the record, including the Budd tract, was in contravention of the provisions of the "timber and stone act," and that the patent and deed now assailed should be declared void.

II. The land is not of a description which can be disposed of under this act, because not chiefly valuable for timber or stone, and unfit for cultivation, but is valuable for agricultural purposes, and the defendant Budd, in making his proof in the land office, procured the giving of false testimony as to the character of the land in this respect.

Mr. Jefferson Chandler for appellees.

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

In the brief of counsel for the government it is stated that "the two principal questions arising in the case are: First. Is there such a combination or conspiracy shown to have existed to obtain this, or this and other timber lands for the defendant Montgomery, as authorizes the annulment of the patent issued to defendant Budd? Second. Is land of the character and description of this quarter section subject to entry and purchase under the 'timber and stone act' of 1878?"

The first question is, perhaps, stated too broadly, for the inquiry is necessarily limited to the land in controversy. If its title was fairly acquired, it matters not what wrongs have

been done by either defendant in acquiring other lands; so the question properly to be considered is, was this land wrongfully and fraudulently obtained from the government? We have had many cases of this nature before us, and the rules to guide in its determination have been fully settled. *Kansas City, Lawrence &c. Railroad* v. *Attorney General*, 118 U. S. 682; *Maxwell Land Grant Case*, 121 U. S. 325, 381; *Colorado Coal Co.* v. *United States*, 123 U. S. 307; *United States* v. *Des Moines Navigation &c. Co.*, 142 U. S. 510.

In the second of these cases Mr. Justice Miller thus clearly states the rule:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a

court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This case is even stronger in its aspects than some that have been before us, for if the particular wrong charged upon the defendants be established the money paid is, by the second section of the act, forfeited, and there is not even the possibility suggested in the case of *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, of an equitable claim upon the government for its subsequent repayment. The hardship of such a result, so different from that which is always enforced in suits between individuals, makes it imperative that no decree should pass against the defendants unless the wrong be clearly and fully established.

The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should enure to the benefit of such co-defendant. Upon this question, the fact that stands out prominently is, that there is no direct testimony that Budd made any agreement with Montgomery, or even that they ever met, or either knew of the existence of the other, until after Budd had fully paid for the land. No witness ever knew or heard of any agreement. What, then, is the evidence upon which the government relies? It appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the government, and in two instances a day or so before such payment; that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting

to Montgomery; and that the patentee, Budd, years after his conveyance to Montgomery, stated to a government agent who was making inquiry into the transaction that he still held the land and had not sold it, but that it was "in soak." But surely this amounts to little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the government — point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law. And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase. Nor is this a case in which one particular tract was the special object of desire, and in which therefore it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose. This is evident, among other things, from the testimony of one Tipperry, upon which some reliance is placed

by the government, which was that Montgomery offered him one hundred dollars besides all his expenses if he would take a timber claim in that vicinity (no particular tract being named) and afterwards sell to him. The government relies also on the testimony of Edward J. Searls, that Montgomery promised to give him $125, and all costs and expenses, if he would enter a tract of timber land and convey to him, and that thereafter Montgomery advanced the money for the payment to the government, and subsequently, on receipt of a deed, paid him the $125. If it be conceded that this testimony as to another transaction be competent in this case, and there be put upon the testimony the worst possible construction against Montgomery, to the effect that he made a distinct and positive agreement with Searls for the purchase of a tract which the latter was to enter and obtain from the government, and so a transaction within the exact denunciation of the statute, still that testimony only casts suspicion on the transaction in question here, and suggests the possibility of wrong in it. Because a party has done wrong at one time and in one transaction, it does not necessarily follow that he has done like wrong at other times and in other transactions. Suppose in each of the twenty-one cases specified in the testimony the government had filed a separate bill making the patentee and Montgomery parties defendant, and charging in each, as here, a prior unlawful agreement, and in twenty of them the patentee and Montgomery had each answered, denying under oath any prior agreement, while in the twenty-first they had likewise answered, admitting in full as charged the making of such an unlawful agreement, would the admission in the one case be adjudged, in the face of the denial under oath in the other twenty, clear, full and convincing proof that in those cases likewise there was a prior, unlawful agreement? And yet such admission of both patentee and Montgomery would be stronger and more satisfactory evidence than the separate testimony of the patentee. And this is all the testimony which in any manner points to wrong in this transaction. Surely this does not come up to the rule so well established, as to the necessary proof in a case like this.

But it is suggested that there is a presumption of law that, where it appears that a transaction is wholly within the knowledge of one party to a suit, and he fails to disclose fully the facts concerning such transaction, it was of the character claimed by the adverse party. But that proposition has no application here. The charge is that Budd made a prior agreement with Montgomery. When Budd made his application he filed an affidavit swearing that he had made no agreement with any one. This is one denial under oath of the truth of this charge. In the bill as filed answers under oath were called for, and Budd and Montgomery each filed an answer under oath denying specifically the existence of any such prior agreement; and an answer under oath in an equity case, when called for, is to be taken as evidence. But it is said that neither one of the defendants appeared as a witness, nor did the notary who took the acknowledgment of Budd's deed to Montgomery, nor did White or Rockwell, the two witnesses to the application of Budd for purchase of the land. As no wrong is charged against the three latter, if the government, the complaining party, failed to call them, it is to be presumed that, upon inquiry, it found that they knew nothing which would tend to substantiate its claim. With regard to the two defendants, they having once sworn that there was no agreement, there was nothing farther to disclose. If the government doubted their statements under oath, it could have called either one and cross-examined him to its satisfaction. It is familiar law that where a witness discloses in his testimony that he is adverse in interest and feeling to the party calling him, the latter may change the character of his examination from a direct to a cross-examination, and the opposing party is always adverse in interest. In *Clarke* v. *Saffery*, Ryan & Moody, 126, in which the plaintiff's counsel called the defendant as his own witness and sought to cross-examine him, Chief Justice Best said: "If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the judge to allow a cross-examination; but if a witness called, stands in a situation which of necessity makes him adverse to the party calling him, as in

the case here, the counsel may, as matter of right, cross-examine him." See also *People* v. *Mather*, 4 Wend. 229; *Bank of Northern Liberties* v. *Davis*, 6 W. & S. 285; *Towns* v. *Alford*, 2 Alabama, 378. The government failed in this case to exercise such right of cross-examination, and surely cannot now be permitted to make its failure a basis of impeaching their sworn statements. Indeed, in view of the meagreness of this testimony, it is not to be wondered at that the counsel for the government could conscientiously make no stronger claim than this:

"While the proofs of conspiracy and combination involving the two defendants are not so direct and full as a complainant might desire to establish, it is yet believed that the judicial judgment upon the facts shown may fairly be that the obtaining of the lands by Montgomery, as shown in the record, including the Budd tract, was in contravention of the provisions of the 'timber and stone act,' and that the patent and deed now assailed should be declared void."

With regard to the second question: The description in the act is of lands "valuable chiefly for timber, but unfit for cultivation." It is conceded that these lands were valuable chiefly for timber. It is claimed, however, that they were fit for cultivation, and therefore not within the description of lands purchasable under this act. But obviously at the time of the purchase the land was unfit for cultivation. It was covered with a dense growth of timber; fir trees, many of them two hundred feet in height and five feet in diameter. In respect to the testimony the trial court makes this comment:

"Thirteen witnesses were called who testified that the soil is stony and inferior for farming purposes; that it contains excellent fir and cedar timber, besides hemlock and an undergrowth of various shrubs and brush; that the trees are large, tall and straight, and sound, and will yield from 50,000 to 150,000 feet of the best quality of lumber per acre, and this testimony and estimate are not controverted. The field-notes made by the government survey or at the time of surveying the land, more than twenty-five years ago, describe the land

as being stony and second-rate, and the timber as fir, cedar and hemlock, and the most convincing testimony of all is a series of twelve photographs taken near the centres of each legal subdivision of the tract. These pictures exhibit, with unerring certainty and faithfulness, magnificent trees standing so near together as to force each other to grow straight and tall. They satisfy the court that this tract is valuable and desirable for the timber upon it, and also that no man would be willing to subjugate this piece of forest for the mere sake of cultivating it."

If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be, but what is. Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is "chiefly." Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.

But after all, the question is not so much one of law for the courts after the issue of the patent, as of fact, in the first instance, for the determination of the land officers. The courts

do not revise their determination upon a mere question of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation, is conclusive. There is, in such cases, no general appeal from the land officers to the courts, and especially after the title has passed, and the money been paid. We do not, however, need to rest upon this proposition in this case, for the testimony clearly shows that the tract as a whole was not fit for cultivation, but was valuable chiefly for its timber.

We see no error in the rulings of the trial court, and its decree will be

Affirmed.

Mr. Justice Brown, with whom concurred Mr. Justice Harlan, dissenting.

Mr. Justice Harlan and myself agree with the majority of the court in its construction of the timber and stone act of June, 1878, that it provides for the sale of lands valuable chiefly for timber, but unfit, *at the time of such sale*, for cultivation. From so much of the opinion, however, as holds that the purchase of these lands by the defendant Montgomery was *bona fide*, we are constrained to dissent.

The object of the act in question was to authorize the sale of timbered lands in lots not exceeding 160 acres to any one person, at a minimum price of $2.50 per acre; and, in furtherance of this object, it was provided in section 2, that the applicant must make oath that he has made no other application under the act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself.

Dissenting Opinion: Brown, Harlan, JJ.

The facts in regard to this particular entry are meagre. It appears that Budd and Montgomery were both residents of Portland, Oregon, and that Budd carried on a stock stable there; that he entered the land on August 23, 1882, paid for it on November 10, and conveyed it to defendant Montgomery on December 4, for a nominal consideration of $1. Nearly three years thereafter he stated to a special agent of the land office that he had taken up the land for his own benefit; that he had not sold it to anybody, but still held it, (a statement manifestly untrue;) that he was not sure that he had ever seen the tract, but had once gone into the neighborhood for that purpose; and that the land was in "soak," whatever that may mean. He refused to make an affidavit, but said he would make a statement. The tract for which he paid $2.50 per acre is shown to be worth $5000, or over $31 per acre.

Did the case rest upon this statement alone, it must be conceded that the government had not proven enough to authorize an annulment of the patent subsequently issued. But it is a familiar rule that where a particular act is equivocal in its nature, and may have been done with fraudulent intent, proof of other acts of a similar nature done contemporaneously or about the same time are admissible to show such intent. Cases of fraud are recognized exceptions to the general rule that the commission of one wrongful act has no legal tendency to prove the commission of another. Such other acts always have a bearing upon the questions of fraudulent intent or guilty knowledge where they are in issue. Thus, a single act of passing counterfeit money is very little, if any, evidence that the party knew it was counterfeit, since the innocent passing of such money is an every-day occurrence; but if it be shown that the person accused made other attempts to pass the money at or about the same time, or that he had other counterfeit money in his possession, the proof of scienter is complete. The same rule is frequently invoked in cases of alleged frauds upon the government. It was applied by this court in *Castle* v. *Bullard*, 23 How. 172, to a case where the defendants were charged with having fraudulently sold the goods of the plaintiff; in *Lincoln* v. *Claflin*, 7 Wall. 132, to an

action for fraudulently obtaining property; and in *Butler* v. *Watkins*, 13 Wall. 456, to an action for deceit in endeavoring to prevent a patentee from using his invention. The authorities are fully reviewed in *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, a case where a policy of life insurance was alleged to have been obtained for the purpose of cheating and defrauding the insurance company, and evidence was admitted that policies in other companies had been obtained with like intent.

In this connection the evidence shows that, in addition to Budd, there were twenty-one others, who within the next few months entered and paid for similar tracts of land, and within a few days thereafter conveyed them to the defendant Montgomery for the nominal consideration of $1. In two instances the land was deeded before the payment to the government. Thus of four entries and payments November 10, deeds were in all, except one instance, executed prior to December 15; of three entries in December, deeds were made within two days in two cases, and the day before the payment in the other; of three payments on March 17, for entries previously made, deeds were executed upon May 1; of eleven payments in June deeds were all made before the end of the month; and of one payment made July 2, a deed was executed June 26. In all these cases except one the entries were witnessed by George F. White and George W. Taylor, White being an agent of Montgomery for examining timber lands. All of the lands covered by these twenty-two entries lie in the same township, except one, which lies in an adjoining township. In all the cases but two the acknowledgments were made before the same notarial officer. The deeds thus executed to Montgomery covered over 3000 acres, and, if valued on the basis of the valuation of the Budd land, would amount to about $100,000. Two witnesses swore that, in 1882, Montgomery requested them to take a timber claim, and offered to pay them $100 each for their rights and expenses.

These facts, with certain others stated in the opinion of the court, constituted the case of the government. While, if these facts stood alone, without opportunity for further ex-

planation, it might be open to argument whether they established such a case of want of good faith as to call upon this court to annul the patents, we are clearly of the opinion that they are of such a nature as to call upon the defendants to produce the testimony within their reach to explain the suspicious circumstances attending these entries. As the case stands, the inference seems to us unavoidable, either that Montgomery bargained for these lands beforehand, or that he was most singularly fortunate in being able to purchase them so soon after their entry. Neither Budd nor Montgomery, nor their witnesses White and Rockwell, were put upon the stand, though all, or at least, some of them, must have been cognizant of the entire facts connected with these transactions. "It is certainly a maxim," said Lord Mansfield, "that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted." *Blatch* v. *Archer*, Cowp. 63, 65. It has always been held that the omission of a party to testify as to facts in his knowledge in explanation of, or to contradict, adverse testimony is a proper subject for consideration both at law and in equity. *McDonough* v. *O'Neil*, 113 Mass. 92. The rule was thus stated by Chief Justice Shaw in the celebrated case of *Commonwealth* v. *Webster*, 5 Cush. 295, 316: "Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered — though not alone entitled to much weight; because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is, that the proof, if produced, instead of rebutting, would tend to sustain the charge."

It is said by Mr. Starkie in his work on Evidence, vol. 1,

page 54: "The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence if adduced would operate to his prejudice." The same rule is applicable even in criminal proceedings. 3 Starkie, 1253; see also 2 Pothier on Obligations, 340.

It is said, however, in excuse, that, when Budd made his application, he filed an affidavit that he had made no agreement with any one; and that Budd and Montgomery each filed an answer under oath denying specifically any such prior agreement. This, however, answers but poorly for the testimony which these witnesses could give upon the stand. Our experience with human nature teaches us that men who are guilty of a transaction of this kind will not hesitate to put upon file a formal denial of their bad faith, and we hazard nothing in saying that the first impulse of an innocent man under such circumstances would be to offer himself as a witness in his own behalf and vindicate his own conduct in the transaction. It is true that the government was at liberty to call upon these witnesses, but in so doing it would make them its own, vouch for their veracity and integrity, be bound by their statements, and be denied, except in the discretion of the court, the right of cross-examination, which is the one thing indispensable to bring out the facts as they actually existed. Even if the right of cross-examination be conceded, we do not understand that it changes in any way the obligation of the defendants to produce such explanatory testimony as is within their control. While it is true that from the fact that a person has been guilty of fraud in one transaction, it is not necessarily implied that he has been guilty of it in another, the probability of a fraudulent intent is very greatly increased by the multiplication of transactions of a similar nature.

The evidence in this case tends to show that defendant Montgomery had, by this and other devices, appropriated to himself over ten thousand acres of land in and about this neighborhood. It is unnecessary to say that, however this

may have been done, it is a practical defeat of the intention of Congress. It certainly demands, and in this instance seems to have received, a searching investigation. When we see the most valuable portion of an immense domain, which has been reserved by the beneficence of Congress for the benefit of actual settlers, or of small proprietors, being gradually absorbed by a few speculators, we are forced to inquire whether there is not a limit beyond which even a land patent of the United States begins to lose something of its sanctity.

We think the decree of the court below dismissing the bill should be reversed.

BRENHAM *v.* GERMAN AMERICAN BANK.

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

No. 120. Argued March 17, 1892. — Decided March 28, 1892.

Bonds were issued by the city of Brenham, in Texas, in July, 1879, payable to bearer, to the amount of $15,000, under the assumed authority of an act of Texas, passed in 1873, incorporating the city, and giving its council authority to borrow, for general purposes, not exceeding $15,000 on the credit of the city; *Held*, that the city had no authority to issue negotiable bonds, and that, therefore, even a *bona fide* holder of them could not recover against the city on them or their coupons.

Power in a municipal corporation to borrow money not being nugatory although unaccompanied by the power to issue negotiable bonds therefor, it is easy for the legislature to confer upon the municipality the power to issue such bonds; and, under the well settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case.

The cases on this subject reviewed; and *Rogers* v. *Burlington*, 3 Wall. 654, and *Mitchell* v. *Burlington*, 4 Wall. 270, held to be overruled.

This was an action against a municipal corporation to recover upon coupons cut from negotiable bonds issued by it. Judgment below for plaintiff, to which this writ of error was sued out. The cause was first argued on the 14th of December, 1891. On the 26th of January, 1892, a reargument was

ordered, which was had March 17. The case is stated in the opinion.

Mr. S. R. Fisher, for plaintiff in error, argued at the first hearing, and at the second submitted on his brief.

Mr. A. H. Garland, for defendant in error, argued at both hearings. *Mr. Henry Sayles*, for same, argued at the first hearing, and submitted on his brief at the second.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought November 8, 1886, in the Circuit Court of the United States for the Western District of Texas, by the German-American Bank, a New York corporation, against the city of Brenham, a municipal corporation of the State of Texas, to recover $4175 and interest, on 504 coupons, amounting to $4175, being 280 coupons for $2.50 each, 125 coupons for $5 each, 84 coupons for $25 each, and 15 coupons for $50 each, cut from 50 bonds for $50 each, 25 bonds for $100 each, 14 bonds for $500 each, and 3 bonds for $1000 each, being all the bonds of the issue, $15,000 in amount. The bonds read as follows, except as to number and amount, and had the proper coupons annexed:

"United States of America.

"State of Texas. City of Brenham.

"City of Brenham Bonds.

"No. ——. $100.

"Bonds for General Purposes, $15,000.

"Twenty years after date, for value received, the city of Brenham promises to pay to bearer one hundred dollars, with interest at the rate of ten per cent per annum from date, payable semi-annually, on the first days of September and March of each year, upon presentation of the proper coupon hereto annexed, both principal and interest payable at the office of the treasurer of the city of Brenham. This bond is redeemable by the city of Brenham after the expiration of ten years

from date hereof. This bond is authorized by an ordinance of the city of Brenham, approved June 7, A.D. 1879.

"In witness whereof, the mayor and secretary of
[L. S.] the city of Brenham hereunto set their hands and affix the seal of the city of Brenham, this 31st day of July, A.D. 1879.

"M. P. KERR, *Mayor.*

"C. H. CARLISLE, *City Secretary.*"

The ordinance referred to in the bonds is set forth in the margin.[1]

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[1] An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city, to borrow money for general purposes.

Be it ordained by the city council of the city of Brenham:

SEC. 1. That the mayor be, and is hereby, authorized and empowered to have printed coupon bonds of the city of Brenham to the amount of fifteen thousand dollars.

SEC. 2. Said bonds shall be three (3) of the denomination of one thousand dollars ($1000.00,) fourteen (14) of the denomination of five hundred ($500.00) dollars, twenty-five (25) of the denomination of one hundred ($100.00) dollars, and fifty of the denomination of fifty ($50.00) dollars.

They shall be made payable to bearer twenty years after date, at the office of the treasurer of the city of Brenham, with interest from date until paid, at the rate of ten per cent per annum, payable semi-annually, on the first days of September and March, at the office of the treasurer of the city of Brenham, but the city shall have the right to redeem said bonds at any time after five years from date.

SEC. 3. Said bonds shall be dated and interest begin to run on the first day of ———, A.D. 18—, provided that should any of said bonds be sold at a subsequent date the amount of interest then due shall be endorsed as a credit on the coupons first due.

SEC. 4. Said bonds shall be signed by the mayor and countersigned by the city clerk, and the seal of the city shall be affixed, and they shall be numbered and registered as Series 2, No. —, giving the number of the bond issued, commencing with No. 1.

SEC. 5. Coupons shall be attached to each of said bonds for each semi-annual instalment of interest, which said coupon shall have printed thereto the signature of the mayor and the city clerk, and shall be received for general ad valorem taxes of the city.

SEC. 6. Said bonds shall be negotiated and sold by the mayor and the finance committee of the city as the same may be required for general purposes, but in no case shall they be sold at a greater discount than five per

The original petition of the plaintiff alleged that the bonds and coupons were issued, executed, sold and delivered, and put in circulation under authority of the ordinance referred to.

The defendant, by its original answer, protested against the jurisdiction of the court, and raised the question of the *bona fide* ownership by the plaintiff of the coupons sued on, alleging that they were owned by one Mensing, a citizen of Texas, and that the transfer of them by him to the plaintiff was colorable only, and for the purpose of giving the court jurisdiction. The defendant at the same time demurred to the petition, specifying grounds of demurrer, and put in an answer to the merits, setting forth that the city had a population of less than 10,000 inhabitants, and was incorporated February 4, 1873, with powers limited by its charter and the constitution of the State; that it had no power, on June 7, 1879, to pass ordinances repugnant to the constitution and laws of the State; that, under the constitution of the State of 1876, and prior to the passage of the ordinance of June 7, 1879, cities and towns with a population of 10,000 inhabitants or less had authority to collect an annual tax to defray only the current expenses of local government, and were without power to borrow money, issue negotiable bonds therefor and collect taxes for the payment of the same; that the city council had no power, on June 7, 1879, to pass the ordinance of that date; that no bonds or coupons issued in pursuance thereof constituted any legal liability against the city; that the bonds were issued in violation of the ordinance, in that the ordinance

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cent, and the proceeds thereof shall be placed in the treasury of the city to the credit of the general fund.

SEC. 7. That there be, and is hereby, appropriated out of the general ad valorem tax of the city one-eighth of one per cent, or so much thereof as may be necessary, on the assessed value of the taxable property of the city, as a special interest and sinking fund with which to pay the interest on said bonds and liquidate the same, and said fund shall be kept separate from the other funds of the city and shall be used for no other purpose.

SEC. 8. That this ordinance go into effect and have force from and after its passage.

Approved June 7th, 1879. M. P. KERR, *Mayor.*

Attest: C. H. CARLISLE, *Secretary.*

authorized the issuing of the bonds payable twenty years after the date thereof, and to be redeemable, at the option of the defendant, at any time after five years from their date; that § 4 of article 11 of the constitution provided that no municipal corporation should become a subscriber to the capital stock of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; that $3000 of the $15,000 of the bonds were for the benefit of the fire department of the city, and the remaining $12,000 were in aid of the Gulf, Colorado and Santa Fé Railroad Company, in providing for the purchase of the right of way over the streets of the city and the purchase of depot ground, to secure the construction of said railroad through the city; that $12,000 of the bonds were sold by the city, $5000 to one Mensing, and $7000 to two other persons, and Mensing also became the owner of those $7000 of bonds, and he and the other two purchasers bought the bonds with actual knowledge of the purpose for which they were issued, as well as record notice of such illegal purpose, as disclosed by the public records and minutes of the city council; and that the plaintiff, if it became the owner of the bonds and coupons, purchased the coupons after their maturity and with knowledge of all the facts attending their issue, well knowing that they were issued to raise money to enable the defendant to purchase the said right of way and depot ground for the said railroad company.

Afterwards, the defendant put in an amended answer, amending its former demurrers and answer, but not varying the material allegations of fact contained in its former answer.

The plaintiff then filed a supplemental petition, demurring to the answers and excepting thereto by special allegations, and also alleging matters of fact in response to the answers, and averring that the defendant was authorized to issue the bonds in question, and that, if their proceeds were misappropriated by the city council or the agents of the city, such misappropriation ought not to affect the rights of the plaintiff; that the bonds were sold by the lawfully authorized agents of the city, and it received full value for them; that the parties from whom the plaintiff received the bonds were *bona fide*

purchasers of them before maturity, having paid a valuable consideration therefor; and that the defendant was estopped by the fact that it paid interest on the bonds without objection for three years after they were issued, and in 1884 published a statement of its financial condition, in which it included said $15,000 of bonds as part of its legal liabilities, all of which was made known to the plaintiff before it became the owner of the bonds.

The defendant then filed a supplemental answer, demurring to the supplemental petition and specially excepting to parts of it, and raising an issue of fact as to its allegations.

The plea in abatement, or to the jurisdiction of the court, was tried by a jury, which found for the plaintiff; and afterwards the issues of fact on the pleadings were tried by a jury, which found a verdict for the plaintiff for $5510.10, and the court entered a judgment overruling the general and special demurrers and exceptions of the defendant, and the general demurrer and exceptions of the plaintiff, and the special exceptions and demurrers of the defendant to the plaintiff's supplemental petition; and a judgment for the plaintiff was entered for $5510.10 with interest and costs. To review this judgment the defendant has brought a writ of error.

On the 4th of February, 1873, an act was passed by the legislature of Texas, (Special Laws of Texas of 1873, c. 2, p. 2,) incorporating the city of Brenham. By article 3, § 2, of that act, (p. 14,) it is provided as follows: "Sec. 2. That the city council shall have the power and authority to borrow for general purposes not exceeding ($15,000) fifteen thousand dollars on the credit of said city;" also, by article 7, § 1, (p. 23,) as follows: "Sec. 1. Bonds of the corporation of the city of Brenham shall not be subject to tax under this act."

At the date of the incorporation of the city and of the passage of the ordinance in question, the city had a population of over 4000 and less than 10,000 inhabitants.

On the 28th of March, 1881, one Dwyer instituted the suit in the District Court of Washington County, Texas, against one Hackworth, assessor and collector of taxes of the city of Brenham, to enjoin the collection of certain taxes levied by

the city council of the city and assessed against Dwyer, including as a part thereof one-eighth of one per cent to pay interest and provide a sinking fund on the bonds of the city, the bonds so referred to being the identical bonds which are involved in this suit. That case went to the Supreme Court of Texas, and is reported as *Dwyer* v. *Hackworth*, 57 Texas, 245.

Various points are taken by the defendant as assignments of error; but we consider it necessary to discuss only one of them, the decision of which will dispose of the case.

The court charged the jury, among other things, (35 Fed. Rep. 185,) that the power in the city to borrow money carried with it the authority to issue the bonds, and that the defendant had capacity to issue the bonds in question as commercial paper, and bind itself to pay them and the coupons. The defendant, by its demurrer to the plaintiff's petition, stated as ground of demurrer that it did not appear from the petition that the defendant was authorized by the constitution and laws of Texas to issue the bonds and coupons. The court overruled such demurrer, and by a bill of exceptions it appears that the defendant excepted to such ruling. The defendant demurred also to the plaintiff's supplemental petition, on the ground that that petition failed to show any authority in the defendant to issue the bonds and coupons. This demurrer was overruled, and it appears by a bill of exceptions that the defendant excepted to the ruling. It also appears by a bill of exceptions that the defendant excepted to the charge that the power of the city to borrow money carried with it authority to issue the bonds, and that the city had the capacity to issue the bonds as commercial paper, the ground of the exception being stated to be that, under the constitution of Texas, the expense of carrying out the general governmental purposes of the defendant was to be defrayed by the levying of a tax and not by issuing bonds, and that the bonds issued were not authorized to be clothed with the incidents of commercial paper.

The principal contention on the part of the defendant is that it was without authority to issue the bonds, and that they were void for all purposes and in the hands of all persons,

This point is presented with reference to the charter of 1873, considered apart from the provisions of the constitution of 1876, and also with reference to the effect which the constitution had upon the power claimed under the charter.

Article 11, sections 3 to 7 inclusive, of the constitution of Texas of 1876, provided as follows:

"SEC. 3. No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law.

"SEC. 4. Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent, and shall be collectible only in current money. And all license and occupation tax levied, and all fines, forfeitures, penalties, and other dues accruing to cities and towns, shall be collectible only in current money.

"SEC. 5. Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two and one-half per cent of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent thereon.

"SEC. 6. Counties, cities and towns are authorized, in such mode as may now or may hereafter be provided by law, to levy, assess and collect the taxes necessary to pay the interest and provide a sinking fund to satisfy any indebtedness heretofore legally made and undertaken; but all such taxes shall be assessed and collected separately from that levied, assessed and collected for current expenses of municipal government.

and shall when levied specify in the act of levying the purpose therefor, and such taxes may be paid in the coupons, bonds or other indebtedness for the payment of which such tax may have been levied.

"SEC. 7. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized, upon a vote of two-thirds of the tax-payers therein, (to be ascertained as may be provided by law,) to levy and collect such tax for construction of sea-walls, breakwaters or sanitary purposes, as may be authorized by law, and may create a debt for such works and issue bonds in evidence thereof. But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent as a sinking fund, and the condemnation of the right of way for the erection of such works shall be fully provided for."

There is nothing in the charter of the defendant which gives it any power to issue negotiable, interest-bearing bonds of the character of those involved in the present case. The only authority in the charter that is relied upon is the power given to borrow, for general purposes, not exceeding $15,000 on the credit of the city. The power given to the defendant by § 4 of article 11 of the constitution, the defendant having a population of less than 10,000 inhabitants at the date of its charter and at the date of the ordinance, was only the power to levy, assess and collect an annual tax to defray the current expenses of its local government, not exceeding, for any one year, one-fourth of one per cent.

That in exercising its power to borrow not exceeding $15,000 on its credit, for general purposes, the city could give to the lender, as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper, is quite clear; but that does not cover the right to issue negotiable paper or bonds, unimpeachable in the hands of a *bona fide* holder. In the present case, it appears that Mensing bought from the defendant $5000 of the bonds at 95 cents on the dollar, and that other $7000 of the bonds were sold by

the city for the same price, it thus receiving only $11,400 for $12,000 of the bonds, and suffering a discount on them of $600. The city thus agreed to pay $12,000, and interest thereon, for $11,400 borrowed. This shows the evil working of the issue of bonds for more than the amount of money borrowed.

It appears by the record that depot grounds in, and the right of way through, the city of Brenham were bought for the Gulf, Colorado and Santa Fé Railroad Company with money realized from the sale of bonds issued under the ordinance of June 7, 1879, and that $3000 of such bonds were used by the city for fire department purposes.

The power to borrow the $11,400 would not have been nugatory, unaccompanied by the power to issue negotiable bonds therefor. *Merrill* v. *Monticello*, 138 U. S. 673, 687; *Williams* v. *Davidson*, 43 Texas, 1, 33, 34; *City of Cleburne* v. *Railroad Company*, 66 Texas, 461; 1 Dillon on Municipal Corp. 4th ed. § 89, and notes; § 91, n. 2; § 126, n. 1; §§ 507, 507 *a*.

The confining of the power in the present case to a borrowing of money for general purposes on the credit of the city, limits it to the power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation; and the presumption is that the grant of the power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and not to plunge the municipal corporation into a debt on which interest must be paid at the rate of ten per centum per annum, semi-annually, for at least ten years. It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case.

A review of the cases on this subject in this court will be useful.

In *Rogers* v. *Burlington*, 3 Wall. 654, 666, in 1865, it was held that the statutory power granted to the city of Burling-

ton, Iowa, "to borrow money for any public purpose," gave authority to the city to borrow money to aid a railroad company in building a road for public travel and transportation, and that, as a means of borrowing money to accomplish such object, the city might issue its bonds to be sold by the railroad company to raise the money. Bonds were issued and loaned to the company. They were coupon bonds in the usual form, and were secured by first-mortgage bonds of the company. Suit was brought by a *bona fide* holder for value, to recover against the city on the coupons, and the case came up on a demurrer to the petition. The demurrer was sustained by the Circuit Court and judgment rendered for the city; but this court reversed that judgment. In the opinion of this court, as to the power to issue the negotiable bonds, it was said: "Common experience shows that the issuing of bonds by a municipal corporation as material aid in the construction of a railroad, is merely a customary and convenient mode of borrowing money to accomplish the object; and it cannot make any difference, so far as respects the present question, whether the bonds, as issued by the defendants, were sold in the market by their officers, or were first delivered to the company, and were by their agents sold for the same purpose." Chief Justice Chase and Justices Grier, Miller and Field dissented. Justice Field delivered a dissenting opinion, in which his three associates concurred, and which stated, as to the authority of the city to issue the bonds, that there was no such authority, either in the charter of the city or in any other legislation of the State; that the authority conferred was to borrow money; that no money was borrowed, but the bonds of the city were loaned; and that borrowing money and loaning credit were not convertible terms.

In *Mitchell* v. *Burlington*, 4 Wall. 270, the case of *Rogers* v. *Burlington*, *supra*, was affirmed.

But in *Police Jury* v. *Britton*, 15 Wall. 566, (when Justices Wayne, Nelson and Grier had left the bench, and Justices Strong, Bradley and Hunt had come upon it, Chief Justice Chase and Justices Clifford, Swayne, Miller, Davis and Field

remaining,) it was held that the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. In the opinion of the court, delivered by Mr. Justice Bradley, it is stated that the police jury of the parish of Tensas, Louisiana, which issued the negotiable bonds in question in that case, had no express authority to issue them; that the power could not be implied from the ordinary powers of local administration and police which were conferred upon the boards and trustees of political districts; that it was one thing for county and 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 might be multiplied to an indefinite extent; and that, although the authority for such bodies to issue negotiable paper might be implied in some cases from other and express powers granted, those implications should not be extended beyond the fair inferences to be gathered from the circumstances of each case.

In *Claiborne County* v. *Brooks*, 111 U. S. 400, it was held that the power to issue commercial paper was foreign to the objects of the creation of the political divisions of counties and townships, and was not to be conceded to such organizations unless by virtue of express legislation or by very strong implication from such legislation; and that the power conferred by statutes of Tennessee upon a county, to erect a court-house, jail and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. The opinion in the case was delivered by Mr. Justice Bradley; and the case of *Police Jury* v. *Britton*, 15 Wall. 566, was cited and approved, although the unsuccessful

party cited as authority the case of *Rogers* v. *Burlington*, 3 Wall. 654.

In *Concord* v. *Robinson*, 121 U. S. 165, it was held that a grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, did not authorize the issuing of negotiable bonds in payment of such appropriation. The opinion of this court was delivered by Mr. Justice Harlan, and the case of *Claiborne County* v. *Brooks*, 111 U. S. 400, was cited and approved.

In *Kelley* v. *Milan*, 127 U. S. 139, and *Norton* v. *Dyersburg*, 127 U. S. 160, it was held that the power granted to a municipal corporation to become a stockholder in a railroad company did not carry with it the power to issue negotiable bonds in payment of the subscription, unless the latter power was expressly or by reasonable implication conferred by statute. In the opinion in the case of *Norton* v. *Dyersburg*, the case of *Claiborne County* v. *Brooks*, 111 U. S. 400, was cited with approval.

In *Young* v. *Clarendon Township*, 132 U. S. 340, it was held to be settled law that a municipality has no power to issue its bonds in aid of a railroad, except by legislative permission; and in the opinion of the court, delivered by Mr. Justice Lamar, the cases of *Claiborne County* v. *Brooks* and of *Kelley* v. *Milan* were cited and approved.

In *Hill* v. *Memphis*, 134 U. S. 198, 203, the opinion of the court being delivered by Mr. Justice Field, it was held that the power conferred by a statute on a municipal corporation to subscribe for the stock of a railroad company did not include the power to issue negotiable bonds representing a debt, in order to pay for that subscription; and it was said that that rule was well settled. It was added: "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;" and the cases of *Police Jury* v. *Britton*,

Claiborne County v. *Brooks*, *Kelley* v. *Milan* and *Young* v. *Clarendon Township* were cited with approval.

In *Merrill* v. *Monticello*, 138 U. S. 673, 687, 691, it was held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable securities to be sold in the market and to be taken by the purchaser freed from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor which might circulate in the market as a negotiable security, freed from any equities that might be set up by the maker of it, were essentially different transactions in their nature and legal effect. In the opinion of the court, which was delivered by Mr. Justice Lamar, the cases of *Police Jury* v. *Britton*, *Claiborne County* v. *Brooks*, *Kelley* v. *Milan*, *Young* v. *Clarendon Township* and *Hill* v. *Memphis* were cited with approval. It was added: "It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a *bona fide* holder for value, from equitable defences. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name."

The opinion then stated that the logical result of the doctrines announced in the five cases which it cited clearly showed that the bonds sued on in the case of *Merrill* v. *Mon-*

ticello were invalid, and added: "It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case, all that can be contended for is, that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations."

We, therefore, must regard the cases of *Rogers* v. *Burlington* and *Mitchell* v. *Burlington*, as overruled in the particular referred to, by later cases in this court. See 1 Dillon's Mun. Cor. 4th ed. §§ 507, 507 *a*.

The case of *Dwyer* v. *Hackworth*, 57 Tex. 245, is relied upon by the plaintiff. In that case, Dwyer, a taxpayer, brought suit against Hackworth, assessor and collector of taxes of the city of Brenham, to enjoin the collection of certain taxes assessed against Dwyer, to pay the interest on the bonds involved in the present suit. In the District Court of Washington County, Texas, in which the suit was brought, the defendant had judgment, sustaining the legality of the taxes and dismissing the plaintiff's suit. The case was carried by the plaintiff to the Supreme Court of Texas, and in the opinion of that court it is said that the city of Brenham had authority under its charter to borrow money for general purposes, "and did so borrow, by selling its bonds, to the amount

of $15,000." This expression is urged by the plaintiff as recognizing the lawfulness of the issue of the bonds; but the court, while reversing the judgment below, said that it could not enjoin the collection of the taxes on the ground of the invalidity of the bonds, without making the holders of those bonds parties to the suit, citing *Board* v. *Railway Co.*, 46 Texas, 316. There was, therefore, no adjudication in that case as to the validity of the bonds, and the remark of the court that the city borrowed money by selling its bonds to the amount of $15,000 is of no force on the question of the validity of the bonds. *Lewis* v. *City of Shreveport*, 108 U. S. 282, 287.

It is also to be remarked that the ordinance of June 7, 1879, provided that the city should have the right to redeem the bonds "at any time after five years from date," while each bond on its face states that it is redeemable by the city "after the expiration of ten years from date hereof." The officers of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption.

We see nothing in the provisions of the constitution of Texas of 1876, before cited, to aid the power of the city to issue these negotiable bonds.

We cannot regard the provision in the charter of the city, that bonds of the corporation of the city "shall not be subject to tax under this act," as recognizing the validity of the bonds in question. Whatever that provision may mean, it cannot include bonds unlawfully issued.

As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons. *Marsh* v. *Fulton County*, 10 Wall. 676; *East Oakland* v. *Skinner*, 94 U. S. 255; *Buchanan* v. *Litchfield*, 102 U. S. 278; *Hayes* v. *Holly Springs*, 114 U. S. 120; *Daviess County* v. *Dickinson*, 117 U. S. 657; *Hopper* v. *Covington*, 118 U. S. 148, 151; *Merrill* v. *Monticello*, 138 U. S. 673, 681, 682.

As the action here is directly upon the coupons, and there is no right of recovery upon them, the judgment must be

Dissenting Opinion: Harlan, Brewer, Brown, JJ.

Reversed, and the case remanded to the Circuit Court, with a direction to sustain the defendant's general demurrer and special demurrer and exceptions to the plaintiff's original petition, and to sustain the special exceptions and demurrers of the defendant to the plaintiff's supplemental petition, and to enter judgment thereon in favor of the defendant and dismissing both of said petitions, with a general judgment for the defendant. [See p. 549, *post.*]

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BREWER and MR. JUSTICE BROWN, dissenting.

MR. JUSTICE BREWER, MR. JUSTICE BROWN and myself being unable to concur in the opinion just rendered, the grounds of our dissent will be stated.

The charter of the city of Brenham, granted in 1873, provided that "the city council shall have the power and authority to *borrow*, for general purposes, not exceeding fifteen thousand dollars, on the credit of said city;" also, that the "*bonds* of the corporation of the city of Brenham shall not be subject to tax under this act." Special Laws of Texas, pp. 14 and 23.

Under the authority conferred by this charter the city council in 1879 passed an ordinance, entitled, "An ordinance to provide for the issue and sale of fifteen thousand dollars in coupon bonds of the city, to *borrow* money for general purposes." Bonds, negotiable in form, and to the full amount authorized by the ordinance, were issued by the city in 1879, and the coupons held by the German-American Bank were from the bonds so issued. The court does not hold that the issuing of these bonds was in violation of the constitution of Texas adopted in 1876. But it does hold that, while the city, under its power to borrow, could give to the lender non-negotiable paper as a "voucher" for the repayment of the money borrowed, it could not legally issue negotiable instruments or bonds as evidence of the loan. This view is conceded to be in conflict with *Rogers* v. *Burlington*, 3 Wall. 654, and *Mitchell* v. *Burlington*, 4 Wall. 270. But it is said that later

adjudications of this court have, in effect, overruled those cases. We cannot give our assent to the doctrine announced in the present case. Nor — we submit with some confidence — is that doctrine sustained by any decision of this court which has been cited.

What was the case of *Rogers* v. *Burlington?* Besides the general powers appertaining to municipal corporations, the city of Burlington had *express* power, by its charter, "to borrow money for any public purpose," the matter being first submitted to popular vote. The people having voted, by the requisite majority, in favor of issuing and lending $75,000 in the bonds of the city to a particular railroad company, bonds for that amount, negotiable in form, were issued. The court held the construction of a railroad to be a public purpose, within the meaning of the charter of the city, and that it made no difference whether the bonds were sold in the market by the officers of the municipality, or were first delivered to the company and sold by its agents for the same purpose. "Technically speaking," the court observed, "it may be said that the transaction, as between the company and the defendants, was, in form, a contract of lending; but as between the defendants and the persons who purchased the bonds in the market it was undeniably a contract of borrowing money; and the same remark applies to the transaction in its practical and legal effect upon all subsequent holders of the securities who have since become such for value, and in the usual course of business."

The minority dissented, not upon the ground that an express power in a municipal corporation to borrow money did not give authority to execute negotiable instruments for the money borrowed — although that question was upon the very face of the case — but upon the ground that the transaction was not one of borrowing money. Mr. Justice Field, speaking for the minority, said: "Here the authority conferred is to *borrow money;* yet no money was borrowed, but the bonds of the city were lent. Borrowing money and lending credit are not convertible terms. The two things which they indicate are essentially distinct and different." Mr. Justice Mil-

ler, in a separate dissenting opinion, called attention to the fact that the Supreme Court of Iowa had then recently held the bonds, involved in that suit, to be void, upon the ground that the transaction "was a loan of credit, and not a borrowing of money." The principle announced in *Rogers* v. *Burlington* was applied in *Mitchell* v. *Burlington*, 4 Wall. 270.

The cases, decided since *Rogers* v. *Burlington*, which have been cited, in the opinion of the court, as announcing the doctrine that an express power given to a municipal corporation to borrow money does not authorize the execution of negotiable instruments for the money so borrowed, are: *Police Jury* v. *Britton*, 15 Wall. 566, 570, 572; *Claiborne County* v. *Brooks*, 111 U. S. 400, 406; *Concord* v. *Robinson*, 121 U. S. 165, 167; *Kelley* v. *Milan*, 127 U. S. 139, 150; *Norton* v. *Dyersburg*, 127 U. S. 160, 175; *Young* v. *Clarendon*, 132 U. S. 340; *Hill* v. *Memphis*, 134 U. S. 198, 203; and *Merrill* v. *Monticello*, 138 U. S. 673, 686, 687.

In *Police Jury* v. *Britton*, it appeared that a police jury, in a parish of Louisiana, charged with the supervision and repair of roads, bridges, causeways, dikes, levees and other highways, was prohibited by statute from contracting any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted. And the question arose as to whether it could rightfully issue negotiable bonds to take the place of certain orders previously given by it for work done on levees in the parish. The case involved no question as to the scope and effect of an *express* power in the parish *to borrow* money. Mr. Justice Bradley, speaking for the court, after observing that the police jury had no express authority to issue bonds, and that, if it existed, it must be *implied* from the general powers of local administration with which they were invested, said: "We have, therefore, the question directly presented in this case whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to

issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness?" This question was answered in the negative. But, to prevent any possible misapplication of the principles announced, the court said: "We do not mean to be understood that it requires, in all cases, *express* authority for such bodies *to issue negotiable paper*. The power has frequently been *implied* from other *express* powers granted. Thus, it has been held that the power *to borrow* money *implies* the power to issue the ordinary securities for its repayment, *whether in the form of notes or bonds payable in future*." It thus appears that *Police Jury* v. *Britton* distinctly declares that case not to be within the rule that an express power to borrow money carries with it authority to issue negotiable securities for the amount borrowed.

In *Claiborne County* v. *Brooks*, the question was whether the power in a county to contract for the erection of a courthouse implied authority to issue negotiable bonds of a commercial character in payment for the work. The court, speaking again by Mr. Justice Bradley, held that it did not, and said: "Our opinion is, that mere political bodies, constituted as counties are, for the purpose of local police 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*" — referring to the same clauses in the opinion in *Police Jury* v. *Britton*, above quoted, as embodying a distinct expression of the views of the court.

In *Concord* v. *Robinson*, it was decided that "the grant to a municipal corporation of power *to appropriate moneys* in aid of the construction of a railroad, *accompanied* by a provision directing the levy and collection of taxes to meet *such appropriation, and prescribing no other mode of payment*," did not imply authority to issue negotiable bonds on account of such

appropriation; in *Kelley* v. *Milan*, that "a municipal corporation, in order to exercise the power of becoming *a stockholder in a railroad corporation*, must have such power expressly conferred upon it by a grant from the legislature, and that even the power to subscribe for such stock does not carry with it the power to issue negotiable bonds in payment of the subscription, unless the power to issue such bonds is expressly *or by reasonable implication conferred by statute;*" in *Norton* v. *Dyersburg*, that "the mere authority given to a municipality *to subscribe for stock* in a railroad company did not carry with it the implied power to issue bonds therefor, especially where, as in the present case, special provisions were made for paying the subscription by taxation;" in *Young* v. *Clarendon Township*, authority to make the municipal bonds there involved was conceded, and the case turned upon the question, whether their execution was not subject to the restrictions and directions of the act which authorized them to be issued; and in *Hill* v. *Memphis*, that "the power *to subscribe for stock* does not of *itself* include the power to issue bonds of a town in payment of it," and that "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 approved in repeated decisions of this court."

It thus appears that in no one of the above cases, decided since *Rogers* v. *Burlington*, was there any question as to negotiable securities being issued under an *express* power to *borrow* money; and that some of them concede that such a power carries with it authority to give a negotiable paper for money borrowed.

The case which seems to be much relied upon to support the present judgment is *Merrill* v. *Monticello*. But we submit that it does not sustain the broad doctrine that negotiable securities may not be issued in execution of an *express* power to *borrow money*. What could or could not be done, under such a power, was not a question involved in that case. The question was whether authority in the town of Monticello to issue negotiable bonds could be *implied*, not from an express,

but from an *implied* power to borrow money. After observing that, under the laws of Indiana, the proposition that a town has an *implied* authority to borrow money, or contract a loan, under the conditions, and in the manner expressly prescribed, was not to be controverted, the court, speaking by Mr. Justice Lamar, said: "But this only brings us back to the question, Does the *implied* power *to borrow* money or contract a loan carry with it *a further implication* of power to issue funding negotiable bonds, for that amount, and sell them in open market?" The question in that case, as framed by the court, clearly shows that it was only considering whether an authority in a municipal corporation to issue negotiable securities could be *implied* from a power to borrow which was *itself* to be *implied* from other powers granted. This, also, appears from the following clause in the opinion: "It is admitted that the power to *borrow* money, or to incur indebtedness, *carries with it* the power to issue *the usual evidences of indebtedness*, by the corporation, to the lender or other creditor. Such evidences may be in the form of *promissory notes*, *warrants*, *and perhaps*, *most generally*, *in that of a bond*." And it is further shown by the fact that the opinion, referring to the clause in *Police Jury* v. *Britton*, above quoted, which states that authority in a municipal corporation to issue negotiable securities may be implied from an *express* power to *borrow* money, states that it has no application to the case then before the court, in which the attempt was made to *imply* authority to issue negotiable bonds simply from an *implied* power *to borrow money*.

Another case in this court, not referred to, is very much in point. It is *City of Savannah* v. *Kelly*, 108 U. S. 184, 190. A railroad corporation, whose principal and beginning point was that city, issued its negotiable bonds upon which to raise money to pay debts for construction, and for future improvements. The city, owning some of the capital stock of the corporation, guaranteed the payment of those bonds. The bonds, so guaranteed, were put upon the market and sold. The question was as to the authority of the city to make this guaranty under the power conferred upon it by an act of the legislature,

"to obtain money on loan, on the faith and credit of said city, for the purposes of contributing to works of internal improvements." Mr. Justice Matthews, speaking for the court, said that the fact that the money "was not advanced directly to the city, but, upon its assurance of repayment, to the railroad company, is not a departure even from the letter of the law, much less from its meaning; nor does the fact that the money was advanced partly on the credit of the railroad company diminish the presumed reliance of the purchaser upon that of the city, with which it was joined. It is difficult to conceive of language more comprehensive than that employed, to embrace *every form of security in which the faith and credit of the city might be embodied;* and that in such cases it is not important to the character of the transaction that the money is obtained in the first instance by the railroad company, upon the credit of the city, was directly ruled in *Rogers* v. *Burlington*, 3 Wall. 654, and affirmed in *Town of Venice* v. *Murdock*, 92 U. S. 494." Of course, if the city of Savannah, having the power "to obtain money on loan," could guarantee negotiable bonds, issued by the railroad company for the purpose of raising money to be contributed to works of internal improvement in which the city was interested, the city could have made the loan directly upon its own negotiable bonds.

It is, perhaps, proper to say that our views find support in the admirable commentaries of Judge Dillon on the Law of Municipal Corporations. The court refers to sections 507 and 507 *a* of those Commentaries. But those sections do not, in any degree, support the conclusion reached in this case. The doctrine which the learned author declares, in those sections, to be alike unsound and dangerous, is, "that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and as *incidental* thereto the power to issue commercial securities, that is, paper which cuts off defences when it is in the hands of a holder for value acquired before it is due." But Judge Dillon, while agreeing that the power to issue commercial paper, unimpeachable in the hands of a *bona fide* holder, is not among the ordinary *incidental* powers of a public municipal corporation, and must be con-

ferred expressly, or by fair implication, says, after a careful review of the authorities: "*Express power to borrow money*, perhaps, in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as, for example, subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability." 1 Dillon's Mun. Corp. § 125, 4th ed. It is eminently just to apply that rule in the present case, because the act giving the city of Brenham authority to borrow, not exceeding $15,000, for general purposes, expressly provided that its *bonds* should not be subject to tax under that act. Such a provision could have had reference only to negotiable bonds, which would be put upon the market for the purpose of raising money.

It seems to us that the court, in the present case, announces for the first time that an express power in a municipal corporation, to borrow money, for corporate or general purposes, does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a *bona fide* holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate, corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created — which is the mode usually adopted in such cases — the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebtedness. The aggregate amount of negotiable notes and bonds, executed by municipal corporations, for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country, must be

enormous. A declaration by this court that such notes and bonds are void, because of the absence of *express* legislative authority to execute *negotiable* instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion.

RICE *v.* SANGER.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 1400. Submitted March 21, 1892. — Decided March 28, 1892.

The judgment of the Supreme Court of a State in a case which is remanded by that court to the trial court and retried there, is not a final judgment which can be reviewed by this court.

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

Mr. William A. McKenney and *Mr. J. D. McCleverty* for the motion.

Mr. E. F. Ware opposing.

THE CHIEF JUSTICE: This was an action commenced by one Rice against Sanger *et al.* in the District Court of Bourbon County, Kansas, wherein judgment was rendered February 27, 1888, in favor of plaintiff. The cause was thereupon taken by the defendants to the Supreme Court of that State, the judgment reversed, and the cause remanded for further proceedings in accordance with the views of the court as expressed in its written opinion. To review this judgment, a writ of error from this court was allowed, but after that, the case went back to the state district court in accordance with the mandate of the Supreme Court, and was subsequently tried therein.

The judgment attempted to be brought here was not a final judgment, and the writ of error is *Dismissed.*

SHERMAN *v.* GRINNELL.

ERROR TO THE CITY COURT OF NEW YORK.

No. 245. Argued and submitted March 25, 1892. — Decided April 4, 1892.

S. collected money from the Treasury of the United States as the attorney at law of G., a former collector at the port of New York. Not paying it over, the executors of G. brought suit against him in a state court in New York, to recover this money. He set up in defence that the case had been reopened by the government, and that he feared he would be compelled to repay it; and that no valid agency could exist by force of the statutes of the United States to collect and pay over this money. Both defences were overruled and judgment entered for plaintiff. A writ of error was sued out to this court. *Held*, that no Federal question was involved in the decision of the state court.

THE court stated the case as follows:

This was an action brought by the executors of the estate of Moses H. Grinnell, deceased, formerly collector of the port of New York, in the City Court of New York against Roger M. Sherman, to recover the sum of $1778.95 collected from the United States for plaintiffs' testator by defendant as his attorney.

An award by the Secretary of the Treasury in favor of Mr. Grinnell for the sum in question, made May 2, 1885, was offered in evidence on the trial, to which the defendant objected on the ground that the jurisdiction of the Secretary of the Treasury to make the award had not been shown, and that it appeared affirmatively on the face of the award that the Secretary had no power to make it. This objection was overruled and exception taken. Plaintiffs also put in evidence a copy certified under the seal of the collector of customs for the port of New York, of a paper, whereby Roger M. Sherman receipted to the collector for the sum in question as attorney for the executors of Mr. Grinnell. Defendant objected to the admission of this receipt in evidence on the ground that the certification was insufficient, and also that the receipt purported to be part of the proceedings in the Treasury matter,

in respect of which no proof had been offered of the jurisdiction of the Secretary. The objection was overruled and exception taken.

The court made findings of fact and conclusions of law, and among other things found that the defendant as attorney for the executors received the sum of $1778.95 from the Treasurer of the United States on or about May 9, 1885. On June 1, 1885, the executors made demand upon Sherman for the money, which he refused to pay over, alleging that since the award the matter had been reopened by the Secretary and was still in debate, and evidence was offered on his behalf tending to show this, and that the matter of the award had been sent to the Court of Claims.

The City Court held that the defendant was estopped from denying his clients' title after having collected the money for them, and gave judgment for the amount claimed, with interest, costs, &c., whereupon the defendant took the case by appeal to the general term of the court, by which the judgment was affirmed.

It was said in the opinion of the general term, delivered by Hall, J.: "Defendant seeks to justify his refusal to pay over, by the claim that since the money was paid over to him the matters out of which it arose or accrued have been reopened by the government and referred to the Court of Claims, and he fears that in case the award should be revoked he may be compelled to repay the money to the government. Defendant's relations with plaintiffs were simply as attorney at law, and, in fact, the money was paid by the government to them, not to him; he was a mere conduit through which it passed; his receipt was their act, not his own; his acts were their acts and binding upon them; the money was theirs, not his, and he should have paid it over immediately upon its receipt. Any claim which the government may have, now or hereafter, will be against plaintiffs, not against defendant. The plaintiffs are estopped from claiming in any future proceeding that they have not received the money, as it has been paid to the person authorized by them to receive it. It does not lie with defendant to assert that the money was wrongfully paid

over; he made and maintained the claim, and the money was recovered as the result of his efforts. I have carefully examined the elaborate and ingenious brief of defendant and the numerous authorities cited, but I fail to discover their applicability to the facts of this case. No new title, adverse or superior to plaintiffs', is asserted in this case. No demand has been made upon defendant to deliver the money over or to withhold it from the plaintiffs, and no step contemplating or looking towards a disturbance of plaintiffs' title was taken until long after the money was demanded and should have been paid over. It would seem almost preposterous to assert that plaintiffs are bound to allow their money to lie in the hands of their attorney until the initiation and conclusion of some imaginary proceeding in behalf of the government. The defendant stands in no different position from any other custodian of plaintiffs' money; it has been paid legally to them and they have the right to control it. Defendant seems to be much more tender of the interests of the United States than its officers are. No claim has been made upon him by the government; no notice has been given to him not to pay over to his clients, and yet he seeks to hold the money for an indefinite time until some one does make a demand upon him; but his first duty is to his clients."

Defendant thereupon carried the case by appeal to the general term of the Court of Common Pleas for the city and county of New York, and the judgment was again affirmed. The record having been remitted to the City Court, the judgment of affirmance was made the judgment of that court, and a writ of error was then sued out from this court.

Errors were assigned here to the effect as stated in the brief of plaintiff in error that he specially claimed immunity from this suit, because the subject of the suit was money of the United States improperly paid from the Treasury by mistake and contrary to law, in which these plaintiffs have no right, title or interest; because the Secretary of the Treasury had, before suit commenced, set aside and vacated his award of said money; because defendant is a trustee for the United States in respect to said money; and because no valid agency

existed or could exist by force of the statutes of the United States, to collect, receive or pay over said money, under the circumstances; and that said claim was improperly overruled. Also that he was improperly held to be estopped from asserting these matters; and that the receipt certified by the collector, was improperly received in evidence, because the certification was not by the head or acting chief officer for the time being of a department of the government of the United States. The admission of the award in evidence was also questioned.

Mr. Roger M. Sherman in person submitted for plaintiff in error.

Mr. Treadwell Cleveland (with whom was *Mr. Henry W. Hardon* on the brief) for defendants in error.

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

There was no Federal question involved in the decision of the City Court that the defendant was estopped from showing that the moneys in question were paid out of the United States Treasury under a mistake of fact; that the Secretary had vacated the award; or that no valid agency existed by force of the statutes of the United States to collect and pay over these moneys.

The court did not pass upon the validity of any statute of or authority exercised under the United States, nor decide against any title, right, privilege or immunity specially set up or claimed by the defendant for himself under any statute of, or commission held, or authority exercised under, the United States. What he undertook to set up was a claim to the funds made by the United States; and in respect to that his contention was that the question of the award had been opened, and that the matter had been referred to the Court of Claims.

The court simply decided that he could not deny his clients' title after having collected the money for them, and he as-

signed as error that the court held that he was so estopped. The ground upon which the judgment rested was broad enough to sustain it without deciding any Federal question, if there were any in the case. As to the admission of the award and of the receipt in evidence, the rulings involved the application either of the general or the local law of evidence, and as such furnish no ground for our interposition. *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79; *Hammond* v. *Johnston*, 142 U. S. 73.

The writ of error is *Dismissed.*

COLUMBIA AND PUGET SOUND RAILROAD COMPANY *v.* HAWTHORNE.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

240. Argued March 24, 1892. — Decided April 4, 1892.

The refusal to direct a verdict for the defendant at the close of the plaintiff's evidence, and when the defendant has not rested his case, cannot be assigned for error.

In an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is not competent evidence of negligence in its original construction.

This was an action brought in a district court of the Territory of Washington, against a corporation owning a saw-mill, by a man employed in operating a machine therein, called a trimmer, to recover damages for the defendant's negligence in providing an unsafe and defective machine, whereby one of the pulleys, over which ran the belt transmitting power to the saw, fell upon and injured the plaintiff. The defendant denied any negligence on its part, and averred negligence on the part of the plaintiff.

At the trial, the plaintiff introduced evidence tending to show that the pulley, weighing about fifty pounds, revolved around a stationary shaft made of gas pipe, with nothing to

hold the pulley on, but a common cap or nut screwed on the end of the pipe, and its thread running in the same way as the pulley, and liable to be unscrewed by the working of the pulley; that the nut became unscrewed and came off, so that the pulley fell upon and greatly injured the plaintiff; and that if the nut had been properly put on, with a bolt through the shaft, the accident could not have happened.

The plaintiff's counsel asked a witness whether there had been any change in the machinery since the accident. Thereupon the following colloquy took place:

Defendant's counsel. "We object to that. The rule is well understood, and as your honor has already given it in other cases, that a person is not bound to furnish the best known machinery, but to furnish machinery reasonably safe. It is not a question as to what we have done with the machinery in the last few years or months since the accident occurred, but what was the condition then."

The Court. "The rule is quite well settled, I think, that where an accident occurs through defective machinery or defective fixtures or the machine itself, if that is shown to be true, then a change, repair or substitution of something else for the defective machinery is admissible as showing or tending to show the fact. I think that is quite well settled."

Defendant's counsel. "I thoroughly concur with the court as to the rule."

Plaintiff's counsel. "We propose to show changes."

The Court. "I think it is admissible."

Defendant's counsel. "We will save an exception."

The Court. "Exception allowed."

The witness then answered that there had been changes since the accident, and that they consisted in putting a rod through the shaft and gammon nuts on the end of the rod to keep the pulleys on, and in putting up some planks underneath the pulleys to keep them from falling down. To the admission of the evidence of each of these changes an exception was taken by the defendant and allowed by the judge.

At the close of all the evidence for the plaintiff, (which it is unnecessary to state,) the defendant moved "for a judgment

of nonsuit, on the ground that the plaintiff had failed to prove a sufficient cause for the jury;" and an exception to the overruling of this motion was taken by the defendant and allowed by the court.

The defendant then introduced evidence, and the case was argued by counsel and submitted by the court to the jury, who returned a verdict of $10,000 for the plaintiff, upon which judgment was rendered. The defendant appealed to the Supreme Court of the Territory, which affirmed the judgment. 3 Wash. Ter. 353. The defendant sued out this writ.

Mr. Artemas H. Holmes for plaintiff in error.

Mr. John B. Allen for defendant in error.

Evidence was admitted of alterations in the machinery subsequent to the accident. At most, such testimony is but a circumstance to be weighed by the jury for what it is worth. In the case at bar it is of no consequence, because both the defect causing the accident and the defendant's knowledge of it were otherwise absolutely proven, with no attempt at contradiction. Moreover, it was waived.

The Supreme Court of Pennsylvania, after citing numerous cases in support of the rule, said: "Plaintiff offered to show that, immediately after the accident defendant put up a gaslight close to the opening of the elevator door. The evidence should not have been rejected." *McKee* v. *Bidwell*, 74 Penn. St. 218, 225.

In *West Chester & Philadelphia Railroad* v. *McElwee*, 67 Penn. St. 311, the court said: "There was no error in admitting the testimony of Charles Rourke that the track had been moved since the date of the accident. If it tended to show, as suggested, that the track was originally too near the office and shanty to permit the cars to be run on it without danger, then it was evidence of a fact proper for the consideration of the jury in determining whether due and reasonable care had been used by the company to avoid the accident. If the proximity of the track to the buildings did not increase

the danger, why was it moved? And if it did, then a higher degree of care was necessary in order to avoid accident, and in this aspect the evidence was properly received."

In *Readman* v. *Conway*, 126 Mass. 374, evidence of subsequent repairs was held admissible, the court saying: "These acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair."

"The making of the passage way larger than it had formerly been was an admission, slight it may be, and of but little value, but still an admission, on the part of the defendant, that the passage way had previously been too small. And why might not the jury consider such evidence for what it is worth? Many authorities sustain the introduction of this kind of evidence." *St. Louis & San Francisco Railway* v. *Weaver*, 35 Kansas, 412.

It is true the Supreme Court of Minnesota, in the case of *Morse* v. *Minneapolis & St. Louis Railway*, 30 Minnesota, 465, says such evidence ought not under any circumstances to be admitted, but in the course of the opinion the court said: "Plaintiff was also permitted to show that after the accident defendant repaired the switch alleged to have been defective." But that court held in *O'Leary* v. *Mankato*, 21 Minnesota, 65, that such evidence was, under certain circumstances, competent.

This case was followed in *Phelps* v. *Mankato*, 23 Minnesota, 276, and *Kelly* v. *South Minnesota Railway*, 28 Minnesota, 98, and this position is not without support in the decisions of other courts.

In *Kansas Pacific Railway* v. *Miller*, 2 Colorado, 442, the following statement is made: "Objection was taken to the admissibility of evidence showing that after the accident the company constructed a new bridge and afforded a larger space for the passage of water. The construction of the new bridge in a manner different from the old one is an admission that the first one was inadequate, but cannot be taken as an admission that its construction was attended with negligence."

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

The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that upon the evidence introduced the plaintiff is not entitled to recover cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. *Grand Trunk Railway* v. *Cummings*, 106 U. S. 700; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527; *Northern Pacific Railroad* v. *Mares*, 123 U. S. 710; *Robertson* v. *Perkins*, 129 U. S. 233.

The only other exception argued is to the admission of evidence of changes in the machinery after the accident.

It was argued for the plaintiff that this exception was not open to the defendant, because it had been waived by his counsel saying, after the first ruling of the court on the subject, "I thoroughly concur with the court as to the rule." Assuming these words to be accurately reported, it is not wholly clear whether they refer to the rule as to evidence of subsequent changes, or to the rule, mentioned just before, as to the degree of care required of the defendant. That they were not understood, either by the counsel or by the court, as waiving the objection to evidence of subsequent changes, is shown by the plaintiff's counsel thereupon saying, "We propose to show changes," and by the court ruling them to be admissible, and allowing an exception to this ruling, and immediately afterwards allowing two other exceptions to evidence on the same subject. And the question of the admissibility of this testimony was considered and decided by the Supreme Court of the Territory. 3 Wash. Ter. 353, 364.

This writ of error, therefore, directly presents for the decision of this court the question whether, in an action for injuries caused by a machine alleged to be negligently constructed, a subsequent alteration or repair of the machine by the defendant is competent evidence of negligence in its original construction.

Upon this question there has been some difference of opinion in the courts of the several States. But it is now settled, upon much consideration, by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant. *Morse* v. *Minneapolis & St. Louis Railway*, 30 Minnesota, 465; *Corcoran* v. *Peekskill*, 108 N. Y. 151; *Nalley* v. *Hartford Carpet Co.*, 51 Connecticut, 524; *Ely* v. *St. Louis &c. Railway*, 77 Missouri, 34; *Missouri Pacific Railway* v. *Hennessey*, 75 Texas, 155; *Terre Haute & Indianapolis Railroad* v. *Clem*, 123 Indiana, 15; *Hodges* v. *Percival*, 132 Illinois, 53; *Lombar* v. *East Tawas*, 86 Michigan, 14; *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168.

As was pointed out by the court in the last case, the decision in *Readman* v. *Conway*, 126 Mass. 374, 377, cited by this plaintiff, has no bearing upon this question, but simply held that in an action for injuries from a defect in a platform, brought against the owners of the land, who defended on the ground that the duty of keeping the platform in repair belonged to their tenants and not to themselves, the defendants' acts in making general repairs of the platform after the accident "were in the nature of admissions that it was their duty to keep the platform in repair, and were therefore competent."

The only States, so far as we are informed, in which subsequent changes are held to be evidence of prior negligence, are Pennsylvania and Kansas, the decisions in which are supported by no satisfactory reasons. *McKee* v. *Bidwell*, 74 Penn. St. 218, 225, and cases cited; *St. Louis & San Francisco Railway* v. *Weaver*, 35 Kansas, 412.

The true rule and the reasons for it were well expressed in *Morse* v. *Minneapolis & St. Louis Railway*, above cited, in which Mr. Justice Mitchell, delivering the unanimous opinion of the Supreme Court of Minnesota, after referring to earlier

opinions of the same court the other way, said: "But on mature reflection, we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employés in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." 30 Minnesota, 465, 468.

The same rule appears to be well settled in England. In a case in which it was affirmed by the Court of Exchequer, Baron Bramwell said: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before." *Hart* v. *Lancashire & Yorkshire Railway*, 21 Law Times (N. S.) 261, 263.

As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and it cannot be known how much the jury were influenced by it, its admission requires that the

Judgment be reversed, and the case remanded to the Supreme Court of the State of Washington, with directions to set aside the verdict and to order a new trial.

RED RIVER CATTLE COMPANY *v.* SULLY.

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

No. 249. Submitted March 28, 1892. — Decided April 4, 1892.

When the errors assigned depend upon the terms and construction of a contract, it should appear in the record.

THIS was an action brought by the defendant in error to recover damages for the non-performance of a contract contained in a bill of sale of cattle running on a range and in the pastures of the plaintiffs in error in Texas. The record contained no copy of this contract. The brief of the counsel for plaintiffs in error stated "the questions involved" thus:

"1. Under the contract, should the winter loss from December 29, 1883, to October 1, 1885, be added to the number of cattle actually found and counted? or should only the winter loss occurring from December 29, 1883, to the spring of 1884, be added to the number actually found and counted?

"2. Under the contract, before the Red River Cattle Company could recover for any excess over 3700 head owned by it on the 29th of December, 1883, was it necessary that more than 3700 should be actually found and counted? or was it only required that the number actually found and counted, when added to the winter loss occurring after December 29, 1883, should exceed 3700 head?"

Mr. Sawnie Robertson and *Mr. W. O. Davis* for plaintiffs in error.

Mr. James W. Brown for defendant in error.

THE CHIEF JUSTICE: The only errors assigned which might call for consideration depend upon the terms and the construction of a contract which does not appear in the record.

The judgment is, therefore, *Affirmed.*

Counsel for Plaintiff in Error.

MISSOURI *ex rel.* THE QUINCY, MISSOURI AND PACIFIC RAILROAD COMPANY *v.* HARRIS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 256. Argued March 29, 1892. — Decided April 4, 1892.

No Federal question is involved when the Supreme Court of a State decides that a municipal corporation within the State had not power, under the constitution and laws of the State, to make the contract sued on.

MANDAMUS, to compel the performance of an alleged subscription by Sullivan County, Missouri, to stock of a railroad company. The defence was that no valid subscription had been made under the constitution and laws of Missouri. The Supreme Court of the State, in rendering the judgment to which this writ of error was sued out, said, in its opinion:

"The power of the county court to subscribe to the stock of a railroad company was made by the constitution of 1865 and Gen. Stat., 1865, p. 338, § 17, to depend upon the fact that two-thirds of the qualified voters of the county at a regular or special election held therein should assent thereto. . . . Taking in this case the admission that the registration books offered in evidence contained the names of 1940 persons as qualified to vote in said county at said election, it is evident that two-thirds of the qualified voters of the county of Sullivan did not assent to said subscription, as only 1049 of said voters voted in favor of the subscription. Besides this, while there was evidence tending to show that the railroad company had complied with the conditions of the subscription, there was also evidence to show that it had not complied, and the trial court might on this ground have well denied the relief asked. The judgment, for the reasons given, is hereby affirmed."

Mr. John P. Butler for plaintiff in error.

Syllabus.

Mr. A. W. Mullins for defendants in error. *Mr. D. M. Wilson* was with him on the brief.

THE CHIEF JUSTICE: The writ of error is dismissed because no Federal question is involved, upon the authority, among other cases, of *Railroad Co.* v. *Rock*, 4 Wall. 177, 181; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *N. O. Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18, 30; and *Railroad Co.* v. *Todd County*, 142 U. S. 282.

Writ of error dismissed.

GLASPELL *v.* NORTHERN PACIFIC RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

No. 1330. Submitted March 14, 1892. — Decided April 4, 1892.

Upon the trial of this case in the District Court in Dakota, a verdict was returned, November 24, 1888, in favor of plaintiff for $12,545.43, and judgment was rendered accordingly November 26, 1888. On November 28, 1888, the court made an order by consent extending the time for serving notice of intention to move for a new trial, for motion for new trial, and for settlement of a bill of exceptions until January 28, 1889, which time was subsequently extended by order of court for reason given, to February 28, and thence again "for cause" to March 28, 1889, upon which day the following order was entered: "The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for new trial, and within which to move for new trial, is hereby extended to April 13th, 1889." The time was again extended to May 31, 1889, and on the 23d day of that month the following order was entered: "The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial, and within which to move for a new trial in said action." This was the last order of extension. On December 14, 1889, there was filed in the office of the clerk of the District Court a notice of motion for new trial, which was as follows: "Take notice that the motion for a new trial herein will be brought on for argu-

ment before the court at chambers, at Jamestown, Dakota, on September 12, 1889, at 10 o'clock A.M., or as soon thereafter as counsel can be heard." On the margin of this notice appeared this indorsement: "Hearing continued until the 21st September, 1889. Roderick Rose, Judge." The notices and motion seem to have been served September 3, 1889. The bill of exceptions was signed August 30, 1889, and filed September 3, 1889. The certificate thereto concluded thus: "Filed as a part of the records in this action this August 30th, 1889, (and within the time provided by law, as enlarged and extended by orders of the judge of this court.)" On February 17, 1890, the judge further certified: "The above and foregoing certificate is hereby modified and corrected so as to conform to the facts and record in the case by striking out all that part of it in the two last lines thereof preceding my signature and after the words and figures 'August 30th, 1889.'" On November 2, 1889, the State of North Dakota was admitted into the Union. *Held*,

(1) That this bill of exceptions was not settled and filed within the time allowed by law or under any order of the court;

(2) That the alleged motion for a new trial not having been filed until December 14, 1889, was not made, and no notice of intention to make it was given, within the time allowed by law or by any order of the court;

(3) That a renewal of notice and motion after the State was admitted, if it could have been made, would necessarily have been in the state court, whose jurisdiction would have attached to determine it.

THE court stated the case as follows:

This was an action brought by Glaspell against the Northern Pacific Railroad Company, February 24, 1885, in the District Court for Stutsman County, in the Sixth Judicial District of the Territory of Dakota, to recover damages for deceit in the sale by defendant to plaintiff of two thousand two hundred and forty acres of land. Upon the trial of the case in that court a verdict was returned, November 24, 1888, in favor of plaintiff for $12,545.43, and judgment was rendered thereon, November 26, 1888, for said amount, with costs, taxed at $64.15. On November 28, 1888, the court made an order by consent extending the time for serving notice of intention to move for a new trial, for motion for new trial, and for settlement of a bill of exceptions until January 28, 1889, which time was subsequently extended by order of court for reason given, to February 28, and thence again "for cause" to March 28, 1889, upon which day the following order was entered:

"The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for new trial, and within which to move for new trial, is hereby extended to April 13th, 1889." The time was again extended to May 31, 1889, and on the 23d day of that month the following order was entered: "The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial, and within which to move for a new trial in said action." This was the last order of extension.

On December 14, 1889, there was filed in the office of the clerk of the District Court for Stutsman County, North Dakota, a notice of intention to move for a new trial and a notice of a motion for new trial. The notice of intention stated that the motion would be made upon the bill of exceptions, &c., and the notice of motion was as follows: "Take notice that the motion for a new trial herein will be brought on for argument before the court at chambers, at Jamestown, Dakota, on September 12, 1889, at 10 o'clock A.M., or as soon thereafter as counsel can be heard." On the margin of this notice appeared this indorsement: "Hearing continued until the 21st September, 1889. Roderick Rose, Judge."

The notices and motion seem to have been served September 3, 1889. The bill of exceptions was signed August 30, 1889, and filed September 3, 1889. The certificate thereto concluded thus: "Filed as a part of the records in this action this August 30th, 1889, (and within the time provided by law, as enlarged and extended by orders of the judge of this court.")

On February 17, 1890, the judge further certified: "The above and foregoing certificate is hereby modified and corrected so as to conform to the facts and record in the case by striking out all that part of it in the two last lines thereof preceding my signature and after the words and figures 'August 30th, 1889.'"

Statement of the Case.

On November 2, 1889, the State of North Dakota was admitted into the Union. On the 7th of December, 1889, there was filed in the District Court for Stutsman County, North Dakota, the petition of the defendant stating that it is a corporation created under acts of Congress; that the action was commenced and was now pending in said District Court; setting forth the trial, verdict and judgment, the settlement and allowance of the bill of exceptions August 30, 1889, the service of notice of intention to move for a new trial, the continuance of the hearing of the motion until September 21, 1889; and alleging that the motion had not been decided, but was now pending; that the matter in controversy exceeded two thousand dollars exclusive of costs; that the action was one arising under the laws of the United States, and to which moreover petitioner had a defence arising under such laws; that the action arose and was commenced in the Territory of Dakota and within the limits of that portion of the Territory which had since been admitted into the Union as the State of North Dakota; that the action was pending in the District Court of Stutsman County at the time of the admission of the State, and "is a suit of which the Circuit Court of the United States for the District of North Dakota might have had jurisdiction under the laws of the United States had such Circuit Court of the United States for the District of North Dakota been in existence at the time of the commencement of said action;" and that the petitioner is entitled under the acts of Congress in such cases made and provided, and more particularly under the act of Congress approved February 22, 1889, to enable the people of North Dakota, etc., to form a constitution and state government, and to be admitted into the Union, to remove said suit into the Circuit Court of the United States for the District of North Dakota for proceedings therein; and petitioner accordingly tenders bond, etc. Bond in the usual form on removal was filed at the same time with the petition. On March 14, 1890, the clerk of the District Court certified to copies of the petition and bond, and also that he refused "to transmit the files, records and proceedings in said cause to the United States Circuit Court for the District of North Dakota

for the sole reason that the judge of the District Court for Stutsman County has forbidden me so to do."

On March 26, 1890, the defendant applied to the Circuit Court of the United States for the District of North Dakota for an alternative writ of *certiorari* directed to the judge of the District Court of the Fifth Judicial District within and for Stutsman County, North Dakota, upon the affidavit of the attorney for the defendant, together with copies of the petition and bond duly certified by the clerk of the state court. The affidavit was to the effect that "after the admission into the Union of the State of North Dakota, and prior to the filing of said petition in the office of the clerk of the District Court for Stutsman County, your petitioner did not in any manner invoke the aid or action of the state court in said cause; that during the period aforesaid the state court did not make any orders or exercise any act of jurisdiction in said cause, save that all the papers, files and proceedings and records therein remained and now remain in the care and custody of the clerk of said court for Stutsman County as the successor in office of the clerk of the Territorial District Court wherein said action originated, was tried, and was pending at the date of the admission of the State of North Dakota into the Union;" and that the legal fees due the clerk of the state court had been tendered, and demand made that he transmit the files, records and proceedings to the United States court, which he refused to do. Thereupon an alternative writ of *certiorari* was issued in said cause directed to the judge of the District Court for the Fifth Judicial District of North Dakota, requiring him to show cause, etc., to which the clerk of the state court by direction of the judge of said court made a return, setting up the institution of the action, the verdict and judgment, the various orders extending the time for settling the bill of exceptions, the signing of the bill August 30, 1889, and the certificates of that date and of February 17, 1890, etc. The return also stated that "an execution was issued on said judgment, February 17, 1890, and is now in the hands of the sheriff of Stutsman County." The clerk further certified that at no time had the defendant demanded a certified copy or transcript of the

files, records and proceedings, but that he demanded that the clerk transfer to the Circuit Court the original files and proceedings in the action.

A motion was made April 7, 1890, to discharge the order to show cause and overruled, and the writ of *certiorari* ordered to issue July 11, 1890, requiring the clerk of the District Court of Stutsman County to transmit to the United States court at Bismarck "all the files, records and proceedings of said case, and certified copies of any entries in the books of all records remaining in said District Court of Stutsman County in this cause." The writ thereupon issued, and was complied with July 28, 1890. A motion to remand was then made in the Circuit Court and denied, and on October 10, 1890, a motion for a new trial was heard and taken under advisement, and granted November 3, 1890. 43 Fed. Rep. 900.

The case was subsequently retried in the Circuit Court, the plaintiff insisting throughout upon his objection to the jurisdiction of the court, and resulted in a verdict for plaintiff for $1120, on which judgment was entered with costs taxed at $249.95. From that judgment this writ of error is prosecuted.

Mr. Edgar W. Camp and *Mr. Samuel L. Glaspell* for plaintiff in error.

Mr. A. H. Garland and *Mr. H. J. May* for defendant in error.

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

The constitution of North Dakota was submitted to a vote of the people on the first Tuesday in October, 1889, (falling that year on the first day of the month,) at which time all the State and District officers created and made elective by the instrument, including the judges of the Supreme and District Courts, were elected, it being also provided that they should take the required oaths of office within sixty days after the proclamation of the President admitting the State. This was

issued November 2, 1889, but during the interval, from October 1 to the qualification of the judges, the continuity of the courts was preserved by the sixth section of the schedule to the constitution, (Laws N. Dakota, 1891, p. 55,) which reads thus:

"§ 6. Whenever any two of the judges of the Supreme Court of the State, elected under the provisions of this constitution shall have qualified in their offices, the causes then pending in the Supreme Court of the Territory on appeal or writ of error from the District Courts of any county or subdivision within the limits of this State, and the papers, records and proceedings of said court shall pass into the jurisdiction and possession of the Supreme Court of the State, except as otherwise provided in the Enabling Act of Congress, and until so superseded the Supreme Court of the Territory and the judges thereof shall continue, with like powers and jurisdiction as if this constitution had not been adopted. Whenever the judge of the District Court of any district elected under the provisions of this constitution shall have qualified in his office, the several causes then pending in the District Court of the Territory within any county in such district, and the records, papers and proceedings of said District Court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the District Court of the State for such county, except as provided in the Enabling Act of Congress, and until the District Courts of this Territory shall be superseded in the manner aforesaid, the said District Courts and the judges thereof shall continue with the same jurisdiction and power to be exercised in the same judicial districts respectively as heretofore constituted under the laws of the Territory."

The twenty-third section of the act of Congress of February 22, 1889, entitled, "An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana and Washington, to form constitutions and state governments and to be admitted into the Union on an equal footing with the original States and to make donations of public lands to such States," is as follows:

"SEC. 23. That in respect to all cases, proceedings and

matters now pending in the Supreme or District Courts of either of the Territories mentioned in this act at the time of the admission into the Union of either of the States mentioned in this act and arising within the limits of any such State, whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said Territory; and in respect to all other cases, proceedings and matters pending in the Supreme or District Courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said Supreme and District Territorial courts; and all the files, records, indictments and proceedings relating to any such cases, shall be transferred to such Circuit, District and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States Circuit, District or state court, as the case may be; *Provided, however*, That in all civil actions, causes and proceedings, in which the United States is not a party, transfers shall not be made to the Circuit and District Courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts." (25 Stat. c. 180, 676, 683.)

This section embodies the view thus expressed by Mr. Justice Clifford, speaking for the court, in *Baker* v. *Morton*, 12 Wall. 150, 153: "Whenever a Territory is admitted into the Union as a State, the cases pending in the territorial courts

of a Federal character or jurisdiction are transferred to the proper Federal court, but all such as are not cognizable in the Federal courts are transferred to the tribunals of the new State. Pending cases, where the Federal and state courts have concurrent jurisdiction, may be transferred either to the state or Federal courts by either party possessing that option under the existing laws."

By its terms, cases exclusively of Federal jurisdiction are consigned to the courts of the United States, and cases exclusively of state jurisdiction to the courts of the State, while the proviso applies to cases of concurrent jurisdiction, which may proceed in the state courts or be transferred on request to the United States courts. But in order to such transfer, the action, cause or proceeding must be "pending."

Assuming that, because defendant was a corporation created by the United States, this was a case "whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement" of the case, and that if it stood on motion for new trial it was so far pending as to be susceptible of removal, what was the fact when the petition was filed in the state court December 7, 1889?

By section 5343 of the Compiled Laws of Dakota of 1887, referred to by counsel for defendant, it was provided that "an action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment be sooner satisfied." But the meaning of the act of Congress is not to be determined by provisions of that character in territorial laws. If this case had gone to judgment and no motion for a new trial had been made, or, if made, had been abandoned or overruled prior to the admission of the State, then there was no cause, proceeding or matter pending which would justify the Circuit Court in taking jurisdiction.

Under section 5216 of the Dakota Code, already referred to, appeals "must be taken within two years after the judgment shall be perfected, by filing the judgment roll."

The conclusion that cases in the Dakota local courts are

pending, without action therein, for two years after rendition of judgment, so as to be capable of being transferred on request into the Circuit Court, is quite inadmissible.

The record of cases of exclusive Federal jurisdiction which have gone to judgment should, indeed, be transmitted to the Circuit Court and the judgments there enforced, but where final judgment has been rendered in cases of concurrent jurisdiction, no reason can be assigned for, nor do the terms of the act of Congress contemplate, such a transfer.

By section 5090 of the Compiled Statutes of Dakota: "The party intending to move for a new trial must, within twenty days after the verdict of the jury, if the action were tried by jury, or after notice of the decision of the court, if the action were tried without a jury, serve upon the adverse party a notice of his intention, designating the statutory grounds upon which the motion will be made and whether the same will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case," etc.

Under section 5092: "The application for a new trial shall be heard at the earliest practical period after service of notice of intention, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits are served or the bill of exceptions or statement, as the case may be, is filed, and may be brought to a hearing in open court or before the judge at chambers, in any county in the district in which the action was tried, by either party, upon notice of eight days to the adverse party, specifying the time and place of hearing," etc.

Section 5083 provides: "When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment, if the actions were tried with a jury, or after receiving notice of the entry of judgment, if the action was tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken, upon which the party relies. Within twenty days after such service the

adverse party may propose amendments thereto and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. . . ."

Section 5093 reads: "The court or judge may, upon good cause shown, in furtherance of justice, extend the time within which any of the acts mentioned in sections 5083 and 5090 may be done, or may, after the time limited therefor has expired, fix another time within which any of such acts may be done."

Section 4939 provides: "The court may likewise, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited by this code, or, by an order, enlarge such time; and may also, in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding," etc.

In *St. Croix Lumber Co.* v. *Pennington*, 2 Dakota, 467, the Supreme Court of the Territory decided that, under the code as it then existed, if a bill of exceptions was not presented for settlement within the time fixed by statute, or such other time as might be allowed by the court or judge, no power existed for its allowance. But the Supreme Court of North Dakota, in *Northern Pacific Railroad Co.* v. *Johnson*, 1 North Dakota, 354, held that, under sections 4939 and 5093 of the Compiled Laws, the District Court could, after the time granted for settling a bill had expired, without making an order extending the time, and against objection, settle and allow such bill; the order of settling operating to extend the time until the date of actual settlement; and that "until the time for appeal has expired, all of the various steps leading up to and including a motion for a new trial may, with respect

to time, after statutory time has elapsed, be taken at any time allowed by the sound judicial discretion of the trial court. This court will presume that such discretion is properly exercised in all cases until the contrary appears."

In *Moe* v. *Northern Pacific Railroad Co.*, 50 N. W. Rep. 715, however, the court held that the authority conferred by section 5093 to extend the time to settle bills of exceptions and statements after the statutory periods for so doing had expired, "is not an absolute, non-reviewable discretion, but on the contrary, such discretion is a sound judicial discretion, and can be exercised only upon the conditions named in the statute, *i.e.*, 'upon good cause shown in furtherance of justice.' Where the cause shown is spread out in full upon the record in the court below, and an objection to the action of the court below in settling the bill or statement is properly made, this court, upon a motion to purge its records, will review the cause shown; and if, in the opinion of this court, good cause was not shown for settling the bill or statement after time, such motion will be granted, and the bill or statement will be stricken out."

In the case at bar, the time within which to settle a bill of exceptions was extended six times. The first was by consent of counsel, the second for reasons given, the third, as asserted, "upon good cause shown," and the fourth, fifth and last extension assigned no ground. The last order of extension expired June 29, 1889, defendant having ten days after the settling of the bill within which to serve notice of intention to move for new trial and within which to move for a new trial. The bill of exceptions was, nevertheless, signed August 30, 1889, and filed September 3. The certificate originally stated not only the date but that the settlement was "within the time provided by law, as enlarged and extended by orders of the judge of this court," but subsequently these words were stricken out by the judge, and the question whether the bill was improvidently signed or not was left open, unless the rule be applied, as subsequently laid down by the Supreme Court of the State, that the settlement, whenever made, in itself operated to extend the time. Notice of the intention to move

and of the motion appear to have been given on the third of September, returnable on September 12, 1889, and the hearing appears to have been extended by the judge until September 21. Here the record becomes silent.

It is nowhere disclosed that the defendant appeared to prosecute its motion on the 21st of September, and whatever liberality might be indulged under the provisions of the territorial code, as now expounded by the Supreme Court of the State, we are not prepared to hold, in passing upon the question before us, that any motion was pending on the 7th of December, 1889, there being no evidence whatever that a motion was ever made, except the action of the court assigning the hearing of a proposed motion for a day more than two months before, which came and went without such hearing, the meditated motion having apparently been waived and abandoned.

This bill of exceptions was not settled and filed within the time allowed by law or under any order of the court. The alleged motion for a new trial was not filed until December 14, 1889, and had not been made, and no notice of intention to make it given, within the time allowed by law or by any order of the court. If such notice of intention could lawfully have been given or renewed, or such motion have lawfully been made, within the view of the state tribunal, notwithstanding the expiration of time, this had not been done, and the motion was not pending within the intent and meaning of the twenty-third section of the Enabling Act, when the application for removal was made, even if a removal could have been had, thereunder, if such a motion had been then pending. And the renewal of notice and motion after the State was admitted, if it could have been made, would necessarily have been in the state court, whose jurisdiction would have attached to determine it. On August 22, 1890, notice was given that "the motion for a new trial heretofore made in this action" would be brought on for hearing, in the Circuit Court, on September 5, 1890, and the record recites that on October 10, 1890, "defendant moves for a new trial." The motion could not be treated as having come over from the territorial court, nor

could such a motion be made in the Circuit Court, as final judgment precluded the transfer.

We are of opinion that the motion to remand should have been sustained, and, therefore,

Reverse the judgment, and remand the case to the Circuit Court with directions to send it back to the District Court for the fifth judicial district, Stutsman County, North Dakota, and to return the original files to that court.

POPE MANUFACTURING COMPANY *v.* GORMULLY.

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

No. 204. Argued March 9, 10, 1892. — Decided April 4, 1892.

A court of equity will not enforce the specific performance of a contract wherein the defendant, in consideration of receiving a license to use certain patents belonging to the plaintiff during the life of such patents, agrees never to import, manufacture or sell any machines or devices covered by certain other patents, unless permitted in writing so to do, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and further to aid and morally assist the plaintiff in maintaining public respect for and preventing infringements upon the same, and further agrees that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions, the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice.

This was an appeal from a decree dismissing a bill in equity, wherein the plaintiff sought an accounting upon a contract, and an injunction prohibiting the defendant from manufacturing and selling bicycles and tricycles containing certain patented devices, in violation of a contract entered into between the parties on December 1, 1884. A copy of this contract is printed in the margin.[1]

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[1] This agreement made this first day of December, 1884, by and between the Pope Manufacturing Company, a corporation established under the laws of Connecticut and having a place of business in Boston, Massachusetts,

Statement of the Case.

The bill alleged that the plaintiff was engaged in the manufacture and sale of bicycles and tricycles of superior quality,

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party of the first part, and R. Philip Gormully, of Chicago, Illinois, party of the second part, witnesseth:

That whereas letters patent of the United States, numbered and dated as in the following list, were duly granted for the inventions therein set forth, and by certain good and valid assignments the same are now owned by the party of the first part:

(Here follows a descriptive list of sixty-five patents.)

And whereas said party of the second part is desirous of making, using and selling to others to be used bicycles embodying in their construction and modes of operation certain of the said inventions, and of securing license thereof under certain of said letters patent: Now, therefore, in consideration of one dollar by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, and in further consideration of the covenants, agreements and stipulations hereinafter contained, said parties have consented and agreed as follows:

First. The party of the first part agrees to license, and does hereby license, the party of the second part, subject to the conditions and provisions herein named, to manufacture at the shop or factory of the party of the second part, in Chicago, in the State of Illinois, and in no other place or places, bicycles of fifty-two-inch size and upwards, of such quality, construction, grade and finish as to be sold in the market at retail prices not greater than eighty per cent of the retail list prices of the Standard Columbia bicycles of same or nearest similar sizes and styles, severally embodying the inventions set forth in those of the said letters patent numbered, (here follow the numbers of fifteen patents,) or either of them or either claim thereof and no others, so far as applicable within the conditions and restrictions herein contained, and to sell said bicycles to others to be used, and to use the same within and throughout the United States and the Territories thereof. This license is not to be understood or construed as a license to import, manufacture, buy, sell or deal in bicycles or tricycles, or in pedals, saddles, springs, rims, bearings or other patented parts thereof otherwise than as herein expressly stipulated. This license is not transferable, and is in addition to and not to modify or supersede previous ones except as herein expressed.

Second. The party of the second part hereby agrees to maintain a suitable place of business in said Chicago, and to keep there on hand a stock of bicycles as above referred to, and to promote and aid in extending the interest in bicycling and tricycling and the use of bicycles among those not already wheelmen, and to advertise the business by occupying and paying for one-page space continuously during the term of this license in the monthly magazine published by the Wheelman Company of Boston, Massachusetts, and to a reasonable extent to other publications of general circulation, and to advertise that it is licensed by the Pope Manufacturing Company.

that these machines embodied in their construction inventions covered by letters patent owned by the plaintiff; that in pur-

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Third. The party of the second part agrees to keep at its place of business full, true and correct books of account, open at all reasonable times to the party of the first part and to its delegate, in which shall be set down all bicycles made or sold by the party of the second part, with the name or description, size, style and number thereof, and the names and addresses of the parties to whom sold.

Fourth. The party of the second part agrees to make full and true returns in writing to the party of the first part on or before the tenth day of each calendar month in each year, beginning with the 10th day of January, A.D. 1885, of all bicycles (and whether any or not) made, used or sold in the United States by the party of the second part during the preceding calendar month, with the size, style, number, name, or description, and make of the said machines and the names and addresses of the purchasers, and also of such machines held in stock by the party of the second part at the end of the said preceding month, said returns to be made under oath whenever required by the party of the first part, and to pay the royalties or license fees as herein stipulated on or before the said tenth day of each of said months, on all said bicycles used or sold by them or removed from their said factory or place of business in the preceding month.

Fifth. The party of the second part agrees to pay to the party of the first part the sum of ten dollars upon and for each and every bicycle in whole or in part made by or for it at any time prior to the 1st day of April, A.D. 1886, or the termination of this license, as part license fees or part royalties under said several letters patent or such or either claim thereof as may be used, and as part of the consideration for this agreement; and it is agreed that the party of the second part shall so pay to the party of the first part, under this license and agreement, at least the sum of one thousand dollars within and for each and any consecutive twelve calendar months during the continuance of this license.

Sixth. The party of the second part agrees to sell said bicycles at retail and not to sell the same or any of them to any person or party, either directly or indirectly, except upon such terms and at such prices as shall be satisfactory to the party of the first part and as shall first be submitted to and approved by the said party of the first part, such written submission of rates, terms and prices, with the said approval, to be taken as and to form a part of this agreement, and not to have or sell through any agent or agents in any other place than the said Chicago, nor pay or allow freight beyond the said Chicago, nor any bonus, rebate, allowance or commission on sales or from prices except as expressly agreed in writing between the parties hereto.

Seventh. The party of the second part agrees to mark or stamp in a legible manner the word "patented" on each machine made or sold under this license, together with the date or dates of the patents under which each

suance of a plan adopted by it, it reserved to itself the right to manufacture and sell the highest grades, and among others a

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machine is made or sold, a list of such patents to be furnished by the party of the first part.

Eighth. The party of the second part hereby expressly admits the validity of the several letters patent hereinbefore mentioned, and of each and every claim thereof, and the title of the party of the first part thereto; and further admits specifically that the following inventions are embodied in the "Ideal" bicycle and the "Standard Columbia" bicycle and the "Expert Columbia" bicycle, as follows, to wit: (*a*) the invention claimed in the second clause of claim of said patent, R. 3297, in the saddles of said bicycle, and their connection therewith; (*b*) the invention claimed in the third clause of claim of the last-named patent in the cranks of said bicycles; (*c*) the invention claimed in the fourth clause of claim of said last-named patent in the backbones and rear forks of bicycles; (*d*) the invention claimed in third clause of claim of said patent No. 85,527 in the leg-guard of said bicycle; (*f*) the invention claimed in second clause of claim of said patent 86,834 in the brake mechanism of said bicycles and its connections; (*g*) the invention claimed in the third clause of claim of said patent 86,834 in the steering head of the said bicycles and its connections; (*h*) the invention claimed in the fifth clause of claim of said patent 87,713 in the tires of the wheels of said bicycles; (*i*) the inventions claimed in the third clause of claim of said patent No. 88,507 in the front forks of said Expert; (*j*) the inventions claimed in the fourth clause of claim of said last-named patent in the pedals of said bicycles; (*k*) the inventions claimed in the claim of letters patent No. 194,980 in the balance gear and its connections in the "Columbia" and "Victor" tricycles; (*l*) the invention claimed in the second clause of claim of said patent No. 197,289 as embodied in the ball bearings of said Expert bicycle and Victor tricycle and in "Æolus" ball pedals; and further admits that any machines or part of machines constructed in a substantially similar manner are or would be infringements of said claims respectively; and these admissions are unqualified and may at any time hereafter be pleaded or proved in estoppel of the party of the second part.

Ninth. The party of the second part agrees that it will not import, manufacture or sell, either directly or indirectly, any bicycle, tricycle or other velocipede, or the pedals, saddles, bearings, rims or other patented parts or devices containing any of the inventions or claims in either of the hereinbefore-recited letters patent, nor make, use or sell, directly or indirectly, either (*a*) backbones bifurcated for a rear wheel, or (*b*) balance gear allowing two wheels abreast, differing speeds on curves, or (*c*) bearings containing balls or rollers and laterally adjustable, or (*d*) brakes combined with the handle bars and front wheel, or (*e*) cranks adjustable to different lengths of throw, or (*f*) forks of tubular construction, or (*g*) mud-shield for steering wheels, constructed to turn within the wheel, or (*h*) pedals that are polygonal or offering two or more sides for the foot, or (*i*) round contrac-

style of bicycle known as the Standard Columbia bicycle; that under the agreement entered into with the defendant the lat-

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tile rubber tires in grooved rims or rims containing or adapted for rubber or elastic tires, or (*j*) saddles adjustable fore and aft, or (*k*) saddles having a flexible seat and means of taking up the slack, or (*l*) steering heads, open or cylindrical, with stop for complete turning, or (*m*) leg-guards over front wheel, or (*n*) rims of wrought metal tubing and adapted to receive a tire, or (*o*) rims composed of sheet metal with overlapping edges, or (*p*) wheels containing hollow metallic rim and rubber tires, or (*q*) steering spindle and fork inclined to each other at an angle, or (*r*) two speed or power gears, or (*s*) "Tangent" spokes or "Warwick" rims, or (*t*) any other device or invention secured by either of these patents, other than according to the permission, conditions and description in paragraph numbered "first" in this agreement or as otherwise agreed in writing with the party of the first part, nor in any way, either directly or indirectly, dispute or contest the validity of the letters patent hereinbefore mentioned, or either of them or the title thereto of the party of the first part, but will aid and morally assist the party of the first part in maintaining public respect for and preventing infringements upon the same.

Tenth. If and whenever the party of the first part shall reduce the royalties on bicycles of similar sizes, construction and grade, to any other licensee, the above-named royalties shall be reduced in like manner and proportion to the party of the second part, and the party of the first part will immediately notify the party of the second part of any such reduction of royalties.

The party of the second part may sell said herein-licensed bicycles to regular agents and dealers in the trade and doing business as such in any part of the United States at discounts from the said retail list prices not exceeding twenty-five per cent in any case, and to the smaller agents not exceeding fifteen per cent, it being understood and agreed that said discount of not exceeding twenty-five per cent may be allowed only to *our* (one?) dealer in each or either of the following cities: New York, N.Y.; Philadelphia, Pennsylvania; Boston, Massachusetts; Baltimore, Maryland; St. Louis, Missouri; San Francisco, California; St. Paul, Minnesota; and one city in the Southern States, and to two dealers in Chicago, Illinois. Said party of the second part also agrees to keep the retail list prices fixed, and not to allow said licensed bicycles to be sold at retail at less than said retail prices, either by his own concern or by agents or dealers.

The party of the second part may sell the said licensed bicycles outside of the United States for actual use in foreign parts without the herein-contained restrictions as to prices and discounts, and upon satisfactory evidence of such export and foreign sale of said bicycles there shall be allowed a rebate or credit of one-half of said royalties thereon.

Eleventh. If and whenever the party of the second part shall fail to make returns or to make payments as herein provided, or shall violate or

ter was granted the right to make, use and sell bicycles 52 inches in size and upwards, and of certain style and finish, and

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fail to keep and perform the terms, conditions, promises or agreements or either of them herein mentioned on his part to be kept and performed, the party of the first part may withdraw and terminate this license and the agreements on its part mentioned to be kept and performed, by notifying the party of the second part in writing that the license herein contained has been revoked, and the party of the first part may in like manner revoke this license whenever the reported sales by the party of the second part for any consecutive twelve calendar months shall be less than one hundred machines. The party of the second part may surrender the license herein contained at any time by written notice to that effect and the returning of this contract to the party of the first part; but no such revocation or surrender, and no termination of this contract or any part of it, shall release or discharge the party of the second part from any payment, return, liability or performance which may have accrued, become due, or arisen hereunder, prior to or at the date of such revocation or surrender, or from the obligations, admissions and agreements contained in the sections hereof numbered "sixth," "seventh," "eighth," "ninth," and "eleventh" *hereof*, which are a part of the consideration for the granting of the license herein and are irrevocable, except by written consent of the party of the first part; and it is agreed that at the termination of the license herein contained at any time by expiration, revocation or surrender the party of the second part shall pay the within-named royalty on all said herein licensed machines or parts of machines whether wholly finished or not, or purchased or on hand, or ordered by or for said party of the second part at the date of said termination, and that the party of the second part will not sell the same except by first paying the full amount of said royalty and by complying with all the terms and conditions of this contract; and, further, that if the party of the second part shall continue after such termination of the license to make, sell or use any machine or substantial part thereof, containing either of the parts specifically referred to in section "ninth" hereof, or in any invention in any form set forth and claimed in the letters patent aforesaid, or any of them, the said party of the first part shall have the right to treat the party of the second part either as a party to and in breach of this contract or as a mere infringer, and the said party of the second part consents that in such case, upon any suit brought by the said party of the first part against the said party of the second part in any court, either upon this contract or for an infringement of the said letters patent, or any of them, an injunction may issue without notice to the said party of the second part restraining him from making, selling or using the said part or devices or the invention or inventions in said letters patent, or any of them set forth.

Witness our hands and seals the day and the year first above written.

THE POPE MANUFACTURING COMPANY. THE POPE MFG. CO.,
R. PHILIP GORMULLY. by CHARLES E. PRATT, *Atty.*

embodying the inventions set forth in certain patents named; and that he should not manufacture bicycles embodying the features of certain other patents specified in the agreement. That said defendant expressly agreed that he would not manufacture or sell, directly or indirectly, bicycles, etc., containing any of the inventions or claims in either of said letters patent, nor make, use or sell, directly or indirectly, certain parts of bicycles specified in the contract, other than according to the conditions and terms in said license.

That it was provided by the eleventh clause of said contract that the defendant might surrender the license at any time by written notice, but it was provided in the same clause that no revocation, surrender or termination of said license, or any part of it, should release or discharge said Gormully from any liability which might have accrued, become due or arisen prior to, or at the date of, said surrender, or from the obligations, admissions and agreements contained in sections 6, 7, 8, 9 and 11; that such admissions and agreements were a part of the consideration for the granting of the license, and were irrevocable except by the written consent of the licensor; that it was provided in said clause 11 that if the licensee should continue, after the termination of said license, to make, sell or use any of the machines or parts thereof containing either of the parts referred to in section 9, plaintiff should have the right to treat the defendant as a party to, and in breach of, the contract; and that defendant, by said section 9, consented that if he did make, use or sell any machine containing such parts, an injunction might issue in favor of the plaintiff restraining him from so doing.

After setting forth an immaterial modification of such contract subsequently agreed upon, it further averred that the defendant entered upon the manufacture of bicycles under said license, made returns thereof, and paid royalties to plaintiff in accordance with the same, and that said license in respect to the clause claimed to have been violated is still in full force and effect. The bill further charged that since March 1, 1886, defendant had violated the ninth clause of the contract in constructing bicycles of a kind prohibited by the

contract, in violation of the first and ninth clauses of said contract.

For which reasons, the plaintiff prayed for an account of the machines made in violation of the agreement, and for an injunction.

The court below found that there was no contest between the parties as to the execution of the instrument set out in the bill; that the terms of the contract were such as to prohibit the defendant from making the high-grade styles and kinds of bicycles and tricycles complained of; that, if the contract was valid and in force, it was being violated by the defendant; but that the contract was not of such a nature as to entitle the plaintiff to any relief in a court of equity. 34 Fed. Rep. 877. From a decree dismissing the bill for the want of equity the plaintiff appealed to this court.

Mr. L. L. Coburn and *Mr. Edmund Wetmore* for appellant.

A court of equity has jurisdiction to enjoin parties from doing things which the defendant agreed for a valuable consideration not to do. *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488; *Woodworth* v. *Weed*, 1 Blatchford, 165; *Wilson* v. *Sherman*, 1 Blatchford, 536; *McKay, Trustee* v. *Smith*, 29 Fed. Rep. 295; *Pope M'f'g Co.* v. *Owsley*, 27 Fed. Rep. 100.

When the defendant took a license and manufactured under said license, and the complainant owned a large number of patents, and in consideration of obtaining a limited and conditional license agreed that the other patents under which the complainant is manufacturing are valid, and that he would not embody in his machines the devices covered by those patents, the defendant is estopped from afterwards denying the validity of those patents, and a court of equity will enjoin him from making machines containing the devices covered by those patents. *Magic Ruffle Co.* v. *Elm City Co.*, 13 Blatchford, 151; *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488; *Lockwood* v. *Hooper*, 25 Fed. Rep. 910; *Evory* v. *Candee*, 17 Blatchford, 200; *Burr* v. *Kimbark*, 28 Fed. Rep. 574; *Kinsman* v. *Parkhurst*, 18 How. 289.

Mr. Charles K. Offield and *Mr. W. C. Goudy* for appellee.

Mr. Justice Brown delivered the opinion of the court.

This case involves the question whether a court of equity can be called upon to decree the specific performance of a contract, wherein the defendant, in consideration of receiving a license to use certain patents belonging to the plaintiff during the life of such patents, agrees never to import, manufacture or sell any machines or devices covered by certain other patents, unless permitted in writing so to do, nor to dispute or contest the validity of such patents or plaintiff's title thereto, and further to aid and morally assist the plaintiff in maintaining public respect for and preventing infringements upon the same; and further agrees that if, after the termination of his license, he shall continue to make, sell or use any machine or part thereof containing such patented inventions the plaintiff shall have the right to treat him as an infringer, and to sue out an injunction against him without notice.

There are other covenants in this contract which show that the plaintiff intended to reserve to itself a large supervision and control of the defendant's business; for example, in the second clause, wherein the defendant agrees to maintain a place of business in Chicago, keep on hand a stock of bicycles, and advertise his business by occupying and paying for one page space continuously, during the term of his license, in a certain periodical published in Boston, and in other publications of general circulation; and to advertise that it is licensed by the plaintiff. By the sixth clause he agrees to sell bicycles at retail, and not to sell to any person except upon terms and prices satisfactory to the plaintiff, and as shall first be submitted to and approved by it; and shall not have or sell to any agent in any other place than Chicago, nor pay nor allow freight beyond Chicago, nor any bonus, rebate, allowance or commission on sales. By the seventh clause he agrees to stamp the word "patented" on each machine, together with the dates of the patents under which each of the machines is made or sold, according to a list furnished by the plaintiff.

Opinion of the Court.

It is rarely that this court is called upon to consider so unique a contract, and we have found some difficulty in assigning to it its proper place among legal obligations. Its requirement is not merely that the licensee shall refrain during the term of his license from infringing other patents than those which he is expressly authorized to use, but shall forever afterwards, at least during the life of such patents, refrain from importing, making or selling articles covered by them, and from disputing the validity thereof or plaintiff's title thereto, and shall afford his moral aid and assistance in securing proper aid and respect for such patents. The exact nature and amount of moral suasion the licensee is bound to exert in behalf of the plaintiff is not specified, but is apparently left to be determined by the circumstances of the case.

(1) Ordinarily the law leaves to parties the right to make such contracts as they please, demanding, however, that they shall not require either party to do an illegal thing, and that they shall not be against public policy or in restraint of trade. It is argued with much earnestness here that this contract is open to the last objection, as an attempt to fetter the defendant from importing or making bicycles, in which he might otherwise have a perfect right to deal, and thus foreclose himself from the ability to earn an honest living in his chosen calling. It is scarcely necessary to say that, without this contract, the defendant would have no right to manufacture or sell bicycles covered by valid patents of the plaintiff, so that the contract is not needed for the protection of the plaintiff to this extent. The real question is whether the defendant can estop himself from disputing patents which may be wholly void, or to which the plaintiff may have no shadow of title. It is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are

treated as legal and binding. In certain cases a man may doubtless agree that he will interpose no defence to a specified claim, and that another may take judgment against him without notice. This is a matter of every-day occurrence in connection with what are termed judgment notes. But if one should agree for a valuable consideration that he would set up no defence to any action which another might bring against him and such other person might enter up judgment against him in any such action without notice, we think that no court would hesitate to pronounce such an agreement invalid. There are certain fundamental rights which no man can barter away, such, for instance, as his right to life and personal freedom, and, in criminal cases, the right to be tried by a jury of his peers. Courts have even gone so far as to say that a man cannot consent to be tried by a jury of less than twelve men, whatever may be the circumstances under which the twelfth man is taken from the panel. Cooley's Cons. Lims. 319. We are reluctant to say that a right to defend a whole class of unjust claims may not be one of these. It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly; and it is a serious question whether public policy permits a man to barter away beforehand his right to defend unjust actions or classes of actions, though, in an individual case, he may doubtless assent that a judgment be rendered against him, even without notice.

The reports are not entirely barren of authority upon this subject. Thus in *Crane* v. *French*, 38 Mississippi, 503, 530, 532, it was held that though a party may omit to take advantage of a right, such as the right to plead the statute of limitations, secured to him by law, he could not bind himself by contract not to avail himself of such right if it be secured to him on grounds of public policy. "But there appears to be," says the court, "a clear distinction between declining to take advantage of a privilege which the law allows to a party, and binding himself by contract that he will not avail himself of a right which the law has allowed to him on grounds of public

policy. A man may decline to set up the defence of usury, or the statute of limitations, or failure of consideration, to an action on a promissory note. But it would scarcely be contended that a stipulation inserted in such a note, that he would never set up such a defence, would debar him of the defence if he thought fit to make it. . . . Suppose, then, an agreement made by the maker of a note that he would not set up the defence of usury. Would an action lie for a breach of that agreement, in case the party should make the defence in disregard of it? It appears not, and the reason is, that the right to make the defence is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it. . . . With regard to all such matters of public policy, it would seem that no man can bind himself *by estoppel* not to assert a right which the law gives him on reasons of public policy." There are cases wherein it is held that a promise not to plead the statute of limitations is a good bar, but they are those wherein the promise was made after the cause of action had accrued, and where it was considered by the court as a new promise. There are a few cases, however, which hold that an agreement not to plead the statute, made upon the instrument, or at the time of its execution, may be pleaded as an estoppel. So in *Stoutenburg* v. *Lybrand*, 13 Ohio St. 228, it was held that a contract which provides that a defendant in a proceeding for divorce shall make no defence thereto, is against public policy, and therefore void. "The tendency of such agreements," said the court, "is to mislead the court in the administration of justice, and injuriously affect public interests." A like ruling was made in *Sayles* v. *Sayles*, 1 Foster (21 N. H.) 312; and in *Viser* v. *Bertrand*, 14 Arkansas, 267. So in *Bell* v. *Leggett*, 3 Selden (7 N. Y.) 176, 179, it was said that "all contracts or agreements which have for the object anything which is repugnant to justice, or against the general policy of the common law, or contrary to the provisions of any statute, are void;" and that this principle has often been applied by our courts to contracts which had for their objects the perversions of the ordinary

operations of the government. In that case a note given by a third person to a creditor in consideration of his withdrawing opposition to the discharge of a bankrupt debtor, was held to be void as against the policy of the law. In most of the States wherein the question has arisen it has been held that a debtor is not bound by his waiver of his homestead or other exemptions upon execution. *Kneettle* v. *Newcomb*, 22 N. Y. 249, 251. "In these cases," said the court, "the law seeks to mitigate the consequences of man's thoughtlessness and improvidence, and it does not, I think, allow its policy to be invaded by any language which may be inserted in the contract." The exigencies of this case do not require us to decide the question whether a man may or may not contract beforehand not to set up a certain defence to a particular action; but we are of the opinion that a contract not to set up any defence whatever to any suit that may be begun upon fifty different causes of action is in violation of public policy. See, as pertinent to this question, *Insurance Co.* v. *Morse*, 20 Wall. 445; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Barron* v. *Burnside*, 121 U. S. 186.

(2) But whether this contract be absolutely void as contravening public policy or not, we are clearly of the opinion that it does not belong to that class of contracts, the specific performance of which a court of equity can be called upon to enforce. To stay the arm of a court of equity from enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. This distinction was recognized by this court in *Cathcart* v. *Robinson*, 5 Pet. 264, 276, wherein Chief Justice Marshall says: "The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Coxe's Cases in Chancery, 77. It is said that the plaintiff must come into court with clean hands,

and that a defendant may resist a bill for specific performance, by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation or any unfairness, are enumerated among the causes which will induce the court to refuse its aid." This principle is reasserted in *Hennessy* v. *Woolworth*, 128 U. S. 438, 442, in which it was said that specific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, and always with reference to the facts of the particular case. *Willard* v. *Tayloe*, 8 Wall. 557, 567; *Marble Co.* v. *Ripley*, 10 Wall. 339, 357; 1 Story's Eq. Jur. sec. 742; *Seymour* v. *Delancey*, 6 Johns. Ch. 222, 224; *White* v. *Damon*, 7 Ves. 30, 35; *Radcliffe* v. *Warrington*, 12 Ves. 326, 331.

These principles apply with great force to the contract under consideration in this case. Not only are the stipulations in paragraphs 9 and 11 unusual and oppressive, but there is much reason for saying that they were not understood by the defendant as importing any obligation on his part beyond the termination of his license. Indeed, the operation of these covenants upon his legitimate business was such that it is hardly possible he could have understood their legal purport. The testimony upon this point was fully reviewed by the court below in its opinion, and the conclusion reached that the contract "was an artfully contrived snare to bind the defendant in a manner which he did not comprehend at the time he became a party to it." We have not found it necessary to go into the details of this testimony. While we are not satisfied that his assent to this contract was obtained by any fraud or misrepresentation, or that the defendant should not be bound by it to the extent to which it is valid at law, we are clearly of the opinion that it is of such a character that the plaintiff has no right to call upon a court of equity to give it the relief it has sought to obtain in this suit. We express no opinion upon the question whether an action at law will lie upon the

covenants of the ninth clause of the contract not to manufacture or sell the devices therein specified.

The decree of the court below dismissing the bill is, therefore,

Affirmed.

POPE MANUFACTURING COMPANY *v.* GORMULLY & JEFFERY MANUFACTURING COMPANY. (No. 1.) Appeal from the Circuit Court of the United States for the Northern District of Illinois. No. 205. Argued March 9, 10, 1892. Decided April 4, 1892. MR. JUSTICE BROWN delivered the opinion of the court.

The bill in this case appears to be brought against the defendants as successors of Gormully under the contract of December 1, 1884, which was also made the basis of the suit No. 204, just decided. As it is admitted in the brief that if the court refused relief against Mr. Gormully for want of equity in the prior suit, there is no reason why it should not refuse it in this case, it is unnecessary to go into its details.

The decree of the court below dismissing the bill is, therefore,

Affirmed.

Mr. Lewis L. Coburn and *Mr. Edmund Wetmore* for appellant.

Mr. Charles K. Offield and *Mr. W. C. Goudy* for appellees.

POPE MANUFACTURING COMPANY *v.* GORMULLY & JEFFERY MANUFACTURING COMPANY. (No. 2.)

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

No. 206. Argued March 10, 11, 1892. — Decided April 4, 1892.

Pope Manufacturing Co. v. *Gormully*, *ante*, 224, applied to this case so far as the plaintiff claims to recover for a violation of a contract.

Letters patent No. 252,280, Claims 1 and 2, issued January 10, 1882, to Curtis

Statement of the Case.

H. Veeder for "a seat for bicycles," when properly construed is not infringed by the defendant's Champion saddle.

Letters patent No. 197,289, Claim 2, issued November 20, 1877, to A. L., G. M. and O. E. Peters for an anti-friction journal box, are void for want of novelty.

Letters patent No. 245,542, issued August 9, 1881, to Thomas W. Moran for velocipedes, if it involves any invention, is void for want of novelty in the alleged invention protected by them.

Claims 1 and 3 in letters patent No. 310,776, issued January 13, 1885, to William P. Benham for improvements in velocipedes are void for want of novelty in the alleged invention protected by them.

The second and third claims in letters patent No. 323,162, issued July 28, 1885, to Emmit G. Latta for a mode of protecting the pedals of a velocipede with india-rubber are void for want of invention; as it is clear that the coating of pedals to prevent slipping being conceded to be old, the particular shape in which they may be made is a mere matter of taste or mechanical skill.

The court stated the case as follows:

This was a bill in equity for the infringement of eight patents granted to different parties for devices used in the manufacture of bicycles and velocipedes. Upon a hearing in the court below the bill was dismissed, and the plaintiff appealed to this court. 34 Fed. Rep. 885.

The assignment of errors covers only five patents:

1. Patent No. 252,280, issued January 10, 1882, to Curtis H. Veeder, for "a seat for bicycles," which the court below held to be limited by previous patents to Lamplugh and Brown, to Shire and to Fowler, and as so limited, not to have been infringed by the defendants.

2. Patent No. 197,289, issued November 20, 1877, to A. L., G. M. and O. E. Peters for an anti-friction journal box, which was held to be anticipated, and, if not anticipated, not to have been infringed.

3. Patent No. 245,542, issued August 9, 1881, to Thomas W. Moran for handles for velocipedes, which the court held did not involve invention, and was void.

4. Patent No. 310,776, issued January 13, 1885, to William P. Benham, for improvements in velocipedes, which the court held had not been infringed by the defendants.

5. Patent No. 323,162, issued July 28, 1885, to Emmit G. Latta, for an improvement in velocipedes, which the court, in view of the state of the art, held to be void for want of novelty.

Mr. Lewis L. Coburn and *Mr. Edmund Wetmore* for appellant.

Mr. Charles K. Offield for appellees. *Mr. W. C. Goudy* was with him on the brief.

Mr. Justice Brown delivered the opinion of the court.

The bill in this case, in addition to the usual allegations of a bill for the infringement of a patent, sets forth as a distinct ground for recovery the violation of the contract of December 1, 1884, which it was claimed was obligatory upon the defendants. As this claim was, however, disposed of in the cases Nos. 204 and 205, just decided adversely to the plaintiff, upon grounds which are equally available here, we shall take no further notice of it. The case is, therefore, resolved into an ordinary suit for the infringement of a patent.

(1) Patent No. 252,280, to Curtis H. Veeder, is for a "seat for bicycles." In his specification the patentee states that his "improvements relate to the class of seats known as 'saddles,' and especially to devices for suspending the leather or other flexible material of which the seating-surface is composed, and for stretching or taking up the slack in the same, and for connecting the same with the perch or supporting-bar for the seat, and by means of which the seat is made adjustable backward and forward over the perch or bar; and my present invention . . . consists, first, in a divided metallic spring, or supporting-plate for the flexible seat; second, in a modification of that portion of said metallic spring which forms the framework for the rear of the seat; third, in mechanism for elongating or extending said metallic spring so as to take up the slack of the flexible seat; and fourth, in mechanism for completing the support of the seat and connecting the same with the perch or supporting-bar of the vehicle, so as to be adjustable backward and forward thereon."

He further states that he is aware "that a spring has been used to support the seat or saddle of a bicycle," and, therefore does not claim the general application of a spring for this purpose, but does claim:

"1. A suspension-saddle, constructed with a flexible portion C, and having an under spring in two or more parts, B D, to which the flexible portion is attached at either end, and which metallic parts are extensible, substantially as and for the purposes set forth.

"2. In a velocipede seat, the combination of plates B and D, clamp F, stop b^2, adjusting bolt F^1, substantially as shown and described."

Referring to the state of the art, as disclosed by prior patents, there appears in the patent of John C. Miller, of April 10, 1866, a saddle seat suspended at both ends upon springs; the seat, however, has a framework of iron, and consequently is not flexible, and, of course, has no provision for taking up the slack. In the patent to Fowler of 1880, there is a saddle seat, suspended at the front end upon a coil spring, and at the rear end upon a long plate spring; the seat is rigid, however, and lacks the flexibility which characterizes the Veeder patent, and there was apparently no provision for mutual adjustment of the springs. The Shire patent of 1879 has a flexible saddle seat, the front end of which is attached to a strap which passes through a loop, and is susceptible of being shortened or lengthened by means of a buckle. It also has an under spring to which is attached the forward end of the flexible saddle. It differs principally from the Veeder patent in the fact that the slack is taken up by means of a strap and buckle, instead of by an adjustment of the two springs of the Veeder patent. The Bishop patent of 1859 exhibits a flexible seat suspended upon springs at either end, but it also lacks the adjustable feature.

None of these prior patents exhibit a flexible seat supported at either end by two parts of a spring, which are made adjustable relatively to each other, in such manner as to take up the slack; and for the purposes of this case it may be conceded that there was invention in this device, notwithstanding that

other patents showed flexible seats suspended upon springs at either end, and in some cases with the feature of adjustability. The Veeder patent, however, differs no more from the prior patents than do the defendant's saddles from it. In the defendant's Champion saddle a flexible saddle is supported at either end upon springs, the rear one being made adjustable in such a way as to take up the slack. But as Veeder's invention, in view of the state of the art, is a very narrow one, we think it cannot be properly considered as covering the defendant's device. The springs of the defendant's saddle are not only wholly different in form from those of the Veeder patent, but there is no relation between them, the rear one being independently adjustable. The feature of extensibility does not pertain at all to the springs, but to the peculiar manner in which the rear spring is adjusted to the perch. If Veeder had been the first to invent a saddle supported upon springs, or a flexible spring seat capable of adjustment, it might be thought that the defendants could be held to infringe, though they do not employ the double spring of the Veeder patent, but in view of the state of the art, we think the court below was correct in holding that there was no infringement.

(2) Patent No. 197,289 to the Peters is for an "improvement in anti-friction journal boxes" for overcoming the friction of the bearing of all vehicles mounted on wheels, and the journals of all revolving shafts, etc. The invention is "a combination of rollers or cylinders, made of iron, steel or any suitable metal or other material, of sufficient number and suitable in length, size, and form, which revolve around the spindle or bearing of the axle within the hub of the wheel, and around the journal or bearing of the shaft or cylinder, and within the journal box, the rollers being independent of the bearing and the hub or journal box."

The only claim in issue in the case is the second, which is for "the bearings with the shoulder bevelled or notched, combined with the nut, or its equivalent, correspondingly bevelled or notched, as shown in figure 4."

This patent is in substance for a method of overcoming the friction of an ordinary journal by causing the same to revolve

upon elongated rollers, whose action is guided and secured by putting them in a cage, so that their relative relations to each other in their revolution shall be the same. "To support and keep the rollers from running against one another and thereby producing friction, both ends of each are made with a bearing, which goes into rings, or their equivalents, in such a manner as to allow the rollers to turn freely on their bearings as they revolve around the bearing of the axle or shaft. These rings may be flat, or one or both sides rounding or oval, and of one entire piece, or made in sections or parts, and the parts fitted or hinged together in such a manner as to form the required ring." "To retain the wheel on the bearing of the axle, as the wheel of a common road-vehicle, the ordinary nut in use for that purpose, or its equivalent, is made to bevel in conformity with the bevelled ends of the rollers, and the bearing or axle at the inner ends of the rollers is made with a bevelled shoulder to correspond with the ends of rollers."

The patent to Allcott, of March 29, 1870, has also for its "object the diminution of friction in ordinary axle boxes, and consists in constructing the hub box larger than the journal of the axle, and filling the space between the journal and the box with longitudinal metallic rollers, of which two sizes are employed, the larger and smaller alternating, and more completely filling said space." The axle is formed with a grooved flange and the journal with a similarly grooved or bevelled nut. The ends of the rollers are also somewhat bevelled to correspond with the tapering portions of the journal and nut. When the bevelled ends of the rollers become worn down the bevelled sleeve on the nut may be filed down, and the nut screwed up, thus keeping the rollers from any longitudinal motion.

This patent seems to be very nearly, if not quite, a complete anticipation of the Peters patent. Such differences as exist between them are of minor consequence; the bevelled shoulder combined with the bevelled nut or its equivalent being present in, and the essential feature of both patents. In any view of the case it required no invention to make the slight alterations apparent in the Peters patent.

In addition to this, however, the Jewett patent of May, 1868, shows "a journal or axle box, provided with a series of spherical balls, which are placed in a circular recess or chamber, and revolve in contact with the journal or axle, thereby reducing the friction to a great extent, and entirely avoiding the necessity of employing oil or other lubricating material." The grooves of this patent at the opposite ends of the axles are practically the same in their operation as the bevelled shoulder and nut of the Peters patent, the balls giving both vertical and lateral support, and preventing endwise movements. Similar arrangements are shown in the patent to Perley of 1863, and the English patent to Mennons of 1860.

There was also a patent issued to one Smith upon the same day the Peters patent was issued, namely, November 20, 1877, but upon an application filed September 1, 1877, prior to Peters' application, and, therefore, anticipating Peters' patent, in which was represented an axle formed with a spindle, having a collar at its inner end, in which collar was a circumferential half-round groove. The outer end of this spindle is reduced in circumference, and another collar is placed thereon and fastened by a screw, this collar being also provided with a similar groove. In each collar is placed a series of anti-friction balls, which are of such diameter as to be one-half within the groove in the collar. The other half of the ball is within a groove formed one-half in the hub and the other half in the flange upon an annular plate. The operation of this patent is practically the same as that of the device used by the defendant.

This device appears to be, however, a minor variation upon the English provisional specification of 1853 to Chinnock, which also consisted in securing the axle in the box by means of one or more spherical balls running in a circular channel, formed partly in the axle and partly in the box in which it fits. Defendants are the owners of and manufacturing under this patent, and the fact that this and the Peters' applications were pending before the Patent Office at the same time, and that patents were issued upon the same day, is strong evidence that they were not even considered as competitive inventions.

As the defendant's manufacture was not of the elongated rollers of the Peters' patent, but of the spherical balls of the Chinnock, Jewett and other patents, it would seem to follow that, if its device be an infringement of the Peters' patent, the Peters' patent itself must be an infringement of the prior ball-bearing patents.

(3) The Moran patent, No. 245,542, of August 9, 1881, is for a handle for velocipedes, and consists simply in providing rubber handles for counteracting the jar on the hands in travelling, and preventing injury to the machine when falling. The claims are:

"1. The handle of a velocipede provided with rubber ends, as set forth.

"2. The handle of a velocipede, in combination with rubber tips sleeved upon its ends as set forth.

"3. A rubber handle for a velocipede, consisting of a ball and neck combined in one piece as set forth."

Briefly stated, this patent is for nothing more nor less than the application of a rubber ball or cushion upon the extremities of the handle. The patentee states in his specification that he only claims this rubber in its application to velocipedes, it being a not uncommon device as applied to other handles. We have very grave doubt as to whether this involves any invention; but if it does, it is fully anticipated in the English patent to Harrison, of July, 1877, which exhibits a similar method of covering the handles of bicycles with a sheath or glove of india-rubber. There is a slight difference in the form of the sheath in this case, but it is identical in principle, and used for the same purpose. Indeed, the defendant in this connection seems to rely not upon the validity of his patent, but upon the estoppel alleged to have arisen under the contract of 1884, which we have already held not to exist.

(4) Patent No. 310,776, to Benham, is for a method of attaching the horizontal handle bar to the steering head of a bicycle, and consists in making the handle bar, which may be either solid or tubular, continuous, and attaching to the middle of it a lug or detent, which serves not only to locate the handle bar evenly and quickly by an even division of its length on

either side of the middle line of the head, but also to prevent the handle bar when in position from turning or revolving on its axis. The first and third claims of the patent, which are alleged to be infringed, are as follows:

"1. The combination of an undivided bar and an open-slotted lug, and two sleeve-nuts, or their equivalents, one on either side the lug, surrounding the bar and adapted to lock it rigidly to the lug, essentially as set forth."

"3. In combination with the handle-bar B, the detent D, constructed and adapted to operate substantially as and for the purposes set forth."

The patent is really for making the handle-bar in one piece and so attaching it to the steering head of the bicycle as to prevent any lateral or rotary movement. This is done by the use of sleeve-nuts surrounding the handle-bar and engaging with threaded portions of a lug through which the bar is thrust.

If there be any scope for invention in the attachment of a horizontal bar to a vertical one in such manner that it shall be firm and immovable in any direction, this device appears to have been substantially anticipated by the English patent to Illston, issued in 1879, which shows substantially the same elements operating for the same purpose, and in substantially the same manner. Illston states that he makes "near the top of the head of the bicycle or tricycle a cross-hollow bracket open at its ends and top," corresponding to the open-slotted lug of the Benham patent. "The said bracket has externally a nearly cylindrical figure, and its ends are furnished with convex screws. . . . On each side of the middle flattened part of the handle-bar is a sliding collar milled externally, and screwed internally with a concave screw proper to fit on the convex screw at the end of the hollow or trough bracket on the head." The screw collars of this patent correspond very closely with the sleeve-nuts of the Benham patent.

Upon the whole, it does not seem to us that there was any patentable difference between these two devices, and if there were, we agree with the opinion of the court below, that it is certainly not infringed by the defendants, who, while they use

an undivided handle-bar, have adopted a different method for fastening the same to the steering head, and do not use either the complainant's open-slotted lug and two sleeve-nuts or their detent.

(5) Patent No. 323,162, of July 28, 1885, to Emmit G. Latta, relates to a form of protecting or cushioning the pedals of a velocipede with india-rubber. There are eight claims to this patent, the second and third only of which are alleged to be infringed. They are as follows:

"2. The combination, with the pedal-frame, of a rubber pedal-bar, H, provided with a central longitudinal groove, *h*, and two bearing-surfaces, h^1 h^1, on opposite sides of the groove, *h*, substantially as set forth.

"3. The combination, with the pedal-frame, of a rubber pedal-bar, H, pivoted to the frame by a rod, *i*, and provided on each of its sides with a longitudinal groove, *h*, and two bearing-faces, h^1 h^1, on opposite sides of the groove, whereby the bar, H, is adapted to receive the pressure at its sides or edges and be compressed on opposite sides of the rod *i*, substantially as set forth."

The invention in these claims consists in the pedal-bar, combined with the pedal-frame, the pedal-bar being rubber, constructed with grooves and bearing-faces; the second claim providing for the bar being pivoted to the frame, so that it works easily either side up, and will turn on its bearings as the foot presses on the front face or the rear face of the pedal. The pedal is centrally grooved and has two bearing-faces, one on each side of the centre-rod on which it is pivoted.

The application of india-rubber to foot-pedals is shown in the English patent to Harrison of July, 1877, to prevent the slipping of the feet on the pedals. This rubber is made corrugated, and is placed in the same position upon the pedals as the ordinary smooth surface rubber had been placed. The English patent to Jackson of 1876, also shows a treadle cast in one piece, having suitable grooves formed therein to allow of india-rubber being affixed within them by means of cement. It is entirely clear that the coating of pedals to prevent slipping being once conceded to be old, there is no novelty in the

particular shape in which these rubber coverings are made, or the form which the corrugations or groovings shall take; it is a mere matter of taste or mechanical skill.

If there be any novelty at all in the Latta patent it must receive such an exceedingly narrow construction that the defendant cannot be held to have infringed it.

In short, the patents which are made the basis of this bill are, in view of the state of the art, all of them of a trivial character, and, so far as they possess any merit at all, are not infringed by the devices employed by the defendant.

The decree of the court below dismissing the bill, is, therefore,

Affirmed.

POPE MANUFACTURING COMPANY *v.* GORMULLY & JEFFERY MANUFACTURING COMPANY. (No. 3.)

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

No. 207. Argued March 10, 11, 1892. — Decided April 4, 1892.

The monopoly granted by law to a patentee is for one entire thing, and, in order to enable an assignee to sue for an infringement, the assignment must convey to him the entire and unqualified monopoly which the patentee holds in the territory specified.

A conveyance by a patentee of all his right, title and interest in and to the letters patent on velocipedes granted to him, so far as said patent relates to or covers the adjustable hammock seat or saddle, is a mere license.

Claim 1 in letters patent No. 314,142, issued to Thomas J. Kirkpatrick March 17, 1885, for a bicycle saddle, when construed with reference to the previous state of the art, is not infringed by the defendants' saddle.

This was a bill in equity for the infringement of two letters patent, namely, No. 216,231, issued to John Shire, June 3, 1879, for an improvement in velocipedes, and second, patent No. 314,142, issued March 17, 1885, to Thomas J. Kirkpatrick, for a bicycle saddle.

Both patents were contested by the defendant upon the grounds of their invalidity and non-infringement, and in addition thereto it was insisted that plaintiff had no title to the

Shire patent. Upon the hearing in the court below, the bill was dismissed, and plaintiff appealed to this court. 34 Fed. Rep. 893.

Mr. Lewis L. Coburn and *Mr. Edmund Wetmore* for appellant.

Mr. Charles K. Offield for appellees. *Mr. W. C. Goudy* was with him on the brief.

Mr. Justice Brown delivered the opinion of the court.

There are two patents involved in this case, both of which relate to what is known as hammock saddles for bicycles.

(1) The second claim of the Shire patent, No. 216,231, which is the only one alleged to be infringed, and the only one to which the plaintiff appears to have the title, is as follows:

"2. In a velocipede, an adjustable hammock seat J, substantially as set forth."

Plaintiff derives its title to this patent by assignment from Thomas Kirkpatrick, who himself claimed title to it from Shire, the patentee, under the following instrument:

"Be it known, that I, John Shire, of Detroit, Wayne County, Michigan, for and in consideration of one dollar and other valuable considerations to me paid, do hereby sell and assign to Thomas J. Kirkpatrick, of Springfield, Clark County, Ohio, all my right, title and interest in and to the letters patent on velocipedes granted to me June 3, 1879, and No. 216,231, including all rights for past infringement so far as said patent relates to or covers the adjustable hammock seat or saddle, except the right to use said seat or saddle in connection with the velocipede made by me under said patent, in my business at Detroit.

"Signed and delivered at Detroit, this 10th day of July, 1884.

"John Shire.

"Witness: J. M. Emerson."

The instrument should evidently be read as though there were a comma after the word "infringement," as the following words are evidently intended as a limitation upon the prior granting clause. It is then only so far as this patent "relates to or covers the adjustable hammock seat or saddle," that the patentee conveys his right to the same to Kirkpatrick. The patent itself contains four claims, and covers not only the adjustable hammock seat mentioned in the second claim, but three combinations set forth in other claims, of which the hammock seat is an element in only one.

Did this instrument, then, vest in Kirkpatrick the legal title to that element in the patent embodied in the second claim, or was this a mere license giving him a right to make, use and sell the device in this claim, but not vesting in him the legal title, or enabling him to sue thereon in his own name, nor to convey such right to the plaintiff? It really involves the question, which is one of considerable importance, whether a patentee can split up his patent into as many different parts as there are claims, and vest the legal title to those claims in as many different persons. This question has never before been squarely presented to this court, but, in view of our prior adjudications, it presents no great difficulty. The leading case upon this subject is that of *Gayler* v. *Wilder*, 10 How. 477, 494, wherein it was held that the grant of an exclusive right to make and vend an article within a certain territory, upon paying to the assignor a cent per pound, reserving to the assignor the right to use and manufacture the article by paying to the assignee a cent per pound, was only a license, and that a suit for the infringement of the patent right must be brought in the name of the assignor. While that of course was a different question from the one involved in this case, the trend of the entire opinion is to the effect that the monopoly granted by law to the patentee is for one entire thing, and that in order to enable the assignee to sue, the assignment must convey to him the entire and unqualified monopoly which the patentee held, in the territory specified, and that any assignment short of that is a mere license. "For," said Chief Justice Taney, "it was obviously not the intention of the leg-

islature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place. Unquestionably, a contract for the purchase of any portion of the patent right may be good as between the parties as a license, and enforced as such in the courts of justice. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it." As the assignment was neither of an undivided interest in the whole patent, nor of an exclusive right within a certain territory, it was held to be a mere license.

In *Waterman* v. *Mackenzie*, 138 U. S. 252, an agreement by which the owner of a patent granted to another "the sole and exclusive right and license to manufacture and sell" a patented article throughout the United States, (not expressly authorizing him to use it,) was held not to be an assignment, but a license, and to give the licensee no right to sue in his own name. The language used by the court in this case was a reaffirmance of that employed by Chief Justice Taney in *Gayler* v. *Wilder*, to the effect that the monopoly granted by the patent laws is one entire thing, and cannot be divided into parts, except as authorized by those laws; and that the right of the patentee to assign his monopoly was limited, either, first, to the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or, second, to an undivided part or share of that exclusive right; or, third, to the exclusive right under the patent within and throughout a specified territory. Rev. Stat. 4898. "A transfer," said the court, "of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so

much of the patent itself, with a right to sue infringers: in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement."

We see no reason to qualify in any way the language of these opinions. While it is sometimes said that each claim of a patent is a separate patent, it is true only to a limited extent. Doubtless separate defences may be interposed to different claims, and some may be held to be good and others bad, but it might lead to very great confusion to permit a patentee to split up his title within the same territory into as many different parts as there are claims. If he could do this, his assignees would have the same right they now have to assign the title to certain territory, and the legal title to the patent might thus be distributed among a hundred persons at the same time. Such a division of the legal title would also be provocative of litigation among the assignees themselves as to the exact boundaries of their respective titles. We think the so-called assignment to Kirkpatrick was a mere license, and did not vest in him or his assigns the legal title to the second claim nor the right to sue in his own name upon it.

This disposition of the assignment renders it unnecessary to discuss the validity of the patent.

(2) Patent No. 314,142, to Thomas J. Kirkpatrick, issued March 17, 1885, contains four claims, the first one of which is relied upon to sustain this bill. This claim is as follows:

"1. The combination, with the perch or backbone of a bicycle or similar vehicle, of independent front and rear springs secured to said perch or backbone, and a flexible seat suspended directly from said springs at the front and rear, respectively, substantially as set forth."

"My invention," says the patentee in his specification, "consists in a peculiar arrangement of front and rear springs secured independently to the reach or 'backbone' of the machine in connection with the flexible seat suspended at the front and rear from said springs. . . . These springs, D

and E, are secured independently to the perch or backbone A, each spring being preferably secured as nearly as practicable under the end of the saddle to which said spring is attached. . . . In order to extend the suspended flexible seat as far forward as possible, and at the same time secure the full elasticity of the forward spring D, I construct the said spring with two wings, b^1 b^2, adapted to extend forward of the head B, and turn upward and backward to connect with the forward end of the seat C."

If this claim be extended, as is insisted by the appellant, to include every device by which a flexible seat is suspended upon the perch or backbone of a bicycle by independent springs at the front and rear ends of such seat, it is anticipated by several patents put in evidence by the defendants. Thus in the Fowler patent of 1880, a saddle seat is shown to be suspended above the perch or backbone upon a coil spring in front and with a grooved leaf spring in the rear, these springs being entirely independent of each other. In the Fowler patent of 1881 there is exhibited a saddle seat suspended from the backbone by independent front and rear springs, though there may be some doubt whether the seat in either of these cases is flexible. There is no doubt, however, that in the Veeder patent of 1882 there is a flexible saddle seat carried upon the perch or backbone of a bicycle, and resting upon two parts of the same spring, which, however, cannot be said to be entirely independent of each other. Evidently, however, the feature of flexibility cuts no figure in this case, since it would manifestly require no invention to adapt the Fowler saddles to a flexible seat.

In view of these patents, the Kirkpatrick patent cannot be sustained for the combination indicated without the qualification, "substantially as set forth," at the end of the claim, which limits it to a forward spring adapted to extend forward of the head and turn upward and backward to connect with the forward end of the seat; the effect of this being to throw the seat as far forward as possible, and to render unnecessary any intervening mechanism or device between the forward end of the saddle and the perch.

Statement of the Case.

Limited in this way, it is clear the defendants do not infringe, making use, as they do, of springs, which are not only quite different from the Kirkpatrick springs in their design, but omit the important particular of projecting in front of the steering post.

There was no error in the action of the court below, and its decree is, therefore, *Affirmed.*

POPE MANUFACTURING COMPANY *v.* GORMULLY & JEFFERY MANUFACTURING COMPANY. (No. 4.)

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

No. 208. Argued March 10, 11, 1892. — Decided April 4, 1892.

Pope Manufacturing Company v. *Gormully*, *ante*, 224, applied to this case so far as the claim for recovery based upon contract is concerned.

Claims 2 and 3 in letters patent No. 249,278, issued November 8, 1881, to Albert E. Wallace for an axle bearing for vehicle wheels are void for want of novelty.

Claims 2 and 3 in letters patent No. 280,421, issued July 3, 1883, to Albert E. Wallace for an improvement upon the device covered by his patent of November 8, 1881, are also void for want of novelty.

THIS was a bill in equity for the infringement of letters patent No. 249,278, issued November 8, 1881, to Albert E. Wallace, for an axle bearing for vehicle wheels; and patent No. 280,421, issued July 3, 1883, to the same person and for a similar device. In addition to the usual allegations of the bill for an infringement, it was alleged that the defendants were bound by certain covenants in the contract of December 1, 1884, entered into with the plaintiff, in which they acknowledged the validity of these patents, and agreed not to manufacture ball bearings such as described and shown, and made the subject matter of its claim, and that they are, therefore, estopped to deny the validity of such patents; and that it was also stipulated in said agreement that the devices such as were being made by the defendant were contained in said

patents, and covered by the claims thereof, whereby the defendants were estopped to deny infringement.

The court below held that the defendants were not estopped by this contract; that the patents were invalid; and that, if valid, they were not infringed; and dismissed the bill, from which decree the plaintiff appealed to this court. 34 Fed. Rep. 896.

Mr. Lewis L. Coburn and *Mr. Edmund Wetmore* for appellant.

Mr. Charles K. Offield for appellees. *Mr. W. C. Goudy* was with him on the brief.

Mr. Justice Brown delivered the opinion of the court.

As we have already held, in the case between the plaintiff and defendant Gormully, No. 204, that the contract of December 1, 1884, did not operate to estop the defendants from contesting the validity of these patents, it is not necessary to consider this case any farther so far as the claim for recovery based upon this contract is concerned. The case must be tried as an ordinary suit in equity for the infringement of a patent.

(1) Patent No. 249,278, to Albert E. Wallace, is for an improvement in axle bearings for vehicle wheels. The object of the invention seems to have been the construction of a ball bearing in two parts in such manner as to admit of the wear of the balls being taken up gradually, as the wear progresses, in order to keep the bearings tight. In reference to this he says in his specification:

"Heretofore many anti-friction bearings have been made and described, including various forms of ball bearings, and the latter class have been constructed so as to be adjustable for wear by having the bearing-box made in two or more parts, and so that they may be made to approach each other to tighten the bearings. In respect to bearings for light wheels, particularly for bicycles, it is desirable to make the

parts as light and snug and of as little material as possible, consistently with strength. To make them true — that is, so that the balls shall be perfect spheres — and of even diameter, and that the bearing surfaces in which they revolve shall be of even distance apart, and of even curvature and shape, and shall be kept so, and that in putting together and adjusting the bearing parts shall be made to approach each other with perfect evenness. It is also desirable to make the parts and their joints as few as possible, so that the structure composed of them when put together and in operation shall not be liable to displacement, breakage or accident.

"It is the object of my improvement to secure these desirable qualities in an adjustable anti-friction ball-bearing, and to obviate the difficulties and imperfections existing in previous attempts in this direction."

The second and third claims only are alleged to have been infringed. They are as follows:

"2. The described anti-friction bearing for a wheel and axle, consisting of a one-part bearing-box and a two-part sleeve, having a circular row of balls within said box and between bearing surfaces in the box and on either part of the sleeve, and adapted for adjustment for wear and securement in position on an axle by a screw-thread at the outer end of one part of the sleeve, operating to draw it toward and from the other part, substantially as set forth.

"3. The described anti-friction bearing for a wheel and axle, consisting of a two-part collar or sleeve adapted to inclose the axle, a one-part bearing-box inclosing said sleeve and containing a recess with bearing surfaces, between which and a bearing surface on either part the said sleeve is held, a circular row of balls combined and constructed essentially as shown and described, for securement in position and adjustment for wear by the pressure of one part of the sleeve against the hub of the wheel, and by an external thread on the other part of the sleeve operating in an internal thread in a boss secured to the axle on the opposite side, substantially as set forth."

In reference to the adjustability of his device he says that "it is obvious that this bearing will be readily adjustable to

compensate for any wear of the bearing parts by simply loosening the set screws, and turning the collar S^1, so that the thread shall force it farther into the bearing-box, the impinging of the surface, p^1, upon the balls tending to send them to and a properly close bearing upon the surfaces, qq and pp^1, as in putting the parts together."

The essence of this patent, as we gather from the drawings and the application, consists of two sleeves sliding upon the axle from opposite directions, the inner ends of which are each bevelled, so that when the ends are brought together, or nearly so, they will form a V-shaped groove upon the axle, the inner one of these sleeves resting upon the hub of the axle, and the outer one connected with the crank, both the crank and the sleeve being threaded with a screw. Upon the axle is fitted a solid bearing-box with a similar V-shaped groove containing metallic balls, and adapted to be partly retained in the groove upon the axle formed by the two bevelled sleeves, one of which is made adjustable, so as to approach very near to or in contact with the other sleeve, and thus take up the wear of the balls by narrowing the V-shaped groove in which they are contained.

The use of ball-bearings for bicycle and other wheels was so common at the date of this patent that it is needless even to allude to the large number of prior patents upon this subject.

Bearing in mind that the peculiarity of this patent consists in a sleeve of two parts adapted for adjustment for wear and securement in position by a screw-thread at the outer end of one part of the sleeve, operating to draw it toward and from the other part, we find practically the same device in the English patent to James Bate, for improvements in velocipedes, dated November 14, 1878. Figure 20 of this patent indicates in section a method of affixing and adjusting the cones of a velocipede front or back axle bearing. A fixed cone corresponding to the plaintiff's sleeve, S, is screwed on to a spindle, and has a sleeve formed solid therewith, and screwed inside and out. Another adjustable cone, corresponding to plaintiff's sleeve, S^1, is screwed upon the sleeve and is locked by a nut or collar, also screwed upon the sleeve. The groove corre-

sponding to the V-shaped groove of the plaintiff's patent is formed by the contact of these two cones, precisely as in the Wallace patent, and the feature of adjustability is attained by screwing the adjustable cone upon the sleeve as far as necessary to tighten the bearings, and even up to actual contact with the fixed cone. So far as the object to be accomplished is concerned, it makes no difference which one of these cones is adjustable, so long as it affords opportunity for a gradual tightening of the bearing. If there be any difference between this and the Wallace patent, it is not such a difference as affects the essential feature of both, namely, that of adjustability, or such as to involve any patentable novelty.

The English patents to Lewis, of 1879, and to Bown and Hughes, of March, 1880, also exhibit a somewhat similar device of a loose adjustable cone, but the resemblance to the Wallace patent is not so obvious as in case of the Bate patent.

As the Bate patent anticipates every valuable feature of the second and third claims of the Wallace patent, it is unnecessary to consider the question of infringement.

(2) Patent number 280,421, granted July 3, 1883, to the same party, is for an improvement upon the device covered by the prior patent, and consists in providing the inner sleeve of that patent, which surrounds the axle and rests against the hub of the wheel, with a flange annulus, and attaching to the hub and wheel a locking-button, which engages with notches or teeth on the edge of the annulus, and locks it to the hub so that the sleeve will always turn with the axle or hub. This construction also provided for an adjustment of the inner sleeve on the axle as well as the outer sleeve.

Another modification of this patent not contained in the first, consists in the construction of the bearing-box. In the first patent the bearing-box was attached directly to the frame of the machine, while in the second it is placed within a shell, which in turn is attached to the frame of the machine.

The claims of this patent alleged to be infringed are the second and third, which read as follows:

"2. Constructed and combined substantially as herein set forth, a two-part sleeve, a bearing-box, a row of balls, a ser-

rated annulus, and a locking-button, with an axle and hub and flange, essentially as shown and described.

"3. The combination, in a ball-bearing device, of a free bearing-box G, and a shell-case E, substantially as set forth."

This patent contains in addition all the substantial features of the first patent. Neither of them presented any lateral or side bearing for the bearing-box, its entire bearing being through the balls, both to support the weight vertically and to resist the thrust. Both have two sleeves surrounding the axle. In the first patent, one sleeve was adjustable, while in the other the second sleeve was also made adjustable, and provided with an annular flange serrated on its circumference to engage with a locking-button to lock it at any desired adjustment to the flange. A similar serrated ring, with a corresponding locking device, is found in the English patent to Monks, of 1880, who states that he employs "a turned bush, conical at the outer end, and a somewhat similar one which is screwed upon the outside of the first said bush. In the V-shaped groove, which is formed by these two bushes, when in position, I arrange a series of balls which rotate between the bushes and the lower part of the fork, which forms a cap, somewhat circular, with a segmental groove in it for the balls to work in. . . . The outer end of the bush is formed into a milled or rachet-head, and is prevented from turning round after adjustment by means of a pawl fastened to a plate, my object being adjustment in a simple and efficacious manner when required." The shell-case described in the third claim of this patent seems to be found in the Salamon bearing patent of 1880, and the Jeffery patent of 1883, under the latter of which the defendant is manufacturing. The patent, though issued the same year as the Wallace patent, antedates it, both in respect to the application and the patent itself. We agree with the conclusion of the court below, that "with these old devices found in the art it seems clear to us that the defendants had the right to use the ball-bearing boxes which are shown by the proof to have been embodied in their machine."

It may be said of both of these patents that they are mechanical adaptations of or variations from what had before

been exhibited by the English patents, rather than inventions of anything essentially novel. They appear to involve such immaterial changes as would be required to adapt a known device to use in a combination with other elements already existing, and such as would occur to any skilled mechanic. Indeed, the object of these patents, and the same remark may be made of all, or nearly all, involved in these suits, seems to have been principally to forestall competition, rather than to obtain the just rewards of an inventor. It is true the defendants make use of devices similar in many particulars to those employed by the plaintiff, but they, too, seem rather to have adopted prior and known devices, and fitted them to the peculiar construction of their machine, rather than to have purloined them from the plaintiff.

These cases are not without their difficulties, owing somewhat to the complicated nature of some of the devices, the number of anticipating patents, the difficulty of determining how far the later ones are merely colorable variations of the prior ones, and how far they involve invention; but upon the best consideration we have been able to give them we have seen no reason to differ from the judgment of the court below in its estimate of their value.

The decree of the Circuit Court is, therefore,

Affirmed.

McLANE *v.* KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

No. 235. Argued and submitted March 24, 1892. — Decided April 4, 1892.

In this suit the property of a corporation in a bridge constructed by it over the San Antonio River is held to have been lawfully transferred by the foreclosure of a mortgage upon it.

THIS suit was originally commenced in the District Court of Karnes County, Texas, on September 12, 1882, and thereafter

properly removed to the Circuit Court of the United States for the Western District of Texas. The facts as disclosed by the bill were, that in 1876 there existed a corporation, known as the Helena Bridge Company, and organized for the purposes of building an iron bridge over the San Antonio River at the town of Helena. The defendants King & Son had a contract with the bridge company for the full construction of the bridge, payment therefor to be made partly by the transfer of $10,000 of full-paid stock and partly in notes of the corporation, secured by a mortgage on the bridge. The stock was never issued, but the notes and mortgage were duly executed and delivered. King & Son contracted with the plaintiff Ruckman to do part of the work. By the terms of this contract they were to have transferred to Ruckman, in full payment of his work, the $10,000 of stock. This contract was fully performed by Ruckman, and in the amount due thereon McLane became jointly interested. In 1880, King & Son brought suit on the notes and mortgage; which suit resulted in a judgment for $10,919, and a decree of foreclosure. Subsequently, on proper process, they purchased the property, and still hold it. The object of the suit was to have the plaintiffs decreed to be jointly interested with the Kings in the bridge, and for an accounting of tolls and the profits arising therefrom. For the purpose of invalidating the legal effect of the foreclosure proceedings, it was alleged that such proceedings were instituted and prosecuted "with the fraudulent intent and purpose, then and there entertained by the said Z. King and James A. King, and actuating them in the premises, to obtain possession of the said bridge and its appurtenances, being the only property of value belonging to said Helena Bridge Company and the only revenue-producing property thereof, to render the stock of said Helena Bridge Company worthless in the hands of the holders, and thereby to render the performance of their contracts to deliver stock to these complainants in the said bridge company unavailing and ineffectual if literally executed; and complainants here charge that it was the understanding and agreement of the parties to said contracts between said Z. King & Son and

these complainants for the delivery of said stock, as set forth in complainants' original bill, that the stock should be good and valuable stock, worth fully dollar for dollar in the public market, and that by the institution and prosecution of their said suit against said Helena Bridge Company, and by their taking possession of the said bridge and appurtenances, the said Z. King & Son have rendered the stock of said Helena Bridge Company utterly valueless." It was also alleged that the delivery of the stock, while in law a literal compliance with the terms of the contract, would in equity be nugatory and ineffectual, because the acts of the Kings, as before stated, had rendered it valueless. A demurrer to this bill was sustained, and a decree of dismissal entered. From such decree plaintiffs appealed to this court.

Mr. M. F. Morris for appellants submitted on his brief.

Mr. A. G. Riddle (with whom was *Mr. H. E. Davis* on the brief) for appellees.

Mr. Justice Brewer delivered the opinion of the court.

The foreclosure proceedings transferred the legal title to the bridge to King & Son, and rendered the stock of the bridge company valueless. A transfer of the latter, if now possible, would be of no benefit to the plaintiffs, and is not desired by them. That it was supposed to be of value when the contract was made, and that it is now worthless, creates no liability against the Kings, unless they have wrongfully destroyed that supposed value. But it is not alleged that King & Son did not give full value for the notes and mortgage, or that they were illegally issued by the bridge company, or that they were paid in whole or in part, or that suit was brought before they matured, or a recovery obtained for a larger amount than was due. In other words, it is not shown that King & Son did other than exercise a legal right of collecting a just debt by foreclosure of the mortgage given to secure it. By so doing, they exposed themselves to no lia-

bility to others for the indirect result of such legal act. The allegation that it was done with a fraudulent intent and purpose to obtain possession of the bridge, amounts to nothing. If the act was legal, it is not made illegal by a mere epithet.

So far as respects the charge, that it was the understanding and agreement that the stock should be good and valuable stock, worth fully dollar for dollar in the public market, it is enough to say that the contract, which is in writing and attached to the bill, contains no such provision. There is no stipulation whatever, expressed or suggested in that contract, other than for the transfer of this specified stock. Ruckman took the chances of its value.

The decision of the Circuit Court was right, and the decree is

Affirmed.

LOGAN v. UNITED STATES.

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

No. 1235. Argued January 26, 27, 1892. — Decided April 4, 1892.

A citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, has the right to be protected by the United States against lawless violence; this right is a right secured to him by the Constitution and laws of the United States; and a conspiracy to injure or oppress him in its free exercise or enjoyment is punishable under section 5508 of the Revised Statutes.

The consolidation, under section 1024 of the Revised Statutes, of several indictments against different persons for one conspiracy, if not excepted to at the time, cannot be objected to after verdict.

An act of Congress, requiring courts to be held at three places in a judicial district, and prosecutions for offences committed in certain counties to be tried, and writs and recognizances to be returned, at each place, does not affect the power of the grand jury, sitting at either place, to present indictments for offences committed anywhere within the district.

A jury in a capital case, who, after considering their verdict for forty hours, have announced in open court that they are unable to agree, may be discharged by the court of its own motion and at its discretion, and the defendant be put on trial by another jury.

Statement of the Case.

A juror summoned in a capital case, who states on *voir dire* that he has conscientious scruples in regard to the infliction of the death penalty for crime, may be challenged by the government for cause.

The provision of section 858 of the Revised Statutes, that "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application to criminal trials.

Unless by express statute, the competency of a witness to testify in one State is not affected by his conviction and sentence for felony in another State.

A pardon of a convict, although granted after he has served out his sentence, restores his competency to testify to any facts within his knowledge.

Under section 1033 of the Revised Statutes, any person indicted of a capital offence has the right to have delivered to him, at least two days before the trial, a list of the witnesses to be produced on the trial for proving the indictment; and if he seasonably claims this right, it is error to put him on trial, and to allow witnesses to testify against him, without having previously delivered to him such a list; and, *it seems*, that the error is not cured by his acquittal of the capital offence, and conviction of a lesser offence charged in the same indictment.

Upon an indictment for conspiracy, acts or declarations of one conspirator, made after the conspiracy has ended, or not in furtherance of the conspiracy, are not admissible in evidence against the other conspirators.

FOUR indictments, numbered in the record 33, 34, 35 and 36, on sections 5508 and 5509 of the Revised Statutes (copied in the margin [1]) were returned by the grand jury at January term,

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[1] "SEC. 5508. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured; they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust, created by the Constitution or laws of the United States.

"SEC. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offence is committed."

By the laws of Texas, killing with malice aforethought, either express or implied, is murder; murder committed with express malice is murder in

1890, of the District Court for the Northern District of Texas, sitting at Dallas in that district, against Eugene Logan, William Williams, Verna Wilkerson and Clinton Rutherford, for conspiracy to injure and oppress citizens of the United States in the free exercise of a right secured to them by the Constitution and laws of the United States, and for murder committed in the prosecution of the conspiracy; and were forthwith transmitted to the Circuit Court.

Indictment 34 averred, in the first count, that on January 19, 1889, at Graham in the county of Young and that district, Charles Marlow, Epp Marlow, Alfred Marlow, George W. Marlow, William D. Burkhart and Louis Clift were citizens of the United States, and in the power, custody and control of Edward W. Johnson, a deputy United States marshal for that district, by virtue of writs of commitment from a commissioner of the Circuit Court of the United States for the district, in default of bail, to answer to indictments for an offence against the laws of the United States, to wit, larceny in the Indian country, within the exclusive jurisdiction of the United States; and that while said Johnson held them in his power, custody and control, in pursuance of said writs, the defendants, "together with divers other evil-disposed persons, whose names to the grand jurors aforesaid are unknown, did then and there combine, conspire and confederate by and between themselves, with force and arms, to injure and oppress them, the said Charles Marlow, Epp Marlow, Alfred Marlow, George W. Marlow, William D. Burkhart and Louis Clift, then and there citizens of the United States of America, in the free exercise and enjoyment of a right, and because they were then and there exercising and enjoying said right, then and there secured to them" "by the Constitution and laws of the United States, to wit, the right to then and there be protected by said deputy United States marshal from the assault of" the defendants and other evil-disposed persons, "and the right then and

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the first degree; the punishment of murder in the first degree is death, or imprisonment in the penitentiary for life; and the degree of murder, as well as the punishment, is to be found by the jury. Texas Penal Code of 1879, arts. 605, 606, 607, 609.

there to be held in the power, custody and control of said deputy United States marshal under and by virtue of said writs heretofore set forth, and the further right, while in said custody, to be secure in their persons from bodily harm and injury and assaults and cruelties until they" "had been discharged by due process of the laws of the United States;" and that the defendants, in pursuance of such combination and conspiracy, and in the prosecution thereof, on January 19, 1889, and in the night time, went upon the highway in disguise, and waylaid and assaulted the said prisoners, while in the power, custody and control of said deputy United States marshal, with loaded shotguns, revolvers and Winchester rifles, and, in pursuance and prosecution of the conspiracy, feloniously, wilfully and of their malice aforethought, and from a deliberate and premeditated design to effect his death, did with those weapons kill and murder Epp Marlow, then and there in the peace of the United States being; (charging the murder in due technical form;) "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The other counts in this indictment were substantially similar, except that some of them alleged the prisoners to have been in the custody of Thomas Collier, sheriff and jailer of Young County, under the writs of commitment from the United States commissioner; or alleged Alfred Marlow to have been the person murdered; or charged one of the defendants as principal and the others as accessories in the murder.

Indictments 33 and 36 were substantially like 34. Indictment 35 added John Levell and Phlete A. Martin as defendants, and (besides counts like those in the other indictments, omitting, however, the charge of murder) contained counts alleging a conspiracy to obstruct the deputy marshal and the jailer in the execution of the writs of commitment, and in pursuance thereof, an attempt to take the prisoners from the jail on January 17, and a murder of some of them on the highway on January 19, 1889.

Five other indictments had been returned by the grand jury in February and March, 1889, and transmitted to the Circuit

Court, against Logan, Martin and other persons, (some of whom were not the same as in the other four indictments,) containing charges, in various forms, like those in the added counts in indictment 35.

At October term, 1890, held at Graham, the following proceedings took place:

On October 21, 1890, the district attorney moved that the nine indictments be consolidated and be tried together, because they charged cognate and kindred crimes, and presented parts and phases of the same transaction. The defendants opposed the motion, because the indictments set forth offences of different grades, and were framed under different sections of the statutes, with different penalties and procedures. The motion was granted, and the indictments were all consolidated with No. 34, under the title "No. 34 consolidated;" and the defendants excepted.

On October 22, 1890, the defendants, "excepting to the several indictments presented against them, and by order of this court consolidated and now being prosecuted under case No. 34 on the docket of said court, charging said defendants with a conspiracy to injure and oppress Charles Marlow and others in the free exercise and enjoyment of rights secured to them by the Constitution and laws of the United States, move the court to quash said indictments and dismiss this prosecution, for the following reasons:

"1st. The said indictments are found and presented by a grand jury at the January term of the United States District Court for the Northern District of Texas, holding session at Dallas; and the allegations of said indictments show that the offences therein charged were committed, if at all, in the subdivision of said district, offences committed in which are cognizable alone at the term of the District and Circuit Court to be held at Graham in said Young County; therefore this court is without jurisdiction.

"2d. Said indictments charge these defendants with a conspiracy to injure and oppress Charles Marlow and others named in said indictments in the free exercise and enjoyment of their right secured to them by the Constitution and laws of the

United States, a right to be protected by a deputy marshal of the United States, in whose custody they were, under process of this court; and the said indictments are bad, because no such right as therein alleged is secured to said persons by the Constitution and laws of the United States; and therefore this court has no jurisdiction.

"3d. Said indictments charge no offence against the laws of the United States, or within the jurisdiction of this court; but show upon their face, by the allegations thereof, that the offence committed, if any, was against the laws of the State of Texas, of which the courts of said State have exclusive jurisdiction."

The court overruled the motion to quash the indictment, and the defendants excepted.

On October 30, 1890, the district attorney moved the court for an order to set aside the former order of consolidation, so far as to separate the five earlier indictments; to confirm the consolidation of indictments 33, 34, 35 and 36; to sever Levell and Martin from their co-defendants; and to order the consolidated case to stand for trial against Logan, Williams, Wilkerson and Rutherford. The court made an order accordingly, except that as to Williams the case was continued on his application, and with the consent of the district attorney. To this order no exception was taken by the defendants.

Logan, Wilkerson and Rutherford then severally pleaded not guilty, and a trial was had, resulting, on November 22, 1890, in this verdict: "We the jury find the defendant Clinton Rutherford not guilty. The jury cannot agree as to Eugene Logan and Verna Wilkerson." The court approved the verdict, and ordered it to be recorded; and also ordered that Rutherford be discharged from the indictment, and that Logan and Wilkerson stand committed to the custody of the marshal until further order.

At February term, 1891, held at Graham, the court, on motion of the district attorney, ordered to be consolidated with "No. 34 consolidated" an indictment, numbered 37, found by the grand jury in the District Court at Graham on October 29, 1890, and forthwith transmitted to the Circuit

Court, charging Collier, Johnson, Levell, Marion Wallace, Samuel Waggoner, William Hollis, Richard Cook and five others named, but not including Logan, with the same conspiracy, and in pursuance thereof with the attempt to kill on January 17, and the murder on January 19. No exception was taken to this order.

On motion of the district attorney, suggesting the deaths of Williams and Collier, the indictments were dismissed as to them.

The remaining defendants in indictment 37 "excepted to the several indictments" so consolidated, and made a motion to quash them, on the second and third grounds stated in the former motion to quash. This motion was overruled, and these defendants excepted to the overruling of the motion, and then pleaded not guilty.

Logan and Wilkerson filed a special plea that they had once been in jeopardy for the same offence, in this, that at October term, 1890, of the court they were tried upon the same indictment and for the same murder and conspiracy by a jury; "that said jury were legally drawn, empanelled and sworn, and after hearing the evidence, argument of counsel and charge of the court, retired to consider their verdict; that said jury were in their retirement about forty hours, when they announced in open court that they were unable to agree as to these defendants. Thereupon the court, of its own motion, and without the consent of these defendants or either of them, discharged said jury from further consideration of this case, and remanded these defendants to the custody of the United States marshal; all of which will more fully appear by reference to copies of said verdict and the order of the court entered thereon, which are hereto attached. These defendants further state that there existed in law or fact no emergency or hurry for the discharge of said jury, nor was said discharge demanded for the ends of public justice; and, for the purpose of this motion or special plea only, these defendants aver and charge that the Circuit Court of the United States for the Northern District of Texas, at Graham, at October term, 1890, had jurisdiction over and power to try and determine said

cause." Annexed to this plea were copies of the verdict and of the order of the court thereon, above stated.

To this plea the district attorney filed an exception in the nature of a demurrer. The court ordered the exception to be sustained, and the plea held for naught; and to this order Logan and Wilkerson excepted.

By order of the court, on motion of the district attorney, Johnson and five others in indictment 37 were severed from the other defendants, leaving the case to proceed against Logan, Wilkerson, Levell, Wallace, Waggoner, Hollis and Cook.

Copies of the indictments, having endorsed on each the names of the witnesses upon whose testimony it had been found by the grand jury, were delivered to the defendants therein more than two days before the trial. But no list of the witnesses to be produced at the trial for proving the indictment was delivered to any of the defendants. When the case was called for trial, and the government announced that it was ready, the defendants suggested these facts, and moved the court that they be not required to proceed further until such lists should be furnished them. The court overruled the motion, and the defendants excepted.

At the empanelling of the jury, the district attorney, by leave of the court, put to fourteen of the jurors summoned this question: "Have you any conscientious scruples in regard to the infliction of the death penalty for crime?" and each of them answered that he had such conscientious scruples, and was thereupon challenged for cause. To all this the defendants at the time objected, "because the jury in the United States court has nothing to do with the penalty, but passes alone upon the guilt or innocence of the defendants, and because it is not one of the disqualifications of jury service under the laws of the United States, and because the defendants were unlawfully deprived of the service of each of said jurors, who had been regularly drawn and summoned on the special venire heretofore issued herein as their triers in this cause." The court overruled all these objections, and the defendants excepted.

At the trial, forty witnesses, whose names were not endorsed on either indictment, were called and sworn to testify on behalf of the government. As to each and all of these witnesses the defendants objected to their testifying, because neither their names, nor a list containing their names, had been delivered to the defendants two days before the trial, and because the defendants had objected, on this ground, to proceeding when the case was called for trial. The court overruled the objection, and admitted these witnesses to testify to material facts necessary to prove the indictments and to make out the case for the government; and the defendants excepted.

Phlete A. Martin and one Spear, offered as witnesses by the government, were shown, by certified copies of the records produced and exhibited to them, to have been convicted and sentenced for felony. Martin was convicted, in the Superior Court of Iredell County in the State of North Carolina, of felonious homicide, and was sentenced in August, 1883, to imprisonment for six months in the county jail, and served out his sentence. Spear was convicted, in the District Court of Tarrant County in the State of Texas, of two larcenies, which were felonies by the law of Texas, and was sentenced in January, 1883, to two terms of imprisonment of two years each, and served out his sentence; and the government offered and read in evidence "a full proclamation of pardon" of those offences, issued to Spear by the Governor of Texas in May, 1889.

The defendants objected to each of these two witnesses testifying, "because under the laws of Texas they are incompetent to testify under and by virtue of an express statute, and because, the offences for which they were convicted being infamous crimes, they are incompetent to testify in the United States court held within the State of Texas;" and the defendants further objected to the proclamation of pardon issued by the Governor of Texas to Spear, "because said pardon was issued to him after he had served his full time required in said judgment and sentence, and because the facts about which he was called to testify came to his knowledge after said judgment of conviction and sentence and before the issue of said

proclamation of pardon, and because said proclamation of pardon cannot have the retroactive effect of rendering said witness competent to testify to facts which, when they came to his knowledge, he was incompetent to testify to."

The court overruled all these objections, and admitted the testimony of both witnesses to material facts; and afterwards instructed the jury that they were competent, and that the convictions and sentences affected their credibility only. The defendants excepted to the admission of this evidence, and to the instruction of the court thereon.

The government introduced evidence tending to prove the following facts:

Shortly before October term, 1888, of the District Court of the United States for the Northern District of Texas, held at Graham, the four Marlows named in the indictment, and one Boone Marlow, (the five being brothers,) were arrested on warrants issued by a commissioner of the Circuit Court of the United States on complaints charging them with larceny in the Indian Territory, within the exclusive jurisdiction of the United States; and at that term they were indicted for that offence, and enlarged on bail, and went to live on a farm in Young County, about twelve miles from Graham, known as the Denson Farm.

Afterwards, on December 17, 1888, the sheriff of the county and his deputy, Collier, went to the farm to arrest Boone Marlow on a capias from a court of the State to answer a charge of murder. Without showing their warrant, Collier fired a pistol at him, and he fired at Collier, and, missing him, killed the sheriff. The killing of the sheriff caused great excitement in Young County, and much resentment on the part of his friends against the Marlows. Boone Marlow escaped and did not appear again. The four other Marlows were put in the county jail by the citizens, and surrendered by their bail, and were again committed to the jail by Edward W. Johnson, a deputy United States marshal, under writs of commitment from the commissioner directing him to do so, to answer the indictments for larceny.

On the night of January 17, 1889, a body of men, armed

and partly disguised, entered the jail, surrounded the steel cage in which the four Marlows were confined, and attempted to enter it; but being resisted by the Marlows, and one of the mob knocked down and injured, they finally withdrew without doing any actual violence to the prisoners.

On January 19, 1889, after dark, Johnson, the deputy marshal, undertook to remove the Marlows, with Burkhart and Clift, imprisoned under like commitments, to the jail of an adjoining county. The six prisoners, shackled together, two and two, (Alfred with Charles, Epp with George, and Burkhart with Clift,) by irons riveted around one leg of each and connected by a chain, were placed in a hack driven by Martin, who was county attorney. Johnson, the defendant Wallace and two other men, all armed, followed in another hack; and the defendant Waggoner and another man, also armed, accompanied them in a buggy. When the three vehicles, in close order, had gone along the highway about two miles from Graham, they were attacked, near a run called Dry Creek, by a large body of men, armed and disguised, who opened fire upon the prisoners. Martin and the guards were in league with the attacking party. The four Marlows, in spite of their shackles, immediately dropped out of the hack, and wrested fire-arms, either from the guards or from their assailants, with which they defended themselves, killed two of the mob, wounded others, and finally put the rest to flight. Johnson was wounded, and he and all the guards also fled. Alfred Marlow and Epp Marlow were killed. The other two Marlows were severely wounded, but succeeded in freeing themselves from their brothers' dead bodies, took possession of the hack in which they had come, and together with Burkhart and Clift made their way to a neighboring village, and thence to the Denson Farm.

On the following day Collier, the new sheriff of the county, (one of the defendants in this case, who died before the trial,) went to the Denson Farm with a large body of men whom he had collected for the purpose of recapturing the two surviving Marlows. He was there met by the sheriff of a neighboring county, whose aid he had summoned, but who declined, on

learning the facts of the case, to interfere in the matter. The Marlows refused to give themselves up to any one except the United States marshal or one Morton, his deputy; and no violence was offered to them; but Collier, with a body of men, kept guard near the house for some days until the arrival of Morton, who, against some remonstrance on the part of Collier, took the Marlows into his custody and removed them to Dallas. They were afterwards tried and acquitted on the charges against them.

At the trial of the present case, the principal question of fact was of the defendants' connection with the conspiracy charged in the indictment.

There was evidence in the case tending to show that Johnson, while lying wounded at his home after the fight, assented, at the solicitation of some of the defendants, to the publication in a newspaper of a statement that Logan was one of the guards at Dry Creek on the night of January 19. The government, not for the purpose of contradicting Johnson, but as independent evidence that Logan took part in the fight, not as a guard, but as one of the mob, called several witnesses to prove declarations of Johnson made after the fight, some on the same night and others some days after, that Logan was not a guard on that night, had meant to go as a guard, but had been excused from going, and must have been the person who informed the mob of the intended removal of the prisoners. The defendants objected to the admission of this evidence, among other grounds, because the declarations were not made in Logan's presence, and were made after the crime had been committed and the conspirators had separated. The judge overruled the objection, and admitted the evidence; and the defendants excepted to its admission.

The court also admitted, against the like objection and exception of the defendants, testimony to declarations of Collier, of Hollis and of persons not known to the witnesses, some made on the night of the fight, after the escape of the Marlows, and while Collier, Hollis and others were in pursuit and were stopping at houses on their way to get other persons to join them, and some made on the following day at the

funeral of one of the conspirators and elsewhere, that Logan had been present at the fight, and not as a guard, and had been wounded there.

The two surviving Marlows were permitted to testify, on behalf of the government, that while they, with Burkhart and Clift, were escaping in the hack after the fight, Charles Marlow told his companions that he believed Logan was the man at whom he shot, and who was shooting at him, during the fight. The defendants objected to this evidence, as declarations made in their absence, and as hearsay; and excepted to its admission.

The defendants requested the judge to instruct the jury that the matters alleged in the indictments and the proof made under them constituted no offence under the laws of the United States, and therefore they should return a verdict of not guilty. The judge refused so to instruct the jury; and instructed them as follows: "When a citizen of the United States is committed to the custody of a United States marshal, or to a state jail, by process issuing from one of the courts of the United States, to be held, in default of bail, to await his trial on a criminal charge within the exclusive jurisdiction of the national courts, such citizen has a right, under the Constitution and laws of the United States, to a speedy and public trial by an impartial jury, and, until tried or discharged by due process of law, has the right, under said Constitution and laws, to be treated with humanity, and to be protected against all unlawful violence, while he is deprived of the ordinary means of defending and protecting himself." To this instruction, as well as to the refusal to give the instruction requested, the defendants excepted.

The judge further defined the crimes charged, of conspiracy, and of murder in the prosecution of the conspiracy; and submitted to the jury the questions whether the defendants were guilty of the conspiracy only, and whether they were guilty of the murder also.

Many other rulings and instructions, excepted to at the trial, are omitted from this statement, because not passed upon by this court.

Argument for Plaintiffs in Error.

On April 17, 1891, the jury found the defendants Logan, Waggoner and Wallace guilty of the conspiracy charged in the indictments, and not guilty of murder; and acquitted the other defendants. The court thereupon ordered and adjudged that the other defendants be discharged; and that Logan, Waggoner and Wallace were guilty of conspiracy as charged in the indictments, and sentenced each of them to pay a fine of $5000, to be imprisoned for a term of ten years, and to be ineligible to any office or place of honor, profit or trust, created by the Constitution or laws of the United States. On June 23, 1891, they sued out this writ of error, under the act of March 3, 1891, c. 517, § 5. 26 Stat. 827.

Mr. Jerome C. Kearby and *Mr. A. H. Garland* (with whom was *Mr. H. J. May* on the brief) for plaintiffs in error.

There are a few general propositions that should exercise a controlling influence in the decision of this case. The criminal jurisdiction of the United States courts must be *expressly* conferred by act of Congress: in other words: "The safe course undoubtedly is, to confine the jurisdiction in criminal cases to statute offences duly defined, and to cases within the *express* jurisdiction given by the Constitution," (1 Kent. Com. (13th ed. 332 *et seq.* and notes,) where all the leading cases are cited).

For a long period in the history of the country no attempt was ever made to get any criminal jurisdiction for the United States courts, except upon the high seas and at certain places under the special jurisdiction of Congress. Art. 1, sec. 8, cl. 17, Const.; Rev. Stat. sec. 5339 *et seq.* As was said by Chief Justice Marshall in *United States* v. *Bevans*, 3 Wheat. 336, 388, it is not the offence committed but the place in which it is committed, which must be out of the jurisdiction of the State. So far was this recognized that a soldier in the service of the United States killing a fellow-soldier was held amenable to the state laws and punished under them in the state courts in spite of the objection that he was liable only to the laws of the United States; and the act was done upon a soldier in

camp and under custody. *The People* v. *Godfrey*, 17 Johns. 225.

Outside of the places named, it was conceived the States could very well take care of all crimes committed within their territory; that their peace and dignity were offended by all such crimes outside of those places, and in fact there was no peace and dignity of the United States to be offended save and except in such places.

Among the first and most prominent departures from or innovations upon this rule was the case of *Tennessee* v. *Davis*, 100 U. S. 257, and that was sustained in an act of Congress. Rev. Stat. sec. 643, and the act of March 3, 1875, 18 Stat. p. 401. There was a special act giving this jurisdiction by removal from the state court, but the path to that result was not smooth and open, nor by any means discernible to all; for there is a dissent by Justices Clifford and Field of great energy and power, which is believed by many of the legal profession to be the law of the case. But there was an express act giving this jurisdiction, so far as Congress had the power to give it. But here, as we shall see, it is quite otherwise. Some other cases have occurred since *Tennessee* v. *Davis* on special statutes; but in each of them firm and unyielding opposition by a portion of the court was made. It will serve no useful purpose to refer to them here, as the court is familiar with them, and besides they rest upon statutes whose language is not doubtful conceding the power of Congress to enact them.

Then comes the question, "Why could not Texas punish these people for committing assaults, aggravated assaults, or murder within her unquestioned and unquestionable boundaries?" Her criminal code, it seems, is most ample for this purpose. It would be assuming too much to say she would not try to do it. But if this unfortunately were so, jurisdiction would not come to the United States court because Texas failed to do her duty. This will not stand the test. There must be some *express* law giving the jurisdiction, and that law must be constitutional. These men who were assaulted were in custody of the marshal, but that did not affect the jurisdiction of the State; whatever crime was committed was against

Texas. Godfrey (17 Johns. *ubi supra*) was, as the man he stabbed was, in the military service of the government, and the deceased was in camp and in custody too.

In casting about for reasons for taking these matters out of the Texas courts and from the Texas authorities it would appear from the indictment and from the elaborate charge of the trial court that sections 5508 and 5509 Rev. Stat. are resorted to as allowing this.

It would be tedious to go over and review the history of these sections, the reasons and purposes of their enactment. This has been done so often by this court in cases of the gravest character that no one at all up in the history of the country can well be ignorant on the subject. But it is perfectly safe to say, no such *right* and *privilege* as set forth here ever figured in the minds of the legislators in making these statutes. They came into life for different uses and objects entirely.

In a recent case before Justice Lamar in Georgia, these statutes are discussed with great clearness and accuracy in an opinion reviewing all the cases on this subject, and he points out most distinctly the scope and meaning of those acts, as reaching and applying to matters altogether foreign to anything disclosed in and by this record. The *right* in that case was that of a witness to appear and testify before the grand jury of a Federal court — a right — *if a right*, and not a duty, possibly as high and important as the right of a person or persons to be tried, who were held on commitments as alleged. In that case Justice Lamar demonstrates the *privilege* or *right* of a witness to appear, and it is not such as comes within the purview of the acts referred to. We adopt his reasoning without attempting to add to it. He says (48 Fed. Rep. 78, 83, 84):

"The Congress of the United States clearly possesses the constitutional power and is charged with the constitutional duty to protect all agencies of the Federal government, including the courts, their officers and all persons whose attendance is necessary in the proceedings of those courts, such as parties, witnesses and jurors. That power and duty of protection have been exercised and performed with regard to parties, witnesses and jurors in section 5406 of the Revised Statutes.

"With respect to a prosecution for crime pending in a Federal court, or in a United States grand jury, the right which this particular section designs to protect is a *public* right, *i.e.* the right of the United States to have its witnesses and their testimony, and to have them protected in going to and returning from the court. The wrong punished in such a case is a public wrong, and its correlative is a public right."

"Section 5508 presupposes that the 'right and privilege,' involved has already been secured by the Constitution and laws of the United States, and therefore it is necessary to turn to them for the definition of the right in this indictment charged to be violated, in order to determine whether the indictment is authorized by the provisions of that section.

"Fortunately we are not without judicial construction of these provisions and of other statutes relating to cognate subjects, as well as judicial expositions of the constitutional amendments, which, it is contended, contained the authority for their enactment. *Slaughter-House Cases*, 16 Wall. 36; *United States* v. *Cruikshank*, 1 Woods, 308; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 106 U. S. 629; *Strauder* v. *West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Bradwell* v. *The State*, 16 Wall. 130; *Hurtado* v. *California*, 110 U. S. 516; *Civil Rights Cases*, 109 U. S. 3; *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Waddell*, 112 U. S. 76."

"In these decisions of the Supreme Court it has been found necessary to pass upon the construction of these and many other sections of the Revised Statutes in their application to the varying facts presented by each case. But they all show the steady adherence of that court to the fundamental principles enunciated by Mr. Justice Bradley in the case of *The United States* v. *Cruikshank*, 1 Woods, 308, and reiterated by the Supreme Court of the United States in the same case on a writ of error. They all agree that, aside from the extinction of slavery and the declaration of national citizenship, the constitutional amendments are restrictive upon the power of the general government and the action of the States, and that there is nothing in their language or spirit which indicates

that they are to be enforced by Congressional enactments, authorizing the trial, conviction and punishment of individuals for individual invasions of individual rights, unless committed under state authority; that the Fourteenth Amendment guaranteed immunity from state laws and state acts invading the privileges and rights specified in the amendment, but conferred no rights upon one citizen as against another; that the provision of the Fourteenth Amendment authorizing Congress to enforce its guarantees by legislation means such legislation as is necessary to control and counteract state abridgment, and that the protection and enforcement of the rights of citizens of the United States provided in the Enforcement Act of 1870 and the Civil Rights Act of 1875 refer only to such rights as are granted by and dependent on the Constitution and the valid and constitutional laws of the United States."

"But there is another view which demonstrates that this section does not sustain the indictment in this case. We cannot present it more forcibly than by quoting the following from the opinion of the Supreme Court, delivered by Mr. Justice Bradley in the *Civil Rights Cases*, 109 U. S. 3, 16, 17, 18. Referring to the provisions as above quoted, and other subsequent provisions in the statute from which the section was taken, the learned justice says:

"'This law is clearly corrective in its character, *intended to counteract and furnish redress against state laws and proceedings*, and customs having the force of law, *which sanction the wrongful acts specified.* In the Revised Statutes, it is true, a very important clause, to wit, the words, "any law, statute, ordinance, regulation or custom to the contrary notwithstanding," which gave the declaratory section its point and effect, are omitted; but the penal part by which the declaration is enforced, and which is really the effective part of the law, retains the reference to state laws, by making the penalty apply only to those who should subject parties to a deprivation of their rights under color of any statute, ordinance, custom, etc., of any State or Territory, thus preserving the corrective character of the legislation. Rev. Stat. §§ 1977, 1978, 1979, 5510. . . . In this connection, it is proper to state that

civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property or his reputation, but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts or to be a witness or a juror; he may by force or fraud interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen, but unless protected in these wrongful acts by some shield of state law or state authority he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment, and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with the power to provide a remedy.'"

"'And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the case provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.'"

Mr. Solicitor General for defendant in error.

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

The plaintiffs in error were indicted on sections 5508 and

5509 of the Revised Statutes, for conspiracy, and for murder in the prosecution of the conspiracy; and were convicted, under section 5508, of a conspiracy to injure and oppress citizens of the United States in the free exercise and enjoyment of the right to be secure from assault or bodily harm, and to be protected against unlawful violence, while in the custody of a marshal of the United States under a lawful commitment by a commissioner of the Circuit Court of the United States for trial for an offence against the laws of the United States.

By section 5508 of the Revised Statutes, "if two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," "they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit or trust, created by the Constitution or laws of the United States."

1. The principal question in this case is whether the right of a citizen of the United States, in the custody of a United States marshal under a lawful commitment to answer for an offence against the United States, to be protected against lawless violence, is a right secured to him by the Constitution or laws of the United States, or whether it is a right which can be vindicated only under the laws of the several States.

This question is presented by the record in several forms. It was raised in the first instance by the defendants "excepting to" and moving to quash the indictment. A motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned for error. *United States* v. *Rosenburgh*, 7 Wall. 580; *United States* v. *Hamilton*, 109 U. S. 63. But the motion in this case appears to have been intended and understood to include an exception, which, according to the practice in Louisiana and Texas, is equivalent to a demurrer. And the same question is distinctly presented by the judge's refusal to

instruct the jury as requested, and by the instructions given by him to the jury.

Upon this question, the court has no doubt. As was said by Chief Justice Marshall, in the great case of *McCulloch* v. *Maryland*, "The government of the Union, though limited in its powers, is supreme within its sphere of action." "No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution." 4 Wheat. 316, 405, 424.

Among the powers which the Constitution expressly confers upon Congress is the power to make all laws necessary and proper for carrying into execution the powers specifically granted to it, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. In the exercise of this general power of legislation, Congress may use any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and are consistent with the letter and the spirit of the Constitution. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *Juilliard* v. *Greenman*, 110 U. S. 421, 440, 441.

Although the Constitution contains no grant, general or specific, to Congress of the power to provide for the punishment of crimes, except piracies and felonies on the high seas, offences against the law of nations, treason, and counterfeiting the securities and current coin of the United States, no one doubts the power of Congress to provide for the punishment of all crimes and offences against the United States, whether committed within one of the States of the Union, or within territory over which Congress has plenary and exclusive jurisdiction.

To accomplish this end, Congress has the right to enact laws for the arrest and commitment of those accused of any such crime or offence, and for holding them in safe custody until indictment and trial; and persons arrested and held pursuant to such laws are in the exclusive custody of the United States, and are not subject to the judicial process or executive warrant of any State. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb* v. *Connolly*, 111 U. S. 624. The United States, having the absolute right to hold such prisoners, have an equal duty to protect them, while so held, against assault or injury from any quarter. The existence of that duty on the part of the government necessarily implies a corresponding right of the prisoners to be so protected; and this right of the prisoners is a right secured to them by the Constitution and laws of the United States.

The statutes of the United States have provided that any person accused of a crime or offence against the United States may by any United States judge or commissioner of a Circuit Court be arrested and confined, or bailed, as the case may be, for trial before the court of the United States having cognizance of the offence; and, if bailed, may be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for the offence, and be thereupon recommitted to the custody of the marshal, to be held until discharged by due course of law. Rev. Stat. §§ 1014, 1018. They have also provided that all the expenses attendant upon the transportation from place to place, and upon the temporary or permanent confinement, of persons arrested or committed under the laws of the United States, shall be paid out of the Treasury of the United States; and that the marshal, in case of necessity, may provide a convenient place for a temporary jail, and "shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law." Rev. Stat. §§ 5536–5538.

In the case at bar, the indictments alleged, the evidence at the trial tended to prove, and the jury have found by their

verdict, that while Charles Marlow and five others, citizens of the United States, were in the custody and control of a deputy marshal of the United States under writs of commitment from a commissioner of the Circuit Court, in default of bail, to answer to indictments for an offence against the laws of the United States, the plaintiffs in error conspired to injure and oppress them in the free exercise and enjoyment of the right, secured to them by the Constitution and laws of the United States, to be protected, while in such custody and control of the deputy marshal, against assault and bodily harm, until they had been discharged by due process of the laws of the United States.

If, as some of the evidence introduced by the government tended to show, the deputy marshal and his assistants made no attempt to protect the prisoners, but were in league and collusion with the conspirators, that does not lessen or impair the right of protection, secured to the prisoners by the Constitution and laws of the United States.

The prisoners were in the exclusive custody and control of the United States, under the protection of the United States, and in the peace of the United States. There was a co-extensive duty on the part of the United States to protect against lawless violence persons so within their custody, control, protection and peace; and a corresponding right of those persons, secured by the Constitution and laws of the United States, to be so protected by the United States. If the officers of the United States, charged with the performance of the duty, in behalf of the United States, of affording that protection and securing that right, neglected or violated their duty, the prisoners were not the less under the shield and panoply of the United States.

The cases heretofore decided by this court, and cited in behalf of the plaintiffs in error, are in no way inconsistent with these views, but, on the contrary, contain much to support them. The matter considered in each of those cases was whether the particular right there in question was secured by the Constitution of the United States, and was within the acts of Congress. But the question before us is so important, and the learned counsel for the plaintiffs in error have

so strongly relied on those cases, that it is fit to review them in detail.

In *United States* v. *Reese*, 92 U. S. 214, 217, decided at October term, 1875, this court, speaking by Chief Justice Waite, said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." The decision in that case was that the Fifteenth Amendment of the Constitution did not confer on citizens of the United States the right to vote, but only the right of exemption from being denied by a State the right to vote on account of race, color, or previous condition of servitude; and therefore that sections 3 and 4 of the Enforcement Act of May 31, 1870, (16 Stat. 140, 141, reënacted in Rev. Stat. §§ 2007–2009, 5506,) undertaking to punish the denial or obstruction of the right to vote under the laws of any State or Territory, and not grounded on such discrimination, were unconstitutional.

In *United States* v. *Cruikshank*, 92 U. S. 542, at the same term, in which also the opinion was delivered by the Chief Justice, the indictment was on section 6 of the Enforcement Act of 1870, (reënacted in Rev. Stat. § 5508, under which the present conviction was had,) and the points adjudged on the construction of the Constitution and the extent of the powers of Congress were as follows:

1st. It was held that the First Amendment of the Constitution, by which it was ordained that Congress should make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances, did not grant to the people the right peaceably to assemble for lawful purposes, but recognized that right as already existing, and did not guarantee its continuance except as against acts of Congress; and therefore the general right was not a right secured by the Constitution of the United States. But the court added: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of

grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States." 92 U. S. 552, 553.

2d. It was held that the Second Amendment of the Constitution, declaring that "the right of the people to keep and bear arms shall not be infringed," was equally limited in its scope. 92 U. S. 553.

3d. It was held that a conspiracy of individuals to injure, oppress and intimidate citizens of the United States, with intent to deprive them of life and liberty without due process of law, did not come within the statute, nor under the power of Congress, because the rights of life and liberty were not granted by the Constitution, but were natural and inalienable rights of man; and that the Fourteenth Amendment of the Constitution, declaring that no State shall deprive any person of life, liberty or property, without due process of law, added nothing to the rights of one citizen as against another, but simply furnished an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. It was of these fundamental rights of life and liberty, not created by or dependent on the Constitution, that the court said: "Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." 92 U. S. 553, 554.

4th. It was held that the provision of the Fourteenth Amendment, forbidding any State to deny to any person within its

jurisdiction the equal protection of the laws, gave no greater power to Congress. 92 U. S. 555.

5th. It was held, in accordance with *United States* v. *Reese*, above cited, that counts for conspiracy to prevent and hinder citizens of the African race in the free exercise and enjoyment of the right to vote at state elections, or to injure and oppress them for having voted at such elections, not alleging that this was on account of their race, or color, or previous condition of servitude, could not be maintained; the court saying: "The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." 92 U. S. 556.

Nothing else was decided in *United States* v. *Cruikshank*, except questions of the technical sufficiency of the indictment, having no bearing upon the larger questions.

The main principles on which that decision was based had been clearly summed up by Mr. Justice Bradley when the same case was before the Circuit Court, as follows: "It is undoubtedly a sound proposition, that whenever a right is guaranteed by the Constitution of the United States, Congress has the power to provide for its enforcement, either by implication arising from the correlative duty of government to protect, wherever a right to the citizen is conferred, or under the general power (contained in art. 1, sec. 8, par. 18) 'to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.'" "With regard to those acknowledged rights and privileges of the citizen, which form a part of his political inheritance derived from the mother country, and which were challenged and vindicated by centuries of stubborn resistance to arbitrary power, they belong to him as his birthright, and it is the duty of the particular State of which he is a citizen to protect and enforce them, and to do naught to deprive him of their full enjoyment. When any of these rights and privileges are secured in the Constitu-

tion of the United States only by a declaration that the State or the United States shall not violate or abridge them, it is at once understood that they are not created or conferred by the Constitution, but that the Constitution only guarantees that they shall not be impaired by the State, or the United States, as the case may be. The fulfilment of this guaranty by the United States is the only duty with which that government is charged. The affirmative enforcement of the rights and privileges themselves, unless something more is expressed, does not devolve upon it, but belongs to the state government as a part of its residuary sovereignty." 1 Woods, 308, 314–316.

In *Strauder* v. *West Virginia*, 100 U. S. 303, at October term, 1879, in which it was adjudged that the provision of the Fourteenth Amendment, forbidding any State to deny to any person within its jurisdiction the equal protection of the laws, was violated by statutes of a State providing that white men only should be the jurors on the trial of a black man, the court, speaking by Mr. Justice Strong, said: "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." 100 U. S. 310.

In *Ex parte Virginia*, 100 U. S. 339, at the same term, the court upheld the constitutionality of the Civil Rights Act of March 1, 1875, c. 114, § 4, (18 Stat. 336,) enacting that no citizen, having all other qualifications provided by law, should be disqualified from service as a juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude, and that any officer, charged with the duty of selecting jurors, who should exclude any citizen for such cause, should be guilty of a misdemeanor.

In *United States* v. *Harris*, 106 U. S. 629, at October term, 1882, the indictment was for conspiring to deprive, and for depriving, certain citizens of the United States of the equal protection of the laws, in this, that they were in the custody of officers of a State under lawful arrest on charges of crime, and were, "by the laws of said State, entitled to the due and equal protection of the laws thereof," and "to have their per-

sons protected from violence when so under arrest as aforesaid." That indictment was on section 5519 of the Revised Statutes, which assumed to punish a conspiracy for the purpose of depriving any person or class of persons of the equal protection of the laws. The court, following the cases of *Reese* and *Cruikshank*, above stated, held that section to be unconstitutional, because broader than the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States would justify. The case is clearly distinguished from the case at bar by the facts that those prisoners were in the custody of officers, not of the United States, but of the State, and that the laws, of the equal protection of which they were alleged to have been deprived, were the laws of the State only.

In the cases reported under the head of the *Civil Rights Cases*, 109 U. S. 3, at October term, 1883, the whole extent of the decision was that sections 1 and 2 of the Civil Rights Act of March 1, 1875, c. 114, (18 Stat. 336,) declaring all persons within the jurisdiction of the United States to be entitled to the full and equal enjoyment of inns, public conveyances, and places of public amusement, and assuming to punish the denial of such enjoyment to any citizen, "except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude," were unconstitutional, because not authorized, either by the Thirteenth Amendment, abolishing slavery, or by the Fourteenth Amendment, the general scope and purpose of which were thus defined by Mr. Justice Bradley in delivering judgment: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment." "It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subver-

sive of the fundamental rights specified in the Amendment." "Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures and to supersede them." 109 U. S. 11, 13.

In *Ex parte Yarbrough*, 110 U. S. 651, at the same term, it was adjudged that both section 5508 of the Revised Statutes (on which these indictments are founded) and section 5520, punishing conspiracy to prevent by force, intimidation or threats any citizen from lawfully giving his support to the election of a qualified person as presidential elector or member of Congress, were constitutional, because within the implied powers of Congress. In answer to the argument that the parties assaulted were not officers of the United States, and that their protection by Congress in exercising the right to vote did not stand on the same ground with the protection of election officers of the United States, the court, speaking by Mr. Justice Miller, said: "But the distinction is not well taken. The power in either case arises out of the circumstance that the function in which the party is engaged, or the right which he is about to exercise, is dependent on the laws of the United States. In both cases, it is the duty of that government to see that he may exercise this right freely, and to protect him from violence while so doing, or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." 110 U. S. 662.

In *United States* v. *Waddell*, 112 U. S. 76, at October term, 1884, the court reaffirmed the constitutionality of section 5508 of the Revised Statutes, and, speaking by the same eminent

judge, said: "The statute itself is careful to limit its operation to an obstruction or oppression in 'the free exercise of a right or privilege secured by the Constitution or laws of the United States, or because of his having exercised such rights.' The protection of this section extends to no other right, to no right or privilege dependent on a law or laws of the State. Its object is to guarantee safety and protection to persons in the exercise of rights dependent on the laws of the United States, including, of course, the Constitution and treaties as well as statutes, and it does not, in this section at least, design to protect any other rights." 112 U. S. 79. The particular right, held in that case to be dependent on and secured by the laws of the United States, and to be protected by section 5508 of the Revised Statutes against interference by individuals, was the right of a citizen, having made a homestead entry on public land, within the limits of a State, to continue to reside on the land for five years, for the purpose of perfecting his title to a patent, under sections 2289–2291 of the Revised Statutes, of which the court said: "The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the act of Congress, and, according to its rules, perfect his incipient title. Whenever the acts complained of are of a character to prevent this, or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it, or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute." 112 U. S. 80.

In *Baldwin* v. *Franks*, 120 U. S. 678, at October term, 1886, it was decided that the word "citizen," in section 5508 of the Revised Statutes, as in the original act of May 31, 1870, c. 114, § 6, was used in its political sense, and not as synonymous with "resident," "inhabitant" or "person," and therefore did

not include an alien. It was in regard to that point that Chief Justice Waite said: "This particular section is a substantial reënactment of section 6 of the original act, which is found among the sections that deal exclusively with the political rights of citizens, especially their right to vote, and were evidently intended to prevent discriminations in this particular against voters on account 'of race, color, or previous condition of servitude.'" 120 U. S. 691. He did not say that the section in question, but only that the sections among which it is found, "deal exclusively with the political rights of citizens." To have said that the section in question was so limited would have been in direct conflict with the decision in *United States* v. *Waddell*, above cited, to which the Chief Justice, at the outset of his discussion of the question whether "citizen" included an alien, had referred as establishing the constitutionality of the section.

The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the Constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the

United States; and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which Congress has enacted shall entitle him to a patent.

In the case at bar, the right in question does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held, as well as its executive and judicial officers charged with keeping and trying them.

In the very recent *Case of Neagle*, 135 U. S. 1, at October term, 1889, it was held that, although there was no express act of Congress authorizing the appointment of a deputy marshal or other officer to attend a justice of this court while travelling in his circuit, and to protect him against assault or injury, it was within the power and the duty of the Executive Department to protect a judge of any of the courts of the United States, when there was just reason to believe that he would be in personal danger while executing the duties of his office; that an assault upon such a judge, while in discharge of his official duties, was a breach of the peace of the United States, as distinguished from the peace of the State in which the assault took place; and that a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, had imposed upon him the duty of doing whatever might be necessary for that purpose, even to the taking of human life.

In delivering judgment, Mr. Justice Miller, repeating the language used by Mr. Justice Bradley speaking for the court in *Ex parte Siebold*, 100 U. S. 371, 394, said: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we

are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." 135 U. S. 60. After further discussion of that question, and of the powers of sheriffs in the State of California, where the transaction took place, Mr. Justice Miller added: "That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them." 135 U. S. 69.

The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice. This duty and the correlative right of protection are not limited to the magistrates and officers charged with expounding and executing the laws, but apply, with at least equal force, to those held in custody on accusation of crime, and deprived of all means of self-defence.

For these reasons, we are of opinion that the crime of which the plaintiffs in error were indicted and convicted was within the reach of the constitutional powers of Congress, and was covered by section 5508 of the Revised Statutes; and it remains to be considered whether they were denied any legal right by the other rulings and instructions of the Circuit Court.

2. The objection to the consolidation of the indictments on which the plaintiffs in error were tried and convicted cannot prevail.

Congress has enacted that, "when there are several charges against any person for the same act or transaction, or for two

or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." Rev. Stat. § 1024.

The record before us shows that the court below at different times made three orders of consolidation.

The only exception taken by the defendants to any of these orders was to the first one, made at October term, 1890, by which four of the indictments on which a trial was afterwards had were ordered to be consolidated with five earlier indictments which included other defendants and different offences.

By the second order of consolidation, made on a subsequent day of the same term, the five earlier indictments were ordered to be separated, so that in this respect the case stood as if they had never been consolidated with the four later ones; two of the defendants in one of these four indictments were ordered to be severed and tried separately; and the former order of consolidation was confirmed as to the four indictments, all of which, as they then stood, were charges against the same persons "for the same act or transaction," or, at least, "for two or more acts or transactions connected together," and therefore within the very terms and purpose of the section of the Revised Statutes above quoted, and might perhaps have been ordered, in the discretion of the court, to be tried together, independently of any statute upon the subject. See *United States* v. *Yarbrough*, 110 U. S. 651, 655; *United States* v. *Marchant*, 12 Wheat. 480; *Withers* v. *Commonwealth*, 5 S. & R. 59. And to this order no exception was taken.

By the third order of consolidation, indeed, made at February term, 1891, shortly before the trial, a new indictment against different persons for the same crime was consolidated with the four indictments. But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have

the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict.

3. The objection made to the four indictments, that they should have been found by the grand jury at Graham and not at Dallas, is based on a misapprehension of the acts of Congress upon that subject. By the act of February 24, 1879, c. 97, § 1, creating the Northern Judicial District of Texas, Young County is one of the counties included in that district; by § 4 the terms of the courts in that district are to be held at Waco, at Dallas and at Graham; and by § 5, "all process issued against defendants residing in the counties of" Young and certain adjoining counties "shall be returned to Graham," and against defendants residing in certain other counties to Waco and to Dallas respectively. 20 Stat. 318, 319. By the act of June 14, 1880, c. 213, that act is amended by adding, at the end of section 5, these words: "And all prosecutions in either of said districts for offences against the laws of the United States shall be tried in that division of the district to which process for the county in which said offences are committed is by said section required to be returned; and all writs and recognizances in said prosecutions shall be returned to that division in which said prosecutions by this act are to be tried." 21 Stat. 198. This provision does not affect the authority of the grand jury for the district, sitting at any place at which the court is appointed to be held, to present indictments for offences committed anywhere within the district. It only requires the trial to be had, and writs and recognizances to be returned, in the division in which the offence is committed. The finding of the indictment is no part of the trial. And these indictments were tried at Graham in conformity with the statute.

4. The plea of former jeopardy was rightly held bad. It averred that the discharge of the jury at the former trial without the defendants' consent was by the court, of its own motion, and after the jury, having been in retirement to con-

sider their verdict for forty hours, had announced in open court that they were unable to agree as to these defendants. The further averment that "there existed in law or fact no emergency or hurry for the discharge of said jury, nor was said discharge demanded for the ends of public justice," is an allegation, not so much of specific and traversable fact, as of inference and opinion, which cannot control the effect of the facts previously alleged. Upon those facts, whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion. *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U. S. 148.

5. As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on *voir dire* that they had "conscientious scruples in regard to the infliction of the death penalty for crime" were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. This court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy. *Reynolds* v. *United States*, 98 U. S. 145, 147, 157; *Miles* v. *United States*, 103 U. S. 304, 310. And the principle has been applied to the very question now before us by Mr. Justice Story in *United States* v. *Cornell*, 2 Mason, 91, 105, and by Mr. Justice Baldwin in *United States* v. *Wilson*, Baldwin, 78, 83, as well as by the courts of every State in which the question has arisen, and by express statute in many States. Whart. Crim. Pl. (9th ed.) § 664.

6. In support of the objection to the competency of the two witnesses who had been previously convicted and sentenced for felony, the one in North Carolina, and the other in Texas, the plaintiffs in error relied on article 730 of the Texas Code of Criminal Procedure of 1879, which makes incompetent to testify in criminal cases "all persons who have been or may

be convicted of felony in this State or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted."

By an act of the congress of the Republic of Texas of December 20, 1836, § 41, "the common law of England, as now practised and understood, shall, in its application to juries and to evidence, be followed and practised by the courts of this republic, so far as the same may not be inconsistent with this act, or any other law passed by this congress." 1 Laws of Republic of Texas (ed. 1838) 156. That act was in force at the time of the admission of Texas into the Union in 1845. The first act of the State of Texas on the incompetency of witnesses, by reason of conviction of crime, appears to have been the statute of February 15, 1858, c. 151, by which all persons convicted of felony, in Texas or elsewhere, were made incompetent to testify in criminal actions, notwithstanding a pardon, unless their competency to testify had been specifically restored. General Laws of 7th Legislature of Texas, 242; Oldham & White's Digest, 640. That provision was afterwards put in the shape in which it stands in the Code of 1879, above cited.

The question whether the existing statute of the State of Texas upon this subject is applicable to criminal trials in the courts of the United States held within the State depends upon the construction and effect of section 858 of the Revised Statutes of the United States, which is as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the

courts of the United States in trials at common law, and in equity and admiralty."

In the provision, at the beginning of this section, that "in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried," the distinction between "any civil action" in the second clause, and "any action" in the first clause, shows that the first clause was intended to include criminal actions, or, as they are more commonly called, criminal cases, while the second clause was in terms restricted to civil actions only. *Green* v. *United States*, 9 Wall. 655, 658. And were the whole section to be considered by itself, without reference to previous statutes and decisions, "trials at common law," in the final clause of the section, might also be held to include trials in criminal, as well as in civil cases.

But the history of congressional legislation and judicial exposition on this subject renders such a construction impossible.

By the Judiciary Act of September 24, 1789, c. 20, § 34, it was enacted "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. Although that section stood between two sections clearly applicable to criminal cases, it was adjudged by this court at December term, 1851, upon a certificate of division of opinion in the Circuit Court, directly presenting the question, that the section did not include criminal trials, or leave to the States the power to prescribe and change from time to time the rules of evidence in trials in the courts of the United States for offences against the United States. Chief Justice Taney, delivering the unanimous judgment of the court, said: "The language of this section cannot upon any fair construction be extended beyond civil cases at common law, as contradistinguished from suits in equity. So far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that Congress had the power to establish.

And the section above quoted was merely intended to confer on the courts of the United States the jurisdiction necessary to enable them to administer the laws of the States. But it could not be supposed, without very plain words to show it, that Congress intended to give to the States the power of prescribing the rules of evidence in trials for offences against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress." "The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789." "The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years." *United States* v. *Reid*, 12 How. 361, 363, 366.

In 1862, Congress enacted that "the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, in equity, and in admiralty." 12 Stat. 588. By a familiar rule, the words "trials at common law" in this statute are to receive the construction which had been judicially given to the same words in the earlier statute relating to the same subject. *The Abbotsford*, 98 U. S. 440; *United States* v. *Mooney*, 116 U. S. 104; *In re Louisville Underwriters*, 134 U. S. 488. They have received that construction in several of the Circuit Courts. *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531, 538; *United States* v. *Black*, 1 Fox, 570, 571. The question has not come before this court, probably because there never was a division of opinion upon it in a Circuit Court, which was the only way, until very recently, in which it could have been brought up.

The provision, "that in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions because he is a party to or interested in the issue tried," was first introduced in 1864 in the Sundry Civil

Appropriation Act for the year ending June 30, 1865, as a proviso to a section making an appropriation for bringing counterfeiters to trial and punishment. Act of July 2, 1864, c. 210, § 3; 13 Stat. 351. That proviso, as already suggested, included criminal cases in the first clause, as distinguished from the second. But it had no tendency to bring criminal cases within the general provision of the act of 1862.

The proviso as to actions by or against executors, administrators or guardians, was added, by way of amendment to section 3 of the appropriation act above mentioned, by the act of March 3, 1865, c. 113. 13 Stat. 533. This proviso had evidently no relation to criminal cases.

The combination and transposition of the provisions of 1862, 1864 and 1865, in a single section of the Revised Statutes, putting the two provisos of the later statutes first, and the general rule of the earlier statute last, but hardly changing the words of either, except so far as necessary to connect them together, cannot be held to have altered the scope and purpose of these enactments, or of any of them. It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed. *Potter* v. *National Bank*, 102 U. S. 163; *McDonald* v. *Hovey*, 110 U. S. 619; *United States* v. *Ryder*, 110 U. S. 729, 740.

It may be added that Congress has enacted that any person convicted of perjury, or subornation of perjury, under the laws of the United States, shall be incapable of giving testimony in any court of the United States until the judgment is reversed; Rev. Stat. §§ 5392, 5393; and has made specific provisions as to the competency of witnesses in criminal cases, by permitting a defendant in any criminal case to testify on the trial, at his own request; and by making the lawful husband or wife of the accused a competent witness in any prosecution for bigamy, polygamy or unlawful cohabitation. Act of March 16, 1878, c. 37; 20 Stat. 30; Act of March 3, 1887, c. 397; 24 Stat. 635.

For the reasons above stated, the provision of section 858 of the Revised Statutes, that "the laws of the State in which the

court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty," has no application to criminal trials; and, therefore, the competency of witnesses in criminal trials in the courts of the United States held within the State of Texas is not governed by a statute of the State which was first enacted in 1858, but, except so far as Congress has made specific provisions upon the subject, is governed by the common law, which, as has been seen, was the law of Texas before the passage of that statute and at the time of the admission of Texas into the Union as a State.

At common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the State which enacts it to a conviction and sentence in another State, such conviction and sentence can have no effect, by way of penalty, or of personal disability or disqualification, beyond the limits of the State in which the judgment is rendered. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Commonwealth* v. *Green*, 17 Mass. 515; *Sims* v. *Sims*, 75 N. Y. 466; *National Trust Co.* v. *Gleason*, 77 N. Y. 400; Story on Conflict of Laws, § 92; 1 Greenl. Ev. § 376. It follows that the conviction of Martin in North Carolina did not make him incompetent to testify on the trial of this case.

The competency of Spear to testify is equally clear. He was convicted and sentenced in Texas; and the full pardon of the Governor of the State, although granted after he had served out his term of imprisonment, thenceforth took away all disqualifications as a witness, and restored his competency to testify to any facts within his knowledge, even if they came to his knowledge before his disqualification had been removed by the pardon. *Boyd* v. *United States*, 142 U. S. 450; *United States* v. *Jones*, (before Mr. Justice Thompson,) 2 Wheeler Crim. Cas. 451, 461; *Hunnicutt* v. *State*, 18 Tex. App. 498; *Thornton* v. *State*, 20 Tex. App. 519.

Whether the conviction of either witness was admissible to affect his credibility is not before us, because the ruling on that question was in favor of the plaintiffs in error.

7. Another question worthy of consideration arises out of

the omission to deliver to the defendants lists of the witnesses to be called against them.

Section 1033 of the Revised Statutes is as follows: "When any person is indicted of treason, a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offence, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial." This section re-enacts a provision of the first Crimes Act of the United States, except that under that act the defendant, if indicted for any capital offence other than treason, was not entitled to a list of the witnesses. Act of April 30, 1790, c. 9, § 29; 1 Stat. 118.

The words of the existing statute are too plain to be misunderstood. The defendant, if indicted for treason, is to have delivered to him three days before the trial "a copy of the indictment, and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment;" and if indicted for any other capital offence, is to have "such copy of the indictment and list of the jurors and witnesses" two days before the trial. The list of witnesses required to be delivered to the defendant is not a list of the witnesses on whose testimony the indictment has been found, or whose names are endorsed on the indictment; but it is a list of the "witnesses to be produced on the trial for proving the indictment." The provision is not directory only, but mandatory to the government; and its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defence. Being enacted for his benefit, he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial cannot lawfully proceed until the requirement has been complied with. *United States* v. *Stewart*, 2 Dall. 343; *United States* v. *Curtis*, 4 Mason, 232; *United States* v. *Dow*, Taney, 34; *Regina* v. *Frost*, 9 Car. & P. 129; *S. C.* 2 Moody, 140; *Lord* v. *State*, 18 N. H.

173; *People* v. *Hall*, 48 Michigan, 482, 487; *Keener* v. *State*, 18 Georgia, 194, 218.

The provision is evidently derived from the English statute of 7 Anne, c. 21, § 11, by which it was enacted that, "when any person is indicted for high treason or misprision of treason, a list of the witnesses that shall be produced on the trial for proving the said indictment, and of the jury, mentioning the names, profession and place of abode of the said witnesses and jurors, be also given, at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial and in presence of two or more credible witnesses." Upon a case brought before all the judges of England, in 1840, in which a copy of the indictment and list of the jurors had been delivered to the defendant fifteen days, and a list of the witnesses to be produced on the trial had been delivered to him, ten days before the trial, the defendant, after he had been put upon his trial, and the jury had been sworn and charged with him upon the indictment, objected, upon the first witness being called and before he was sworn, that neither that witness nor any other could be examined, because the list of witnesses had not been delivered to him at the same time as the indictment and the list of jurors, as the statute of Anne required. It was argued for the Crown that the list of witnesses was seasonably delivered, and that, if not, the objection should have been taken earlier. It was held, by a majority of the judges, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to its delivery was not taken in due time; and the judges agreed that, if the objection had been made in due time, the effect of it would have been a postponement of the trial, in order to give time for a proper delivery of the list. In the course of the argument, Chief Justice Tindal said: "If no list had been delivered, the Crown could not have called a single witness." *Regina* v. *Frost*, 9 Car. & P. 129, 175, 187; *S. C.* 2 Moody, 140, 158, 170.

The Supreme Court of New Hampshire, in 1846, under a

statute providing that "every person indicted for any offence, the punishment of which may be death or confinement to hard labor for life, shall be entitled to a copy of the indictment before he is arraigned thereon; a list of the witnesses to be used on the trial, and of the jurors returned to serve on the same, with the name and place of abode of each, to be delivered to him forty-eight hours before the trial," held that an objection to the list of witnesses, for want of due statement of their places of abode, was waived if not taken until after one witness had been called and sworn at the trial. But Chief Justice Parker, in delivering judgment, said that if the defendant's objection was that no list such as the statute requires had been furnished to him, "he may object, when the case is called, to proceeding with the trial until the requisition of the statute is complied with;" and that "undoubtedly it is competent to the respondent, when a witness is called in such a case to be examined against him, to except that such witness is not named in the list furnished to him, for the purpose of excluding the testimony of that witness." N. H. Rev. Stat. c. 225, § 3; *Lord* v. *State*, 18 N. H. 173, 175, 176.

There is no occasion to consider how far, had the government delivered to the defendants, as required by the statute, lists of the witnesses to be produced for proving the indictments, particular witnesses, afterwards coming to the knowledge of the government, or becoming necessary by reason of unexpected developments at the trial, might be permitted, on special reasons shown, and at the discretion of the court, to testify in the case.

In the present case, copies of the indictments, having endorsed on each the names of the witnesses upon whose testimony it had been found by the grand jury, were delivered to the defendants more than two days before the trial. But no list of the "witnesses to be produced on the trial for proving the indictment" was ever delivered to any of them: and forty witnesses, none of whose names were endorsed on the indictments, were called by the government, and admitted to testify, as of course, to support the indictments and make out the case for the government, without a suggestion of any reason for

not having delivered to the defendants the lists required by the statute.

There is no pretence that there was any waiver on their part of their right to such a list. On the contrary, they took the objection when the case was called for trial, and before the empanelling of the jury; and they renewed the objection as soon as witnesses whose names were not endorsed on either of the indictments were called and sworn to testify in support of the indictments, and before any of them had given any testimony in the case; and on each occasion they duly took an exception to the overruling of the objection.

The indictments charged the defendants not only with a conspiracy, which was not a capital offence, but also with having, in the prosecution of the conspiracy, committed a murder, which was a capital offence. They could not therefore lawfully be put on trial, against their objection, until at least two days after they had been furnished with a list of the witnesses to be called against them. When they were to be tried for their lives, they had a right to the benefit of the statute, and the refusal to accord it to them was manifest error.

It was contended on behalf of the United States that this error was cured by the verdict acquitting the defendants of the capital charge, and convicting them of the lesser crime only. The argument is that the defendants, having prevailed in their defence against the capital charge, have not been legally prejudiced, because they would not have been entitled to a list of witnesses if they had been indicted and tried on the only charge of which they were ultimately convicted.

It may be doubted whether this is a satisfactory answer to the objection. An indictment for a capital offence usually includes an offence less than capital, and the defendant may be convicted of either. For instance, one indicted of murder may be convicted of manslaughter, or of an assault only. The statute does not make a defendant's right to a list of the witnesses to be called against him depend upon the degree of the crime of which upon trial he is ultimately convicted, but upon the degree of crime for which he is indicted. The list is to be delivered before the trial to "any person indicted of a capital

offence." The objection that these defendants had been furnished with no list of the witnesses was not like an ordinary objection to the competency of particular testimony; but it affected the whole course of the trial, and put the defendants in anxiety and danger of being capitally convicted until the return of the verdict. True, the government might have elected not to indict them for the capital offence, or might perhaps, when the objection to the want of a list of witnesses was first taken, have entered a *nolle prosequi* of so much of the indictment as contained the allegations necessary to make out that offence, and unnecessary to constitute the lesser crime of conspiracy, and have thereupon proceeded to trial without delivering any list of the witnesses. But the government, having elected to indict and to try the defendants for the capital crime, may well be held bound to afford them those means of preparing their defence, which the statute required, and which, had they been furnished, might perhaps have enabled the defendants to secure a complete acquittal of everything charged against them. The case bears some analogy to that of a defendant held to answer for an infamous crime without presentment or indictment of a grand jury, of which this court has said: "The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury." *Ex parte Wilson*, 114 U. S. 417, 426.

It is unnecessary, however, in this case, to express a definitive opinion upon the question whether the omission to deliver the list of witnesses to the defendants would of itself require a reversal of their conviction and sentence for less than a capital offence, inasmuch as they are entitled to a new trial upon another ground.

8. The court went too far in admitting testimony on the general question of conspiracy.

Doubtless, in all cases of conspiracy, the act of one conspir-

ator in the prosecution of the enterprise is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 12 Wheat. 460, 469. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator, by way of narrative of past facts, are not admissible in evidence against the others. 1 Greenl. Ev. § 111; 3 Greenl. Ev. § 94; *State* v. *Dean*, 13 Iredell, 63; *Patton* v. *State*, 6 Ohio St. 467; *State* v. *Thibeau*, 30 Vermont, 100; *State* v. *Larkin*, 49 N. H. 39; *Heine* v. *Commonwealth*, 91 Penn. St. 145; *Davis* v. *State*, 9 Tex. App. 363.

Tested by this rule, it is quite clear that the defendants on trial could not be affected by the admissions made by others of the alleged conspirators after the conspiracy had ended by the attack on the prisoners, the killing of two of them, and the dispersion of the mob. There is no evidence in the record tending to show that the conspiracy continued after that time. Even if, as suggested by the counsel for the United States, the conspiracy included an attempt to manufacture evidence to shield Logan, Johnson's subsequent declarations that Logan acted with the mob at the fight at Dry Creek were not in execution or furtherance of the conspiracy, but were mere narratives of a past fact. And the statements to the same effect, made by Charles Marlow to his companions while returning to the Denson Farm after the fight was over, were incompetent in any view of the case.

There being other evidence tending to prove the conspiracy, and any acts of Logan in furtherance of the conspiracy being therefore admissible against all the conspirators as their acts, the admission of incompetent evidence of such acts of Logan prejudiced all the defendants and entitles them to a new trial.

Upon the other exceptions taken by the defendants to rulings and instructions at the trial we give no opinion, because they involve no question of public interest, and may not again arise in the same form.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

MR. JUSTICE LAMAR did not concur in the opinion of the court on the construction of section 5508 of the Revised Statutes.

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

UNITED STATES *v.* SANGES.

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

No. 1454. Argued January 12, 13, 1892. — Decided April 4, 1892.

A writ of error does not lie in behalf of the United States in a criminal case.

THIS was an indictment on sections 5508 and 5509 of the Revised Statutes, (copied *ante*, 264, note,) averring that while one Joseph Wright, a citizen of the United States, was returning to his home, after having appeared and testified before the grand jury of the United States, in obedience to subpœnas from the Circuit Court of the United States, against persons charged with violations of the internal revenue laws, and while he was still a witness under such subpœnas, the defendants conspired to injure and oppress him in the free exercise and enjoyment of the right and privilege, secured to him by the Constitution and laws of the United States, to inform the proper officers of the United States of violations of the internal revenue laws, and to testify under and in obedience to such subpœnas, and to return to his home in peace and safety after so testifying, and to be secure, safe and unmolested in his person and exempt from violence for having exercised and enjoyed those rights and privileges; and further averring that the defendants, in pursuance and prosecution of such conspiracy, assaulted and murdered him.

The defendants demurred to the indictment, "because there

are no such rights or privileges secured to the party conspired against, by the Constitution and laws of the United States, as those set out in the indictment;" and "because on the facts alleged in said indictment there is no crime or offence set out of which the courts of the United States can take cognizance."

On October 5, 1891, the Circuit Court, held by Mr. Justice Lamar and Judge Newman, adjudged that the demurrer was well founded in law, and that it be sustained and the indictment quashed. 48 Fed. Rep. 78.

This writ of error was thereupon sued out by the United States, and was allowed by the presiding justice. The defendants in error moved to dismiss the writ of error for want of jurisdiction.

Mr. Attorney General and *Mr. Solicitor General* for plaintiff in error.

Mr. W. C. Glenn for defendants in error. *Mr. A. H. Garland* filed a brief in support of the motion to dismiss.

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

The jurisdiction of this court is invoked by the United States under that provision of the Judiciary Act of 1891, by which "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court" "in any case that involves the construction or application of the Constitution of the United States." Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828.

But the question which lies at the very threshold is whether this provision has conferred upon the United States the right to sue out a writ of error in any criminal case.

This statute, like all acts of Congress, and even the Constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 545; *Rice* v. *Railroad Co.*, 1 Black, 358, 374, 375; *United States* v. *Carll*, 105 U. S.

611; *Ex parte Wilson*, 114 U. S. 417, 422; 1 Kent Com. 336. As aids, therefore, in its interpretation, we naturally turn to the decisions in England and in the several States of the Union, whose laws have the same source.

The law of England on this matter is not wholly free from doubt. But the theory that at common law the King could have a writ of error in a criminal case after judgment for the defendant has little support beyond sayings of Lord Coke and Lord Hale, seeming to imply, but by no means affirming it; two attempts in the House of Lords, near the end of the seventeenth century, to reverse a reversal of an attainder; and an Irish case and two or three English cases, decided more than sixty years after the Declaration of Independence; in none of which does the question of the right of the Crown in this respect appear to have been suggested by counsel or considered by the court. 3 Inst. 214; 2 Hale P. C. 247, 248, 394, 395; *Rex* v. *Walcott*, Show. P. C. 127; *Rex* v. *Tucker*, Show. P. C. 186; *S. C.* 1 Ld. Raym. 1; *Regina* v. *Houston* (1841) 2 Crawford & Dix, 191; *The Queen* v. *Millis* (1844) 10 Cl. & Fin. 534; *The Queen* v. *Wilson* (1844) 6 Q. B. 620; *The Queen* v. *Chadwick* (1847) 11 Q. B. 173, 205. And from the time of Lord Hale to that of *Chadwick's Case*, just cited, the textbooks, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, § 12; c. 50, §§ 10 *et seq.*; Bac. Ab. Trial, L. 9; Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 199.

But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority, that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law.

In a few States, decisions denying a writ of error to the State after judgment for the defendant on a verdict of acquittal have proceeded upon the ground that to grant it would be to put him twice in jeopardy, in violation of a constitutional provision. See *State* v. *Anderson* (1844) 3 Sm. & Marsh. 751; *State* v. *Hand* (1845) 6 Arkansas, 169; *State* v. *Burris* (1848) 3 Texas, 118; *People* v. *Webb* (1869) 38 California, 467; *People* v. *Swift* (1886) 59 Michigan, 529, 541.

But the courts of many States, including some of great authority, have denied, upon broader grounds, the right of the State to bring a writ of error in any criminal case whatever, even when the discharge of the defendant was upon the decision of an issue of law by the court, as on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment.

The Supreme Court of Tennessee, in 1817, in dismissing an appeal by the State after an acquittal of perjury, said: "A writ of error, or appeal in the nature of a writ of error, will not lie for the State in such a case. It is a rule of the common law that no one shall be brought twice into jeopardy for one and the same offence. Were it not for this salutary rule, one obnoxious to the government might be harassed and run down, by repeated attempts to carry on a prosecution against him. Because of this rule it is that a new trial cannot be granted in a criminal case, where the defendant is acquitted. A writ of error will lie for the defendant, but not against him. This is a rule of such vital importance to the security of the citizen, that it cannot be impaired but by express words, and none such are used in" the statutes of the State. "Neither does the constitution, art. 11, sec. 10, apply, for here the punishment does not extend to life or limb. The whole of this case rests upon the common law rule." *State* v. *Reynolds*, 4 Haywood, 110. In a similar case in 1829, the same court said: "The court are unanimously of opinion that no appeal lies for the State from a verdict and judgment of acquittal on a State prosecution. The State, having established her jurisdiction and tried her experiment, should be content. To permit appeals might be the means of unnecessary vexation." *State* v.

Hitchcock, cited in 6 Yerger, 360. In 1834, the same rule was applied, where, after a verdict of guilty, a motion in arrest of judgment had been made by the defendant and sustained by the court. *State* v. *Solomons*, 6 Yerger, 360.

In 1820, a writ of error obtained by the attorney for the Commonwealth to reverse a judgment for the defendant on demurrer to an information for unlawful gaming was dismissed by the General Court of Virginia, saying only: "The court is unanimously of opinion, that the writ of error improvidently issued on the part of the Commonwealth, because no writ of error lies in a criminal case *for* the Commonwealth." *Commonwealth* v. *Harrison*, 2 Virg. Cas. 202.

The Supreme Court of Illinois, in two early cases, as summarily dismissed writs of error sued out by the State, in the one case to reverse a judgment of acquittal upon exceptions taken at a trial by jury, and in the other to reverse a judgment reversing for want of jurisdiction a conviction before a justice of the peace. *People* v. *Dill* (1836) 1 Scammon, 257; *People* v. *Royal* (1839) 1 Scammon, 557.

In 1848, a writ of error by the State to reverse a judgment for the defendant on a demurrer to the indictment was dismissed by the Court of Appeals of New York, upon a careful review by Judge Bronson of the English and American authorities, including several earlier cases in New York in which such writs of error had been brought, of which the court said: "But in none of the cases was the question either made by counsel, or considered by the court, whether the people could properly bring error. Such precedents are not of much importance." *People* v. *Corning*, 2 N. Y. 9, 15. That decision has been since recognized and acted on by that court, except so far as affected by express statutes. *People* v. *Carnal*, 6 N. Y. 463; *People* v. *Clark*, 7 N. Y. 385; *People* v. *Merrill*, 14 N. Y. 74, 76, 78; *People* v. *Bork*, 78 N. Y. 346.

In 1849, the Supreme Judicial Court of Massachusetts, speaking by Chief Justice Shaw, held that a writ of error did not lie in a criminal case in behalf of the Commonwealth; and therefore dismissed writs of error sued out to reverse judgments upon indictments in two cases, in one of which the defend-

ant, after pleading *nolo contendere*, had moved in arrest of judgment for formal defects in the indictment, and thereupon judgment had been arrested and the defendant discharged, and in the other the indictment had been quashed on the defendant's motion. *Commonwealth* v. *Cummings*, and *Same* v. *McGinnis*, 3 Cush. 212.

In the same year, the Supreme Court of Georgia made a similar decision, dismissing a writ of error sued out by the State upon a judgment quashing an indictment against the defendant; and, in an able and well considered opinion delivered by Judge Nisbet, said: "The rule seems to be well settled in England, that in criminal cases a new trial is not grantable to the Crown after verdict of acquittal, even though the acquittal be founded on the misdirection of the judge. This is the general rule, and obtains in the States of our Union. It excludes a rehearing after acquittal upon errors of law, and therefore, it would seem, denies also a rehearing upon judgments of the court upon questions of law, even when the jury have not passed upon the guilt or innocence of the prisoner. If the effect of the judgment is a discharge, there can be no rehearing, either by new trial or writ of error. Indeed it may be stated, as a general rule, that in criminal cases, upon general principles, errors are not subject to revision at the instance of the State." "These principles are founded upon that great fundamental rule of the common law, *Nemo debet bis vexari pro una et eadem causa;* which rule, for greater caution and in stricter vigilance over the rights of the citizen against the State, has been in substance embodied in the Constitution of the United States, thus: 'Nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb.'" After observing that this provision of the Constitution could have no direct bearing upon that case, which was of a misdemeanor only, and in which there had been no trial by jury, the court added: "The common law maxim, and the Constitution are founded in the *humanity* of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State. It is, doubtless, *in the spirit* of this benign rule of the com-

mon law, embodied in the Federal Constitution — a spirit of liberty and justice, tempered with mercy — that, in several of the States of this Union, in criminal causes a writ of error has been denied to the State." *State* v. *Jones*, 7 Georgia, 422, 424, 425.

The Supreme Court of Iowa, in 1856, ordered a writ of error sued out by the State, after the defendant had been acquitted by a jury, to be dismissed, not because to order a new trial would be against art. 1, sec. 12, of the constitution of the State, declaring that "no person shall after acquittal be tried for the same offence," (for the court expressly waived a decision of that question,) but only because of "there being no law to authorize a writ of error on the part of the State in a criminal case." *State* v. *Johnson*, 2 Iowa, 549.

The Supreme Court of Wisconsin, in 1864, held that a writ of error did not lie in behalf of the State to reverse a judgment in favor of the defendant upon a demurrer to his plea to an indictment. *State* v. *Kemp*, 17 Wisconsin, 669. The Supreme Court of Missouri, in 1877, made a similar decision, overruling earlier cases in the same court. *State* v. *Copeland*, 65 Missouri, 497. And the Supreme Court of Florida, in 1881, held that the State was not entitled to a writ of error to reverse a judgment quashing an indictment, and discharging the accused. *State* v. *Burns*, 18 Florida, 185.

In those States in which the government, in the absence of any statute expressly giving it the right, has been allowed to bring error, or appeal in the nature of error, after judgment for the defendant on demurrer to the indictment, motion to quash, special verdict, or motion in arrest of judgment, the question appears to have become settled by early practice before it was contested.

In North Carolina, the right of the State has been strictly limited to the cases just enumerated, and has been denied even when the defendant was discharged upon a judgment sustaining a plea of former acquittal as sufficient in law, or upon a ruling that there was no legal prosecutor; and the Supreme Court has repeatedly declared that the State's right of appeal in a criminal case was not derived from the common law, or

from any statute, but had obtained under judicial sanction by a long practice; and has held that neither art. 4, sec. 8, of the State constitution of 1876, giving that court "jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference," nor art. 4, sec. 27, of the same constitution, providing that in all criminal cases before a justice of the peace "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," gave any right of appeal to the State, but only to the defendant. *State* v. *Hadcock* (1802) 2 Haywood, 162; *State* v. *Lane* (1878) 78 No. Car. 547; *State* v. *Swepson* (1880) 82 No. Car. 541; *State* v. *Moore* (1881) 84 No. Car. 724; *State* v. *Powell* (1882) 86 No. Car. 640.

The Court of Appeals of Maryland, in 1821, sustained a writ of error by the State to reverse a judgment in favor of the defendants on demurrer to the indictment, citing a number of unreported cases decided in that State in 1793 and 1817. *State* v. *Buchanan*, 5 Har. & Johns. 317, 324, 330. But the same court, in 1878, refused to construe a statute of 1872, providing that in all criminal trials it should be lawful for the attorney for the State to tender a bill of exceptions and to appeal, as authorizing the court, on such exceptions and appeal, to order a new trial after a verdict of acquittal. *State* v. *Shields*, 49 Maryland, 301.

In Louisiana, in the leading case, the court admitted that to allow the State to bring a writ of error in a criminal case was contrary to the common law of England, to the law of most of the States, and to the general opinion of the bar; and the later cases appear to be put largely upon the ground that the practice had become settled by a course of decision. *State* v. *Jones* (1845) 8 Rob. (La.) 573, 574; *State* v. *Ellis* (1857) 12 La. Ann. 390; *State* v. *Ross* (1859) 14 La. Ann. 364; *State* v. *Taylor* (1882) 34 La. Ann. 978; *State* v. *Robinson* (1885) 37 La. Ann. 673.

The Supreme Court of Pennsylvania, from an early period, occasionally entertained, without question, writs of error sued out by the State in criminal cases. *Commonwealth* v. *Taylor* (1812) 5 Binney, 277; *Commonwealth* v. *McKisson* (1822) 8 S.

& R. 420; *Commonwealth* v. *Church* (1845) 1 Penn. St. 105. The first mention of the question appears to have been in a case in which the only objection taken to the right of the Commonwealth to sue out a writ of error was that the writ had not been specially allowed; of which the court said: "There is nothing in the disabling provisos of the statutes to limit the right of the Commonwealth; and the powers of this court, whether deduced from the common law, from the old provincial act of 1722, or from legislation under our state constitutions, are quite competent to the review of any judicial record, when no statutory restraints have been imposed. It would be very strange if the Commonwealth might not appeal to her own tribunals for justice without the special consent of certain of her own officers." This theory that the State may sue out a writ of error, unless expressly denied it by statute, is opposed to the view maintained by a host of decisions above cited; and it is observable that such judges as Judge Thompson and Judge Sharswood were in favor of quashing writs so sued out. *Commonwealth* v. *Capp* (1864) 48 Penn. St. 53, 56; *Commonwealth* v. *Moore* (1882) 99 Penn. St. 570, 576.

In many of the States, indeed, including some of those above mentioned, the right to sue out a writ of error, or to take an appeal in the nature of a writ of error, in criminal cases, has been given to the State by positive statute. But the decisions above cited conclusively show that under the common law, as generally understood and administered in the United States, and in the absence of any statute expressly giving the right to the State, a writ of error cannot be sued out in a criminal case after a final judgment in favor of the defendant, whether that judgment has been rendered upon a verdict of acquittal, or upon a determination by the court of an issue of law. In either case, the defendant, having been once put upon his trial and discharged by the court, is not to be again vexed for the same cause, unless the legislature, acting within its constitutional authority, has made express provision for a review of the judgment at the instance of the government.

In the light of these decisions, we come to the consideration

of the acts of Congress on the subject of writs of error in criminal cases.

The appellate jurisdiction of this court rests wholly on the acts of Congress. For a long time after the adoption of the Constitution, Congress made no provision for bringing any criminal case from a Circuit Court of the United States to this court by writ of error. At February term, 1803, indeed, this court, no objection being made, took jurisdiction of a writ of error sued out by the United States to the Circuit Court for the District of Columbia in a criminal case. *United States* v. *Simms*, 1 Cranch, 252. But at February term, 1805, in a like case, this court, upon full argument and consideration, held that it had no jurisdiction of a writ of error in a criminal case, and overruled *United States* v. *Simms*, Chief Justice Marshall saying: "No question was made in that case as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." *United States* v. *More*, 3 Cranch, 159, 172. And it was thenceforth held to be settled that criminal cases could not be brought from a Circuit Court of the United States to this court by writ of error, but only by certificate of division of opinion upon specific questions of law. *Ex parte Kearney*, 7 Wheat. 38, 42; *Ex parte Gordon*, 1 Black, 503; *Ex parte Yarbrough*, 110 U. S. 651; *Farnsworth* v. *Montana*, 129 U. S. 104, 113; *United States* v. *Perrin*, 131 U. S. 55.

As to each of the Territories, except Washington, the Revised Statutes provided that final judgments and decrees of its Supreme Court, where the value of the matter in dispute exceeded $1000, might be reviewed by this court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court of the United States. Rev. Stat. §§ 702, 1909. The act of June 23, 1874, c. 469, § 3, provided that a writ of error should lie from this court to the Supreme Court of the Territory of Utah, "in criminal cases, where the accused shall have been sentenced to capital punishment, or convicted of bigamy or polygamy." 18 Stat. 254. The act of March 3, 1885, c. 355, provided, in § 1, that no appeal or writ of error should

be allowed from the Supreme Court of a Territory unless the matter in dispute exceeded $5000; and in § 2 that the preceding section should not apply to any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." 23 Stat. 443. At October term, 1885, this court, without objection, decided upon the merits a writ of error to the Supreme Court of the Territory of Utah by one convicted of a crime which was neither bigamy or polygamy, nor punishable with death. But at the same term, after argument upon its jurisdiction of a like writ of error, the court dismissed both writs of error, and, in answering the objection that it had taken jurisdiction of the first writ, said: "The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits." *Cannon* v. *United States*, 116 U. S. 55, and 118 U. S. 355; *Snow* v. *United States*, 118 U. S. 346, 354. The question whether the provision of the act of March 3, 1885, c. 355, § 2, authorizing a writ of error from this court to the Supreme Court of any Territory in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States," extended to criminal cases, was then left open, but at October term, 1888, was decided in the negative. *Farnsworth* v. *Montana*, 129 U. S. 104.

The manner of bringing up criminal cases from the Circuit Courts of the United States upon a certificate of division of opinion has undergone some changes by successive acts of Congress. Under the act of April 29, 1802, c. 31, § 6, whenever there was a division of opinion in the Circuit Court upon a question of law, the question was certified to this court for decision; provided that the case might proceed in the Circuit Court if in its opinion further proceedings could be had without prejudice to the merits, and that no imprisonment should be allowed or punishment inflicted, upon which the judges

were divided in opinion. 2 Stat. 159; *United States* v. *Tyler*, 7 Cranch, 285; *United States* v. *Daniel*, 6 Wheat. 542; *United States* v. *Bailey*, 9 Pet. 267. By the act of June 1, 1872, c. 255, § 1, "whenever, in any suit or proceeding" in a Circuit Court, there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree or order, and a certificate of division of opinion as under the act of 1802, "either party" might remove the case to this court "on writ of error or appeal, according to the nature of the case." 17 Stat. 196. That act continued in force only about two years, when it was repealed by the Revised Statutes. By sections 650, 652 and 693 of those statutes, its provisions were restricted to civil suits and proceedings; and by sections 651 and 697 the provisions of section 6 of the act of 1802 were reënacted as to criminal cases. *Ex parte Tom Tong*, 108 U. S. 556, 559. In *United States* v. *Reese*, 92 U. S. 214, and in *United States* v. *Cruikshank*, 92 U. S. 542, argued at October term, 1874, and decided at October term, 1875, which were brought to this court by the United States, by writ of error and certificate of division of opinion, after judgment according to the opinion of the presiding judge, sustaining a demurrer to the indictment, or a motion in arrest of judgment, it appears, by the records and briefs on file, that the judgment below was entered and the certificate of division made under the act of 1872, and that no objection was taken to the jurisdiction of this court. The exercise of jurisdiction over those cases on writ of error is therefore entitled to no more weight by way of precedent than the exercise of appellate jurisdiction *sub silentio* in the cases, above cited, of *United States* v. *Simms*, 1 Cranch, 252, and *Cannon* v. *United States*, 116 U. S. 55.

The first act of Congress which authorized a criminal case to be brought from a Circuit Court of the United States to this court, except upon a certificate of division of opinion, was the act of February 6, 1889, c. 113, § 6, by which it was enacted that "in all cases of conviction" of a capital crime in any court of the United States, the final judgment "against

the respondent" might, on his application, be reëxamined, reversed or affirmed by this court on writ of error. 25 Stat. 656. The writ of error given by that act was thus clearly limited to the defendant; and the terms and effect of the act of June 23, 1874, c. 469, § 3, above cited, concerning writs of error from this court to the Supreme Court of the Territory of Utah, as well as those of the act of March 3, 1879, c. 176, giving a writ of error from the Circuit Court of the United States to a District Court, were equally restricted. 18 Stat. 254; 20 Stat. 354.

The provisions of the Judiciary Act of March 3, 1891, c. 517, material to be considered in this case, are those of § 5, by which appeals or writs of error may be taken from a Circuit Court directly to this court in certain classes of cases, among which are "cases of conviction of a capital or otherwise infamous crime," and "any case that involves the construction or application of the Constitution of the United States;" and those of § 6, by which the Circuit Courts of Appeals established by this act have appellate jurisdiction to review, by appeal or writ of error, final decisions in the District and Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and the judgments or decrees of the Circuit Courts of Appeals are made final "in all cases arising under the criminal laws" and in certain other classes of cases, unless questions are certified to this court, or the whole case ordered up by writ of *certiorari*, as therein provided. 26 Stat. 827, 828.

The provision of section 5, authorizing writs of error from this court in cases of capital or otherwise infamous crimes, is clearly limited in terms and effect (like the provision of the act of 1889, authorizing a writ of error in cases of capital crimes, and earlier acts, above cited) to convictions only. Whether a writ of error by the defendant in a criminal case of lower grade would be included in the provisions of that section for bringing to this court cases in which the jurisdiction of the court below is in issue, or which involve the construction or application of the Constitution of the United States, or the validity of a law of the United States, or the

validity or construction of a treaty, or in which it is contended that the constitution or a law of a State contravenes the Constitution of the United States, is not now before us for decision.

The provision of section 6, giving the Circuit Courts of Appeals in general terms appellate jurisdiction of criminal cases, says nothing as to the party by whom the writ of error may be brought, and cannot therefore be presumed to have been intended to confer upon the government the right to bring it.

In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States.

Writ of error dismissed for want of jurisdiction.

O'NEIL *v.* VERMONT.

ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

No. 6. Argued January 20, 1892. — Decided April 4, 1892.

A complaint, in Vermont, before a justice of the peace, for selling intoxicating liquor without authority, was in the form prescribed by the state statute, which also provided, that, under such form of complaint every distinct act of selling might be proved, and that the court should impose a fine for each offence. After a conviction and sentence before the justice of the peace, the defendant appealed to the county court, where the case was tried before a jury. The defendant did not take the point, in either court, that there was any defect or want of fulness in the complaint. The jury found the defendant guilty of 307 offences, as of a second conviction for a like offence. He was fined $6140, being $20 for each offence, and the costs of prosecution, $497.96, and ordered to be committed until the sentence should be complied with, and it was adjudged, that if the fine and costs, and 76 cents, as costs of

Counsel for Plaintiff in Error.

commitment, aggregating $6638.72, should not be paid before a day named, he should be confined at hard labor, in the house of correction, for 19,914 days, being, under a statute of the State, three days for each dollar of the $6638. The facts of the case were contained in a written admission, and the defendant excepted because the court refused to hold that the facts did not constitute an offence. The case was heard by the Supreme Court of the State, (58 Vermont, 140,) which held that there was no error. On a writ of error from this court; *Held*,

(1) The term of imprisonment was authorized by the statute of Vermont;

(2) It was not assigned in this court, as error, in the assignment of errors or in the brief, that the defendant was subjected to cruel and unusual punishment, in violation of the Constitution of the United States;

(3) So far as that is a question arising under the constitution of Vermont, it is not within the province of this court;

(4) As a Federal question, the 8th Amendment to the Constitution of the United States does not apply to the States;

(5) No point on the commerce clause of the Constitution of the United States was taken in the county court, in regard to the present case, or considered by the Supreme Court of Vermont or called to its attention;

(6) The only question considered by the Supreme Court, in regard to the present case, was whether the defendant sold the liquor in Vermont or in New York, and it held that the completed sale was in Vermont; and that did not involve any Federal question;

(7) As the defendant did not take the point in the trial court that there was any defect or want of fulness in the complaint, he waived it; and it did not involve any Federal question;

(8) The Supreme Court of Vermont decided the case on a ground broad enough to maintain its judgment without considering any Federal question;

(9) The writ of error must be dismissed for want of jurisdiction in this court, because the record does not present a Federal question.

This case came on for argument in regular course on the 4th day of December in October term, 1889. The court ordered the case to be passed to be heard before a full bench. When reached at October term, 1890, it was again passed in consequence of the illness of counsel. The case as now made is stated in the opinion of the court.

Mr. A. H. Garland for plaintiff in error. *Mr. Charles U. Joyce* and *Mr. Joel C. Baker* filed briefs for same.

Opinion of the Court.

Mr. George F. Edmunds for defendant in error. *Mr. P. Redfield Kendall* was on the brief for same.

Mr. Justice Blatchford delivered the opinion of the court.

On the 26th of December, 1882, a grand juror, of the town of Rutland, in the county of Rutland and State of Vermont, made a written complaint, on his oath of office, before a justice of the peace of that county, that John O'Neil, of Whitehall, New York, on December 25th, 1882, at Rutland, at divers times, did "sell, furnish and give away intoxicating liquor, without authority," and contrary to the statute, and further, that O'Neil, at the March term, 1879, of the Rutland County court, had been convicted of selling, furnishing and giving away intoxicating liquors, against the law. Thereupon the justice issued a warrant for the arrest of O'Neil. He was arrested and brought before the justice, and pleaded not guilty.

The statute of Vermont under which the prosecution was instituted is embodied in §§ 3800 and 3802 of chapter 169 of the Revised Laws of Vermont of 1880, (pp. 734, 735,) in these words:

"Section 3800. No person shall, except as otherwise especially provided, manufacture, sell, furnish or give away, by himself, clerk, servant or agent, spirituous or intoxicating liquor, or mixed liquor of which a part is spirituous or intoxicating, or malt liquors or lager beer; and the phrase 'intoxicating liquors' where it occurs in this chapter shall be held to include such liquors and beer.

"The word 'furnish,' where it occurs in this chapter, shall apply to cases where a person knowingly brings into or transports within the State for another person intoxicating liquor intended to be sold or disposed of contrary to law, or to be divided among or distributed to others.

"The words 'give away,' where they occur in this chapter, shall not apply to the giving of intoxicating liquor at private dwellings, or their dependencies, unless given to an habitual drunkard, or unless such dwelling or its dependencies become a place of public resort.

"But no person shall furnish or give away intoxicating liquor at an assemblage of persons gathered to erect a building or frame of a building, or to remove a building or at a public gathering for amusement.

"Nothing in this chapter shall prevent the manufacture, sale and use of wine for the commemoration of the Lord's supper, nor the manufacture, sale and use of cider, or, for medical purposes only, of wine made in the State from grapes or other fruits, the growth of the State, and which is without the admixture of alcohol or spirituous liquor, nor the manufacture by any one for his own use of fermented liquor.

"But no person shall sell or furnish cider or fermented liquor at or in a victualling house, tavern, grocery, shop, cellar or other place of public resort, or at any place to an habitual drunkard."

"Sec. 3802. If a person by himself, clerk, servant or agent, sells, furnishes or gives away; or owns, keeps or possesses with intent to sell, furnish or give away, intoxicating liquor or cider in violation of law, he shall forfeit for each offence to the State, upon the first conviction ten dollars and costs of prosecution; on the second conviction he shall forfeit for each offence twenty dollars and costs of prosecution, and shall also be imprisoned one month; and on the third and subsequent convictions he shall forfeit for each offence twenty dollars and the costs of prosecution, and shall also be imprisoned not less than three months nor more than six months."

The complaint was in the form prescribed by § 3859 of the Revised Laws of Vermont, for offences against § 3802; and § 3860 provides that under such form of complaint "every distinct act of selling" may be proved, "and the court shall impose a fine for each offence."

The justice, after hearing the proofs of the parties, entered judgment finding O'Neil guilty of 457 offences, second conviction, of selling intoxicating liquors in violation of chapter 169 of the Revised Laws, and adjudging that he pay to the treasurer of the State a fine of $9140, and the costs of prosecution, taxed at $472.96, and be confined at hard labor in the house of correction at Rutland for the term of one month,

and that, in case such fine and costs should not be paid on or before the expiration of said term of one month's imprisonment, he should be confined at hard labor in the house of correction at Rutland for the further term of 28,836 days, to be computed from the expiration of said term of one month's imprisonment. From that judgment O'Neil appealed to the county court of Rutland County. The appeal was allowed, and he gave bail for his appearance.

In the county court O'Neil pleaded not guilty, and the case was tried by a jury. He did not take the point, either before the justice of the peace or the county court, that there was any defect or want of fulness in the complaint. Any such point was waived, by the failure to take it. Besides, it did not involve any Federal question. The question of the consolidation of several offences in one complaint is purely a matter of state practice, and it is a familiar rule of criminal law, that time need not be proved as alleged.

The jury found O'Neil guilty of 307 offences "of selling intoxicating liquor without authority and contrary to the laws of Vermont, as of a second conviction for a like offence." He filed exceptions, which state that, for the purpose of the trial, he admitted the following facts: "The respondent, John O'Neil, of Whitehall, in the county of Washington and State of New York, is a wholesale and retail dealer in wines and liquors at said Whitehall, and has been so engaged in business there for more than three years last past, and that said business by him carried on is a lawful and legitimate business under the laws of the State of New York as conducted by him there. That during the last three years the respondent has received at his store, in said Whitehall, three hundred and seven separate and distinct orders by mail, telegraph and express, for specified and designated small quantities of intoxicating liquors, from as many different parties residing in Rutland, in the State of Vermont. The orders so sent by express were in the form of a letter addressed to the said John O'Neil at Whitehall aforesaid, and the letter attached to a jug, and the jug, with the letter attached, was delivered by said parties to the National Express Company, in Rutland, and charges

thereon paid by the parties so sending the order. Orders sent by mail were by letters or postal cards deposited in the post-offices at said Rutland, directed to John O'Neil at Whitehall, New York, and postage paid thereon. Orders sent by telegraph were delivered by the sender at the telegraph offices in said Rutland, directed to said John O'Neil, Whitehall, New York, and charges paid by the sender, which orders requested the respondent to send said intoxicating liquors to the parties ordering the same at said Rutland, and in more than one-half the number of instances said orders directed him to send said liquors by express, C. O. D., and in the other instances, where the orders did not specify, it was the intention of the purchaser to have the goods so sent to him. It is the usual course of trade for merchants receiving an order from a considerable distance for goods in small quantities, to send the same by express, C. O. D., when the order is not from a regular customer or a party of known responsibility. That upon the receipt of said orders the respondent has in each case measured out the liquors called for in his order at his store in Whitehall aforesaid, and packed the same in jugs or other vessels, and attached to each package a tag, upon which was written the name and address of the party ordering the same, and delivered each package so directed and addressed, at Whitehall, aforesaid, to the National Express Company, a New York corporation, a common carrier, doing business between New York and Montreal and including the route between said Whitehall and said Rutland, and each of said packages also had upon said tag the name and business card of the respondent, and none of said packages were in any manner disguised, and all of them were sealed with wax. It was not stated on the jugs or tags what they contained. The respondent at the same time delivered to said express company a bill of said liquor, which said carrier placed in an envelope, marked C. O. D., which envelope had endorsed thereon, among other things, the following instructions: 'Do not deliver the whole or any part of the goods accompanying this bill until you receive pay therefor. Be careful to notice what money you receive, and, as far as practicable, send the

same as received and follow the special instructions of the shipper, if any are given, on the bills. If goods are refused or the parties cannot be found, notify the office from whence received, with names and dates, and await further instructions' — meaning thereby that said express company should receive the amount of said bill upon the delivery of the package to the consignee, and that without payment of said bill the said liquor should not be delivered; that, in the usual and ordinary course of business of said carrier in such cases, the said express company delivered each of said packages to the consignee named upon said tag, at Rutland, and at the same time and concurrently with such delivery received the amount of the said bill in the C. O. D. envelope, the amount of freight for the transportation of said package from Whitehall to Rutland, and the charges for returning said money to the respondent at Whitehall. The express company placed said money for the payment of said bill in the same envelope and returned it to the respondent at Whitehall. The respondent did nothing to or with said liquors after the said packages were delivered by him at said Whitehall to said common carrier, and the said several consignees received the same and made payment as aforesaid, at Rutland, as and under the contract made, as aforesaid, through their said orders so sent to the respondent at Whitehall. That it is the usual and ordinary course of business of said express company, in case goods are refused or the consignees cannot be found, for the office to which goods are sent to notify the office from which they were shipped to notify the consignor of the facts, and the consignor would be consulted and his orders taken and followed as to the disposition of the goods, and this would be the same whether goods were sent C. O. D. or otherwise. The respondent gave no special directions as to any of the packages shipped as aforesaid." It appears clearly, from this admission of facts, that the charges paid in Rutland, to the express company, when the empty jug was sent from Rutland, included only the charges for the transportation of the empty jug to Whitehall, and that the amount of freight for the transportation of the packages containing liquor, from Whitehall to Rutland, was

paid when it was delivered to its consignee at Rutland, simultaneously with the payment of the bill for the liquor, and of the charges for returning the money to Whitehall.

The exceptions state that O'Neil requested the court to instruct the jury that the facts set forth in his admission did not constitute an offence against the statute, under the complaint in the cause, but the court refused so to hold, and he excepted; that he requested the court also to instruct the jury that, under the facts set forth in his admission, they ought to find him not guilty, but the court refused so to instruct the jury, and he excepted; that the court charged the jury, that if they believed the facts set forth in the admission to be true, the same made a case upon which the jury should find a verdict of guilty against him, to which instruction he excepted; that evidence was given that at the March term, 1879, of the Rutland County court, he was convicted of selling, furnishing and giving away intoxicating liquors; and that the court adjudged, upon the verdict and the evidence, that he was guilty of 307 offences of selling intoxicating liquor without authority, as of a second conviction. The exceptions were allowed, and for their trial the sentence was respited, execution stayed and the cause passed to the Supreme Court of Vermont.

The judgment of the county court, as entered, was, that O'Neil pay a fine of $6140, and the costs of prosecution, taxed at $497.96, and stand committed until the sentence should be complied with; and that if the said fine and costs, and costs of commitment, ascertained to be 76 cents, the whole aggregating $6638.72, should not be paid before March 20, 1883, he should be confined at hard labor, in the house of correction at Rutland, for the term of 19,914 days.

The case was heard in the Supreme Court, and a decision was rendered in the general term, the Chief Judge and six Assistant Judges being present, at October term, 1885, which is reported in 58 Vermont, 140. The judgment of the Supreme Court was, that the judgment of the county court was not in anywise erroneous or defective and there was not any error in the proceedings. O'Neil has sued out a writ of error from this court to review that judgment.

The trial and conviction of O'Neil in the county court were solely for "selling intoxicating liquor without authority." The punishment prescribed therefor by § 3802 was that "on the second conviction, he shall forfeit for each offence twenty dollars and costs of prosecution, and shall also be imprisoned one month." The term of confinement for 19,914 days was three days for each dollar of the $6638, under § 4366 of the Revised Laws of Vermont, which prescribes that time of imprisonment in default of payment of the fine and costs in criminal cases. It is not assigned in this court, as error, in the assignment of errors, or in the brief for O'Neil, that he was subjected to cruel and unusual punishment, in violation of the Constitution of the United States. It appears by the report of the case in 58 Vermont, that he took the point in the Supreme Court of Vermont, that the statute of that State was repugnant to the 8th Amendment to the Constitution of the United States and to that of Vermont, in that it allowed "cruel and unusual punishment." That court said, in its opinion: "The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offence with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offences. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed." We forbear the consideration of this question, because as a Federal question, it is not assigned as error, nor even suggested in the brief of the plaintiff in error; and, so far as it is a question arising under the constitution of Ver-

mont, it is not within our province. Moreover, as a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States. *Pervear* v. *The Commonwealth*, 5 Wall. 475.

The opinion of the Supreme Court of Vermont was delivered by Chief Judge Royce. The case being one for selling intoxicating liquors contrary to law, the court stated the question to be, whether the liquors were sold by O'Neil, in contemplation of law, in Rutland County, and said that the answer depended upon whether the National Express Company, by which the liquors were delivered to the consignees thereof, was in law the agent of the vendor or of the vendees; that, if the purchase and sale of the liquors was fully completed in the State of New York, so that, upon delivery of them to the express company for transportation, the title vested in the consignees, as in the case of a completed and unconditional sale, then no offence against the law of Vermont had been committed; but that if, on the other hand, the sale, by its terms, could become complete, so as to pass the title in the liquors to the consignees, only upon the doing of some act, or the fulfilling of some condition precedent, after they reached Rutland, then the rulings of the county court upon the question of the offence were correct.

The court then said: "The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice, for collection. The shipment was in each instance which it is necessary here to consider, 'C. O. D.;' and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by

the express company, which received the shipments coupled therewith."

The court then remarked, that whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the *intention* of the parties, which is to be gathered from their acts and all the facts and circumstances of the case taken together, and cited *Mason* v. *Thompson*, 18 Pick. 305; Benjamin on Sales, §§ 311, 319, note c, and 320, note d; and Robert's Vermont Digest, 610, *et seq.* It then proceeded: "In the cases under consideration," (viz.: the present case, and another case against O'Neil, for keeping intoxicating liquors with the intent to sell, etc.,) "the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfilment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was *intended* by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and *if* he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention *not* to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them

deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale, therefore, remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory *contract* of sale in New York; but the completed *sale* was, or was to be, in this State."

The foregoing comprises all that was said by the Supreme Court material to the case now before us.

It is assigned for error, that the Supreme Court held (1) that the sale of intoxicating liquor in New York, by a citizen of that State lawfully, was a crime under the statute law of Vermont, when the liquor so sold was shipped C. O. D. to the purchaser in Vermont, by his direction; (2) that a shipment of liquors by a common carrier from New York, by a citizen of that State to a purchaser in Vermont, under the circumstances of this case, was a crime under the statute of Vermont, which could be punished by the courts of Vermont; (3) that such statute was not in conflict with the clause of the Constitution of the United States which gives Congress power to regulate commerce with foreign nations and among the several States and with the Indian tribes; (4) that O'Neil, under the facts in this case, was amenable to the statute law of Vermont prohibiting the sale, furnishing and giving away of intoxicating liquors; and (5) that the construction the court gave to that statute, and its application to the facts of this case, was not in conflict with § 8 of article 1 of the Constitution of the United States, in regard to the regulation of commerce.

It is contended for the State of Vermont that this court has no jurisdiction of this case, because the record does not present a Federal question. We are of opinion that this conten-

tion is correct, and that the writ of error must be dismissed for want of jurisdiction in this court.

No point on the commerce clause of the Constitution of the United States was taken in the county court, in regard to the present case, or considered by the Supreme Court of Vermont. One reason for this may have been that the decision in *Peirce* v. *New Hampshire*, 5 How. 504, had not theretofore been in terms overruled or questioned by this court, the cases of *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, not having been then decided. The only points raised in the county court, according to the exceptions, were, that the facts set forth in the written admission of O'Neil did not constitute an offence against the statute of Vermont under the complaint, and that he ought to be found not guilty under the facts so set forth. The matters thus excepted to were too general to call the attention of the state court to the commerce clause of the Constitution, or to any right claimed under it. *Farney* v. *Towle*, 1 Black, 350; *Day* v. *Gallup*, 2 Wall. 97; *Edwards* v. *Elliott*, 21 Wall. 532; *Warfield* v. *Chaffe*, 91 U. S. 690; *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57; *Clark* v. *Pennsylvania*, 128 U. S. 395.

The only question considered by the Supreme Court, in its opinion, in regard to the present case, was whether the liquor in question was sold by O'Neil at Rutland or at Whitehall, so as to fall within or without the statute of Vermont, and the court arrived at the conclusion that the completed sale was in Vermont. That does not involve any Federal question.

In its opinion in 58 Vermont, 140, the Supreme Court considered not only the present case and the case before referred to against O'Neil for keeping intoxicating liquors with intent to sell, etc., but also two other cases, being proceedings *in rem* for the condemnation of intoxicating liquor on its seizure, in which latter two cases the National Express Company was claimant, and in one of them the liquors were forfeited, while in the other of them some of the liquors, (being those which had been paid for to the shipper at Whitehall, New York,) were returned to the claimant and the remainder forfeited.

In its opinion, the court said: "Concerning the claim that section 8" of article 1, "of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted." That this observation had reference solely to the two seizure cases, and not to the present case, is apparent from the fact that the court immediately went on to say: "If an express company or any other carrier or person, natural or corporate, has in possession within this State an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the State, it is a necessary incident of the police powers of the State that such article should be subject to seizure for the protection of the community." The liquors in those two cases *in rem* were seized by the sheriff at Rutland, while in the possession of the National Express Company, some of them having been delivered to that company at Troy, New York, and some at Whitehall, New York, and all of them having been ordered by persons at Rutland for their own use and not for sale or distribution contrary to law.

The Supreme Court of Vermont decided the case before us upon a ground broad enough to maintain its judgment without considering any Federal question. No Federal question was presented for its decision, as to this case, nor was the decision of a Federal question necessary to the determination of this case, nor was any actually decided, nor does it appear that the judgment as rendered could not have been given without deciding one. *Hale* v. *Akers*, 132 U. S. 554, 565, and cases there cited; *San Francisco* v. *Itsell*, 133 U. S. 65; *Hopkins* v. *McLure*, 133 U. S. 380; *Blount* v. *Walker*, 134 U. S. 607; *Beatty* v. *Benton*, 135 U. S. 244; *Johnson* v. *Risk*, 137 U. S. 300; *Butler* v. *Gage*, 138 U. S. 52; *Beaupré* v. *Noyes*, 138 U. S. 397; *Leeper* v. *Texas*, 139 U. S. 462; *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679; *Hammond* v. *Johnston*, 142 U. S. 73; *New Orleans* v. *New Orleans Water Works Co.*, 142 U. S. 79.

It was entirely immaterial how the liquor sold by O'Neil at

Rutland came to be there, for sale there — whether it was made there, or whether it was brought in some way from the State of New York. The only question was whether it was at Rutland so as to be capable of sale there, and whether it was sold there.

Moreover, under the practice in the Supreme Court of Vermont, the very error relied upon must appear affirmatively in the exceptions. *Sequin* v. *Peterson*, 45 Vermont, 255; *State* v. *Preston*, 48 Vermont, 12; *Hathaway* v. *National Life Ins. Co.*, 48 Vermont, 335; *State* v. *Brunelle*, 57 Vermont, 580; *Spaulding* v. *Warner*, 57 Vermont, 654; *Rowell* v. *Fuller*, 59 Vermont, 688.

The result is that the writ of error must be

Dismissed.

Mr. Justice Field dissenting.

I am compelled to disagree with my associates in their disposition of this case. The act charged as an offence in the State of Vermont was in my judgment a lawful transaction in the State of New York. It will, I think, strike many men with surprise to learn that filling an order for the purchase of goods and their transmission from one State by an express carrier, to be paid for on delivery to the buyer in another State can be turned into a criminal offence of the person filling the order in the State where he was not present.

The offence charged consisted of selling, furnishing and giving away intoxicating liquor in Vermont, without authority of law, yet the accusation presenting it makes no mention of any person to whom the article was sold, furnished or given. Here is a copy of the document:

"State of Vermont, }
Rutland County, } *ss:*

"To Wayne Bailey, Esq., justice of the peace within and for the county of Rutland, comes J. P. Cain, grand juror, of the town of Rutland, in said county of Rutland, and on his oath of office complaint makes that John O'Neil, of White-

hall, N.Y., to wit, on the 25th day of December, A.D. 1882, at Rutland aforesaid, did at divers times sell, furnish and give away intoxicating liquor without authority, contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the State.

"J. P. CAIN, *Grand Juror.*"

The accusation describes only a single offence; yet, by the addition of the words "at divers times," that document is held to justify a trial and uphold a conviction for three hundred and seven distinct offences, only one of which is set forth in the accusation, and that defectively, all the others being brought within it by the use of those words.

The punishment imposed was one exceeding in severity, considering the offences of which the defendant was convicted, anything which I have been able to find in the records of our courts for the present century. By the justice of the peace in Vermont, before whom the defendant was accused, he was convicted of four hundred and fifty-seven distinct offences, and sentenced to pay to the treasurer of the State a fine of $9140 and the costs of prosecution taxed at $472.96, and be confined at hard labor in the house of correction in the county of Rutland for one month, and, in case the fine and costs should not be paid on or before the expiration of this month's imprisonment, to be confined there at hard labor for the further term of twenty-eight thousand eight hundred and thirty-six days, to be computed from the expiration of the month's imprisonment. This was more than seventy-nine years for selling, furnishing and giving away, as alleged, intoxicating liquor, which took place in New York, to be delivered in Vermont. An appeal having been taken from that judgment to the county court of Rutland County, a jury was called and the accused pleaded not guilty, and although but one charge was specified, and that defectively, in the complaint, which was the one filed before the justice of the peace, the jurors found him guilty of three hundred and seven distinct offences of selling intoxicating liquors without authority and contrary to the laws of Vermont. He was thereupon sen-

tenced to pay a fine of $6140 to the treasurer of the State, and the costs of prosecution taxed at $497.96, and stand committed until the sentence was complied with; and in case the fine and costs were not paid before the 20th day of March, 1883, at three o'clock in the afternoon of that day, to be confined at hard labor in the house of correction, for the term of nineteen thousand nine hundred and fourteen days, a period of over fifty-four years, a reduction from the term imposed by the justice of the peace of about twenty-five years.

Had he been found guilty of burglary or highway robbery, he would have received less punishment than for the offences of which he was convicted. It was six times as great as any court in Vermont could have imposed for manslaughter, forgery or perjury. It was one which, in its severity, considering the offences of which he was convicted, may justly be termed both unusual and cruel.

That designation, it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the Declaration of Rights, adopted by Parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the Bill of Rights. It was there declared that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. From that period this doctrine has been the established law of England, intended as a perpetual security against the oppression of the subject from any of those causes. It is embodied in the Eighth Amendment to the Constitution of the United States, and in the constitutions of several of the States, though Mr. Justice Story states in his Commentaries on the Constitution "that the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct." (§ 1903.) The inhibition is directed, not only against punishments of the character mentioned, but against all punish-

ments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted. Fifty-four years' confinement at hard labor, away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is a punishment at the severity of which, considering the offences, it is hard to believe that any man of right feeling and heart can refrain from shuddering. It is no matter that by cumulative offences, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offences. The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration. The State has the power to inflict personal chastisement, by directing whipping for petty offences — repulsive as such mode of punishment is — and should it, for each offence, inflict twenty stripes it might not be considered, as applied to a single offence, a severe punishment, but yet, if there had been three hundred and seven offences committed, the number of which the defendant was convicted in this case, and six thousand one hundred and forty stripes were to be inflicted for these accumulated offences, the judgment of mankind would be that the punishment was not only an unusual but a cruel one, and a cry of horror would rise from every civilized and Christian community of the country against it. It does not alter its character as cruel and unusual, that for each distinct offence there is a small punishment, if, when they are brought together and one punishment for the whole is inflicted, it becomes one of excessive severity. And the cruelty of it, in this case, by the imprisonment at hard labor, is further increased by the offences being thus made infamous crimes. In *Ex parte Wilson*, 114 U. S.

417, 429, a party under sentence of imprisonment for fifteen years at hard labor in the house of correction, in Detroit, Michigan, was discharged by this court because he was not tried upon an indictment or presentment of a grand jury, the court holding that a crime, punishable by imprisonment for a term of years at hard labor, was an infamous crime within the meaning of the Fifth Amendment of the Constitution of the United States. The selling of the liquors in New York during three years, upon three hundred and seven distinct orders from Vermont, that is, one in every three or four days, to be paid for on delivery in the latter State, are declared by the punishment inflicted three hundred and seven infamous crimes.

I have stated these particulars of the proceedings and of the judgment of the state courts, to show what great wrongs were inflicted, under the forms of law, upon the defendant. If there is no remedy for them, there is a defect in our laws or in their administration which cannot be too soon corrected. I think there is a remedy, and that it should be afforded by this court.

The sales for which the defendant was prosecuted were either completed transactions in New York, passing there the title to the goods, leaving their transportation to the purchaser in Vermont as a matter for his direction; or, they were mere executory contracts of sale in New York to be completed by delivery of the goods to the purchaser in Vermont.

If the first position be the true one, then Vermont, in attempting to punish the defendant, assumed to punish him for an exterritorial offence by her statute, or to apply her statute to an offence not embraced by its terms. If the former of these alternatives be the one she takes, that is, to punish the defendant for an exterritorial offence, she violates the right of a citizen of New York, and a right of that citizen, which depends upon the relation of his State to the Union, and, as that relation forbids a resort to arms, or negotiation, or any international procedure for protection of her citizens, it belongs to that class of rights which pertain to a citizen of the United States. His rights as such citizen are guarded and must be

defended by the United States, and cannot be abridged or impaired by the law of any State.

But if the statute of Vermont does not reach the defendant by exterritorial operation, and the sales were only inchoate in New York, and consummated by delivery in Vermont, then the acts of selling were exterritorial, and the delivery was by interstate transportation. Until that transportation was completed and the packages of goods were delivered to the purchasers, they were under the commercial power of Congress and not the police power of the State, and the intrusion of the latter to defeat the full protection of the Congressional power was necessarily void.

I assume for this case, as correct, the position of the majority of this court and of the Supreme Court of Vermont, that the sales were only initiated in New York, and were there merely executory contracts, and were not consummated until delivery of the goods to the purchaser in Vermont. As such they were transactions of interstate commerce which the latter State could not prevent, and for which she could not impose any penalty upon the defendant, though she might place such restrictions upon the disposition of the liquor, as the safety and health of the community might require, after it was brought within her limits, and had become part of the general property there. Against the proceedings resulting in the penalty inflicted, the defendant invoked — and in my judgment was entitled to receive — protection under the clause of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the States. The refusal of the state court to afford the protection is sufficient ground for this court to take jurisdiction to review the judgment of that court, and I dissent from my associates in their declining to take such jurisdiction.

On the trial before the county court certain facts were admitted by the accused which constitute the grounds of his conviction. They are given in the opinion of the majority, and it is only necessary to state so much of them as will show the pertinency of the objections I take. The accused resided at Whitehall, in the State of New York, a flourishing town of

several thousand inhabitants, and considerable commerce, at the south end of Lake Champlain, and about twenty-four miles west of Vermont.

He was a wholesale and retail dealer in wines and liquors at that place, and had been there engaged in that business for more than three years. His business was a lawful one under the laws of New York. During those three years he received at his store in Whitehall three hundred and seven separate and distinct orders by mail, telegraph or express for specified small quantities of intoxicating liquors from as many different parties residing in Rutland, Vermont. The orders requested the accused to send the liquors to the parties ordering them at Rutland by the National Express Company, a New York corporation and common carrier, doing business between New York and Montreal, including the route between Whitehall and Rutland, and in more than one-half the number of instances directed that the liquors be sent C. O. D., meaning cash on delivery, and in other instances where the orders did not specify this mode it was the intention of the purchaser to have the goods thus sent to him.

It was the usual course of trade for merchants receiving an order from a considerable distance for goods in small quantities to send the same by express, C. O. D., when the order was not from a regular customer or a person of known responsibility. Upon the receipt of the orders the accused in each instance measured out the liquors called for at his store in Whitehall, put the same in the jugs or other vessels sent, and attached to each one a tag having the address of the party ordering the liquor. He then delivered the package to the express company, each package having upon the tag the name and business of the accused, and not being in any manner disguised, and being sealed with wax. He delivered to the express company with each package a bill in an envelope marked C. O. D., endorsed with instructions not to deliver the same without receiving payment therefor.

He did nothing after the packages were delivered by him at Whitehall; and the several consignees received the same and made payment therefor to the carrier at Rutland.

The accused requested the court to instruct the jury that the facts set forth in his admission did not constitute an offence against the statute, under the complaint in the case, but the court refused the request, and he excepted. He also requested the court to instruct the jury that under the facts they ought to find him not guilty, but this the court refused to do, and he excepted. The court charged the jury that if they believed the facts set forth in the admission they made a case upon which the jury should find a verdict of guilty against him, to which instruction he excepted.

The case was carried to the Supreme Court of the State, and by it the judgment below was affirmed. In giving its opinion that court stated that the case being one for selling intoxicating liquors the question was whether they were sold by the accused in contemplation of law in Rutland County, and that the answer depended upon the question whether the National Express Company, by which the liquors were delivered to the consignees thereof, was in law the agent of the vendor or of the vendees. It stated that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the *charges for the transportation of the packages and for the return of the money paid;* and that this direction was so understood by the express company, which received the shipments coupled therewith. This statement ignores the fact in the admission of the accused, which was submitted to the jury, that the express company was the agent of the Rutland parties, the expenses of that company being paid by the senders of the orders, a fact which showed that the company acted for the purchasers and not for the vendor in the several cases in the carriage to Vermont of the articles sold.

The several transactions appear to have been completed according to the admission, so far as the vendor was concerned, at Whitehall in the State of New York. He was not in Vermont, where the alleged offences were committed. He had no clerk, or agent, or office for the sale of liquors in that State or at any other place than Whitehall. As said by counsel, the

contention of the State appears to have been to make the defendant constructively present in Vermont and by a fiction of law a criminal under her laws. He was, in fact, found guilty of criminal offences in Vermont where he was not present, because he sold liquors in New York on credit to parties in Vermont, payable on delivery.

Transactions like those in controversy, that is, purchases of small quantities of goods upon orders, the packages to be shipped by the vendor with a direction to collect the amount of the price on delivery, take place in this country every month to the amount of millions of dollars. Orders are sent all over the country, for articles of small bulk; to California for fruits and wines, to Florida for oranges, to Kentucky for whiskies, and to the dealers in our large cities in general merchandise for small parcels of different kinds. They are transmitted without hesitation by the vendors upon the receipt of such orders, often even without knowledge of the parties sending them, their security being the retention of a lien upon the property shipped until the cash is actually paid. Amazement would strike the large class of merchants engaged in transmitting goods in this way from one portion of the country to another, if they were told that they thereby rendered themselves liable to the penal statutes of the States to which the goods were sent in compliance with the orders of the purchasers, and might be prosecuted for criminal offences committed in those States, which they had never visited and with whose laws they never intended to interfere. I do not believe that any such danger is incurred by them by engaging in this mode of interstate commerce. None of the cases which I have seen, and my examination has been somewhat extended, has sustained any such doctrine. Whether transactions of the character mentioned are to be deemed absolute sales of the goods on the part of the vendor, with a proviso for withholding their delivery until actual payment, so as to preserve a lien for the price, or only as executory contracts of sale not completed until actual delivery, there is a diversity of opinion. *Pilgreen* v. *The State*, 71 Alabama, 368; *Dutton* v. *Solomonson*, 3 Bos. & Pul. 582; *Garland* v. *Lane*, 46 N. H. 245; *Orcutt*

v. *Nelson*, 1 Gray, 536, 542; and *State* v. *Corl and Tobey*, 43 Arkansas, 353.

But in either view, whether considered as absolute sales or executory contracts of sale, they were, as already stated, transactions of interstate commerce. They were made between citizens of different States, and involved the transportation of the article sold from one State to another. A sale of an article between such citizens and its transportation from one State to another for delivery to the purchaser are the essential elements of interstate commerce. As said by this court in *Welton* v. *State of Missouri*, 91 U. S. 275, 280, commerce "comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."

In *County of Mobile* v. *Kimball*, 102 U. S. 691, 702, this court said: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible."

In the case of the *Daniel Ball*, 10 Wall. 557, 565, this court said: "Whenever a commodity has begun to move, as an article of trade, from one State to another, commerce in that commodity, between the States has commenced." See also *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Brown* v. *Houston*, 114 U. S. 622; *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489; *Steamship Co.* v. *Pennsylvania*, 122 U. S. 326.

The exclusive and protecting power of Congress over interstate commerce is not confined to that commerce which consists of wholesale business, but extends to all cases of the sale,

exchange and transportation of goods between citizens of different States — as much to the single case of fruit or wine as to the carload of grain or cotton.

The transactions considered in this case, which extended over a period of three years, cannot be described without showing that they embody the elements which constitute interstate commerce — sales of goods by a citizen of one State to a citizen of another State and their transportation between the States in their delivery to the purchaser. These facts must have been seen by the Supreme Court of Vermont. They were facts, constantly presenting themselves, and could not have been overlooked. Nor can it make any difference what motives may be imputed to the parties on the one side in selling, and on the other in purchasing the goods; the only inquiry which can be considered, is, were the goods bought and sold subjects of lawful commerce, for if so, they were, in their transportation between the parties — citizens of different States — until their delivery to the purchaser or consignee in the completion of the contracts of sale, under the protection of the commercial power of Congress. It is not necessary, to give this court jurisdiction to review the judgment of that court, that the record should show that the objection that the transactions were those of interstate commerce was specifically taken in terms in the court below; it is sufficient if the facts of the record show that the question of their being transactions of that character was involved in the case, though the court below may state in various forms that it did not deem it necessary to consider it. In *Murray* v. *Charleston*, 96 U. S. 432, 441, it was held that whenever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere; that the jurisdiction to reëxamine such a judgment cannot be defeated by showing that the record does not in direct terms refer to a constitutional provision, nor expressly state that a Federal question was presented; and that the true jurisdictional test is, whether it appears that such a question was decided adversely to the Federal right. Mr. Justice Strong,

speaking for the court, said: "In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the state court expressly assert a right under the Federal Constitution. The true test 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. Everywhere in our decisions it has been held that we may review the judgments of a state court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised;" and the court cited the case of *Crowell* v. *Randell*, 10 Pet. 368, in support of this position, where it was laid down after a review of previous decisions "that it is not necessary the question should appear on the record to have been raised and decision made in direct and positive terms *in ipsissimis verbis*, but it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided, in order to have induced the judgment." See also *Eureka &c. Canal Co.* v. *Yuba County Superior Court*, 116 U. S. 410; *Arrowsmith* v. *Harmoning*, 118 U. S. 194.

If the vendor had, during the same period of three years, sold every third or fourth day a box of fruit or a package of clothing to the vendees in Vermont, payable on delivery, the transactions would have been of the same character as those under consideration — those of interstate commerce — and I doubt whether a question on this point would have been raised by any one. The present transactions, in the fact that the articles are liquors, are in no respect different in character. The decision made by the court below could not have been rendered without its assuming that the facts which constitute interstate commerce were transactions of a different nature.

If that court could, by that assumption, bind this court, the supervising authority of our jurisdiction would be lost in every case by the simple assertion of the court below that it

placed its decision on some particular ground of its own creation. To assent to any such doctrine would be to abrogate our jurisdiction in a most important particular. And that is, in my judgment, exactly what is done in this case. In the opinion of the majority it is stated that the only question considered by the Supreme Court of Vermont, in regard to the present case, was whether the liquor in question was sold by O'Neil at Rutland or Whitehall, so as to fall within or without the statute of Vermont, and it arrived at the conclusion that the completed sale was in Vermont. That, says this court, does not involve any Federal question. To this I answer, that before the state court could reach the question whether the sale fell under the law of Vermont it had to determine whether the sale was completed in that State, or in New York — whether, therefore, an executory sale of goods in New York, completed in Vermont, was or was not a transaction of interstate commerce, and until that question, which was a Federal one, was disposed of, the alleged State question could not be considered. But that the commercial question was brought to the attention of the Supreme Court of Vermont, was argued by counsel there and passed upon by that court, does not rest as an inference from the facts necessarily involved: it appears from its opinion and the official report of the case.

There were at the same time three other cases before the court arising upon substantially the same facts; one against the same respondent and the other two being proceedings for the condemnation of the liquors seized. They were considered together, and the opinion of the court, delivered by its Chief Justice, covered them all and discussed the principal questions involved. It was prepared by him and handed to the reporter, and under the latter's supervision it was published in the official reports of the decisions of the court, and is found in vol. 58 of the Vermont Reports. The law of Vermont requires the judges of the Supreme Court to prepare and furnish to the reporter, each year, reports of the opinions delivered by them, and the reporter to prepare them for publication and to superintend the printing. In looking at the

synopsis of the argument of counsel, which accompanies the report of the opinion thus prepared, we find that they took the position that the transactions complained of were those of interstate commerce, and that the State could not prohibit or regulate that commerce. In *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, 44, it was held that this court might examine the opinions of a state court, delivered and recorded, to ascertain the ground of its judgment. And looking at the opinion of the Supreme Court of Vermont we find several paragraphs bearing upon the question of interstate commerce. One of the paragraphs describes the sales thus: "The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice for collection." I am unable to make out of transactions of this character anything other than those of interstate commerce.

In another paragraph the court refers directly to the commercial clause of the Constitution and repudiates its application. It says: "Concerning the claim that section eight of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, it is sufficient to say that no regulation of, or interference with, interstate commerce is attempted," and the court concludes its opinion covering all the cases by holding that in the two cases of the *State* v. *O'Neil* the respondent takes nothing by his exceptions. That is to say, the court, not denying that the question was raised in the O'Neil cases, passed it off with the statement that no regulation of or interference with commerce was attempted, thus brushing out of consideration the Federal question by assuming that the transactions were purely of state cognizance. In another paragraph the state court expresses disapprobation of the claim that the Federal authority was supreme in matters of interstate commerce. "If it were competent," said that court, "for persons or com-

panies to become superior to state laws and police regulations, and to override and defy them under the shield of the Federal Constitution, *simply by means of conducting an interstate traffic*, it would indeed be a strange and deplorable condition of things." That is to say, that the importation of goods into the State from another State should be protected under the Federal Constitution against hostile state legislation would be deplorable. This observation was undoubtedly made in response to suggestions that transportation of goods between the States was free until regulated by Congress. Deplorable as the Supreme Court of Vermont may have thought the doctrine, it was the settled law, as announced by repeated decisions of this court. In *County of Mobile* v. *Kimball*, 102 U. S. 691, 697, speaking of the power of Congress over commerce, this court said: "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. *Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity, or by that means of transportation, shall be free.*"

And in *Leisy* v. *Hardin*, 135 U. S. 100, 119 this court cites from a previous opinion the following language as to the power of Congress over subjects of interstate commerce, declaring that its doctrine is now firmly established: "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, *such as transportation between the States, including the importation of*

goods from one State into another, Congress can alone act upon it, and provide the needed regulations." See also *Welton* v. *Missouri*, 91 U. S. 275; and *Brown* v. *Houston*, 114 U. S. 622, 630.

In another paragraph of the opinion the state court again refers to the character of the transaction between the vendor in New York and the vendee in Vermont, and the effect of the instruction to the carrier not to deliver the goods except upon prior or contemporaneous payment of the price, upon which it says: "The contract of sale, therefore, remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York, but the completed sale was, or was to be, in this State," (Vermont). No better description of a transaction of interstate commerce could be given: an executory contract of sale made in one State by a citizen thereof to a citizen of another State, and a completed sale under that contract by the transportation and delivery to the purchaser in the latter State.

In the face of these extracts from the opinion of that court, it strikes me with surprise that any one can contend that in deciding the case it did not consider the question of interstate commerce. It seems to me to have been the principal question before it, and the only one which gave it any trouble in the disposition of the case. But notwithstanding these statements, and the character of the transactions themselves, which do not admit, in my judgment, of any accurate description without involving, necessarily, elements of interstate commerce, the assertion is made by the majority, with great positiveness, as though it would brush aside opposing considerations, that "no Federal question was presented for the decision of the court as to this case, nor was the decision of a Federal question necessary to the determination of this case, nor was any actually decided, nor does it appear that the judgment as rendered could not have been given without deciding one." If this assertion could be received with half the confidence with which it is made, the whole controversy would be settled, and any

discussion upon the points raised would be precluded. The opinion of the court would then stand as evidence of wrongs inflicted upon a citizen of the United States under the forms of law, and, if the decision be right, of the inability of their constituted tribunals to give to him any redress, notwithstanding the often-repeated declaration that the power of Congress over interstate commerce is exclusive of all state authority.

It is true that the presumption of law is that the majority of the court are right and that I am wrong; yet, in the face of this presumption, and the positiveness with which the views of the majority are asserted, I cannot yield my convictions the other way, which were never clearer or stronger in any case.

I can conceive of nothing more direct and effective as an interference with the power of Congress over interstate commerce than for a State to hold that the act of transmitting an article to it from another State, in completion of a sale by delivery, is an offence against its laws for which the sender can be punished. Surely commerce between the States would be defeated entirely, or subject to the control of a State to which property might be sent, if it could hold the consummation of the sale of the article sent from another State to be itself a penal offence. And to say that there is no interference in such a case with the power of Congress is, in my humble judgment, and with all due respect to my associates, to trifle with substance by words.

Until Congress acts, every citizen in a State has a right to send lawful articles of commerce into another State. When they reach that State, and become a part of the general property there, they fall under the control of its lawfully established police regulations; but the commerce, which is subject to the control of Congress, necessarily carries the article into another State, and whether the title is vested in the purchaser there or when it starts from the State from which it is sent, is a matter of no consequence; the state power over the article only commences after it is once incorporated into the property of the State, and that does not take place until the transportation is completed and the delivery made. Interstate commerce is not confined to the sale of goods which have been fully paid

for before they leave the State of export. It embraces also goods the sale of which may not be completed until delivery in the State of import; and the distinction in that respect made by the Supreme Court of Vermont would destroy half of the interstate commerce of the country. To regulate commerce is to prescribe the rules by which it shall be governed, that is, the conditions on which it shall be carried on, whether it shall be subject to duties and charges or be left free and untrammelled.

The necessity of some controlling power to regulate commerce both with foreign nations and among the States was one of the principal causes that led to the calling of the convention which adopted the present Constitution. As said by Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419, 445: "The oppressed and degraded state of commerce, previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

And in *Welton* v. *State of Missouri*, 91 U. S. 275, 281, this court said: "The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. *If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by state legislation, the object of investing the control in Congress may be entirely defeated.*"

To sanction, therefore, the legislation of Vermont making the consummation of an act of interstate commerce, that is, the delivery of the article sold or agreed to be sold in another State to the purchaser or intended purchaser in Vermont, a penal offence, is, in fact, to defeat the very object of the grant to Congress. The decision of the Supreme Court of that State conflicts with a long line of previous decisions of this court running through the last quarter of a century, and with those of *Bowman* v. *Chicago &c. Railway Co.*, 125 U. S. 465, and *Leisy* v. *Hardin*, 135 U. S. 100, since rendered, in which the power of Congress over commerce, foreign and interstate, has been exhaustively considered and doctrines declared covering every possible position that can be taken in this case.

In *Bowman* v. *Chicago, &c. Railway Co.* a law of Iowa forbidding, under penalties, common carriers to bring intoxicating liquors into the State from any other State or Territory, without being first furnished with a prescribed certificate, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. It was accordingly held that this law could give no protection to the carrier in refusing to transport the goods into that State as requested by the shipper.

If requiring such a certificate as a condition for the importation of goods into a State was invalid as a regulation of commerce, much more so must a law be, which makes such importation upon a sale, not completed until by a delivery of the goods within the State to which they are transported, a

penal offence, subjecting the importer to a criminal prosecution for the importation. The law of Vermont would have afforded no protection to the express company employed to transport the goods in question into that State had it refused to carry them. The vendor could have sued that company and recovered for not carrying them. How, then, can he be prosecuted for sending the goods by that company? How can a penalty be imposed upon him for doing what he could compel the company to do? To the objection urged that there was no legislation of Congress with which the act of Iowa conflicted, the court said: "If not in contravention of any positive legislation by Congress, it is, nevertheless, a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations." 125 U. S. 498.

In *Leisy* v. *Hardin* the court said, giving expression to its often-repeated declarations, that the power vested in Congress to regulate commerce was complete in itself, acknowledging no limitations other than those prescribed in the Constitution, and was coëxtensive with the subjects on which it acted and could not be stopped at the external boundary of a State, but must enter its interior and be capable of authorizing the disposition of those articles which it introduced, so that they might become mingled with the common mass of property there.

These doctrines, thus clearly stated and supported by an almost unbroken line of decisions of this court for half a century, establish the invalidity of the action of the State of Vermont in making a sale of goods by a non-resident to its citizens, completed on the delivery of the property to them in the State, a penal offence.

It is true that when the decisions in these last two cases were rendered the personnel of this court was different from what it is at present. When *Bowman* v. *Chicago &c. Railway Co.* was decided, Justices Matthews, Miller and Bradley were members of this court and concurred in the decision. And when *Leisy* v. *Hardin* was decided the latter two Justices were still members and concurred in that decision.

These Justices were distinguished for their ability and learning, and it was the occasion of great pride to them that they had contributed by their labors to establish that freedom of interstate commerce from state interference which made the different States, commercially, one country. As said by Mr. Justice Bradley in *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 494: "In the matter of interstate commerce the United States are but one country, and are, and must be, subject to one system of regulations, and not to a multitude of systems." They recognized, with their associates, the right of the State to exercise its police power to the fullest extent, which the health, safety and good order of its people might require, over all property brought from another State within its limits when once mingled with its general property. But they did not admit that the police power of a State was superior to an express power of Congress, and a majority of the court then agreed with them. They respected the declaration of the Constitution that not only that instrument but that all laws of the United States passed in pursuance thereof were the supreme law of the land, and that the judges of every State were bound thereby, anything in the constitution or laws of any State to the contrary. (See Constitution, Art. VI.) They regarded the police power as complete upon all subjects to which it was applicable, but held that it could not be exercised so as to take property, which was an article of commerce, from the regulation of Congress. And on the subject of the relation to each other of the two powers, the police power of the State and the power of Congress over commerce, they often referred to the observations of Mr. Justice Catron, in *The License Cases*, 5 How. 504, 600, that that which from its nature or its condition, from putrescence or other cause, does not belong to commerce is within the jurisdiction of the police power; and that which does belong to commerce is within the jurisdiction of the United States, and that it is not within the power of the State, by its declaration, to determine what is and what is not an article of lawful commerce and thus determine what is and what is not exclusively under its control. Referring to the assumption of such power, that

learned Justice said: "Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated."

These three Justices are no longer members of this court, but since they ceased to be members there has been no adjudication by it until the decision in this case, which, in any respect, changes its previous decisions upon the exclusive power of Congress over interstate commerce.

In *Chapman* v. *Goodnow*, 123 U. S. 541, 548, this court, in considering section 709 of the Revised Statutes, providing for a review of the final judgment or decree in a suit in the highest court of a State, and speaking of the right or immunity which might be claimed under the Constitution, or a treaty, or statute of the United States, and the decision against them, which would authorize the reëxamination of the judgment or decree, said: "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused." Here the claim was rejected, though all reference to it was not avoided. Jurisdiction therefore attached. Having jurisdiction to review the judgment for the denial by the state court of the exclusive power vested in Congress to regulate commerce among the States, there ought not to be any hesitation in declaring that the judgment of the state court should for that reason be reversed. If not reversed of what avail

will it be to say that the power of Congress to regulate interstate commerce is exclusive of all state interference, and that parties dealing in such commerce are protected thereby, when the State can, at any moment, nullify such power by declaring that the delivery of the articles of commerce to parties within the respective States, in completion of a sale made to them in other States, shall constitute a penal offence, and no redress is left to the parties prosecuted? I can never assent to the assumption by the State of any such power as is here asserted.

And I go further than the consideration of the question of interstate commerce involved. Having jurisdiction of the case on the ground stated, I think we may look into the whole record. And if it appears from the proceedings taken and the rulings made in the court below, on questions brought to its notice, that the rights of the accused, affecting his liberty or his life, have been invaded, this court may exercise its jurisdiction for the correction of the errors committed. The Fourteenth Amendment declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and that no State shall deprive any person of life, liberty or property without due process of law. I agree, as held in *In re Rahrer*, 140 U. S. 545, that those inhibitions do not invest Congress with any power to legislate upon subjects which are within the domain of state legislation. They only operate as restraints upon state action, like the prohibitions upon legislation by the States impairing the obligation of contracts, or to pass a bill of attainder or an *ex post facto* law. But in all cases touching life or liberty I deem it the duty of this court, when once it has jurisdiction of a case, to enforce these restraints for the protection of the citizen where they have been disregarded in the court below, though called to its attention. I do not pretend that this court should take up questions not arising upon the record, but I do contend that it is competent for the court when once it has acquired jurisdiction of a case to see that the life or liberty of the citizen is not wantonly sacrificed because of some imperfect statement of the party's rights. We have now jurisdiction to hear writs of error in certain criminal

cases. If such a case were brought before us upon objections to the admission of testimony and we should come to the conclusion that the objections were not tenable, but, at the same time, should perceive that the law, under which the accused was convicted, had been repealed or amended in the punishment imposed, we should not perform our whole duty if we allowed the party to be punished under the law repealed or with greater severity than the amended law authorized, simply because the precise objection was not taken in direct terms in the assignments of error. We should allow additional assignments to be filed, or take notice of the error of our own motion under Rule 21 stated below, that injustice and wrong may not be perpetuated.

Section 997 of the Revised Statutes requires that there shall be annexed to and returned with a writ of error for the removal of a cause an assignment of errors, and Rule 21 of this court declares that when there is no assignment of errors, as required by that section, counsel will not be heard, *except at the request of the court*, and that errors not specified according to the rule will be disregarded. It adds, however, *that the court at its option may notice a plain error not assigned or specified.* This rule seems to provide for a case like the present; and I do not think we should be astute to avoid jurisdiction in a case affecting the liberty of the citizen.

In opening the record in this case, we not only see that the exclusive power of Congress to regulate commerce was invaded, but we see that a cruel as well as an unusual punishment was inflicted upon the accused, and that the objection was taken in the court below, and immunity therefrom was specially claimed. The Eighth Amendment of the Constitution of the United States, relating to punishments of this kind, was formerly held to be directed only against the authorities of the United States, and as not applicable to the States. *Barron* v. *Baltimore*, 7 Pet. 243. Such was undoubtedly the case previous to the Fourteenth Amendment, and such must be its limitation now, unless exemption from such punishment is one of the privileges or immunities of citizens of the United States, which can be enforced under the clause, declaring that

"no State shall make or enforce any law which shall abridge" those privileges or immunities. In *Slaughter-House Cases*, 16 Wall. 36, it was held that the inhibition of that Amendment was against abridging the privileges or immunities of citizens of the United States as distinguished from privileges and immunities of citizens of the States. Assuming such to be the case, the question arises: What are the privileges and immunities of citizens of the United States which are thus protected? These terms are not idle words to be treated as meaningless, and the inhibition of their abridgment as ineffectual for any purpose, as some would seem to think. They are of momentous import, and the inhibition is a great guaranty to the citizens of the United States of those privileges and immunities against any possible state invasion. It may be difficult to define the terms so as to cover all the privileges and immunities of citizens of the United States, but after much reflection I think the definition given at one time before this court by a distinguished advocate — Mr. John Randolph Tucker, of Virginia — is correct, that the privileges and immunities of citizens of the United States are such as have their recognition in or guaranty from the Constitution of the United States. *Spies* v. *Illinois*, 123 U. S. 131, 150. This definition is supported by reference to the history of the first ten Amendments to the Constitution, and of the Amendments which followed the late Civil War. The adoption of the Constitution, as is well known, encountered great hostility from a large class, who dreaded a central government as one which would embarrass the States in the administration of their local affairs. They contended that the powers granted to the proposed government were not sufficiently guarded, and might be used to encroach upon the liberties of the people. In the conventions of some of the States which ratified the Constitution a desire was expressed for Amendments declaratory of the rights of the people and restrictive of the powers of the new government, in order, as stated at the time, to prevent misconception or abuse of its powers. The desire thus expressed subsequently led to the adoption of the first ten Amendments. Some of these contain specific restrictions upon Congress; as

that it shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. Some of them impliedly restrict the powers of Congress in prescribing or construing particular modes of procedure, such as require a presentment or an indictment of a grand jury for the trial of a capital or otherwise infamous crime, and the one that provides that in suits at common law, where the value involved exceeds twenty dollars, the right of trial by jury shall be preserved. Some of them are declaratory of certain rights of the people which cannot be violated, as their right to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures; that no one shall be subject for the same offence to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself; that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; and to be informed of the nature and cause of the accusation; and to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor; and that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The rights thus recognized and declared are rights of citizens of the United States under their Constitution which could not be violated by Federal authority. But when the late civil war closed, and slavery was abolished by the Thirteenth Amendment, there was legislation in the former slaveholding States inconsistent with these rights, and a general apprehension arose in a portion of the country — whether justified or not is immaterial — that this legislation would still be enforced and the rights of the freedmen would not be respected. The Fourteenth Amendment followed, which declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The

freedmen thus became citizens of the United States and entitled in the future to all the privileges and immunities of such citizens. But owing to previous legislation many of those privileges and immunities, if that legislation was allowed to stand, would be abridged; therefore, in the same Amendment by which they were made citizens, it was ordained that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," thus nullifying existing legislation of that character, and prohibiting its enactment in the future.

While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both state and Federal action. The State cannot apply to him, any more than the United States, the torture, the rack or thumbscrew, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against state action in the Fourteenth Amendment. The inhibition by that Amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the constitutions of the several States. The Amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any State of privileges and immunities which the

Constitution recognized and guaranteed as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An inhibition is contained in the several state constitutions against their legislatures passing a bill of attainder or an *ex post facto* law, and yet a like inhibition against state action is embodied in the Constitution of the United States.

When the objection was taken in the Supreme Court of Vermont that the punishment imposed by the county court was cruel and unusual and immunity from it was specially claimed, the answer of the court was that the punishment could not be said to be excessive or oppressive because the defendant had committed a great many offences; that if the penalty was unreasonably severe for a single offence the constitutional question might be urged, but that its unreasonableness was only in the number of offences which he had committed. I do not think this answer satisfactory. The inhibition is directed against cruel and unusual punishments, whether inflicted for one or many offences. A convict is not to be scourged until the flesh fall from his body and he die under the lash, though he may have committed a hundred offences, for each of which, separately, a whipping of twenty stripes might be inflicted. An imprisonment at hard labor for a few days or weeks for a minor offence may be within the direction of a humane government — but if the minor offences are numerous no authority exists to convert the imprisonment into one of perpetual confinement at hard labor such as would be appropriate only for felonies of an atrocious nature. It is against the excessive severity of the punishment, as applied to the offences for which it is inflicted, that the inhibition is directed.

I think the plaintiff in error should be allowed, under the 21st rule, to amend his assignment of errors, so as to present this objection for our consideration, or, that this court, under that rule, without any additional assignment, should take notice of the error, of its own motion; for if the denial by the court below of the immunity claimed against the cruel and unusual punishment imposed was an error, it was one of the gravest character, leaving the defendant to a life of mis-

ery — one of perpetual imprisonment and hard labor. The right of the court to consider this alleged error of its own motion is within its authority under the 21st rule, and considering the unprecedented severity of the punishment — fifty-four years' imprisonment at hard labor for these transactions, which no power of the human intellect can accurately describe except as transactions of interstate commerce — a punishment which makes the offences infamous crimes, I should have thought that the court would have been prompt to listen to anything which could be properly said for the relief of the defendant.

Here this dissenting opinion might close, as I have touched upon the two questions specially brought to the attention of the court below; but there are some expressions in the opinion of the court upon the procedure in the state courts to which I cannot assent, and these I will briefly notice.

The complaint against the accused describes, as I have said, only a single offence, that of selling, furnishing and giving away intoxicating liquor without authority. It designates no person or persons to whom such liquor was sold, furnished or given away, nor specifies any number of offences, but charges that the offence named was committed "at divers times." And yet he was tried and convicted under this complaint of three hundred and seven distinct offences, and punishment was imposed for each one. To the defective character of the complaint the majority of the court say, in their opinion, as though it was a sufficient answer, that the form of the complaint is authorized by the laws of Vermont, and that under it any number of offences may be proved; and that, as the accused did not take the point either before the justice of the peace or the county court that there was any defect or want of fulness in the complaint, such point was waived. To this I answer that the fact that the legislature of Vermont may have authorized the loose form of accusation used, and allowed the trial of a multitude of offences under an imperfect description of one, does not render the proceeding due process of law any more than if it had attempted to authorize trials of criminal offences without any accusation in writing. Due process

of law required a specific description of all the offences for which the defendant was to be put on trial. Proceeding without it was not due process of law; and, in my judgment, no legislation of Vermont could make it so. And it is to me a surprising doctrine that a party can be tried for and convicted of a criminal offence not alleged against him, and afterwards, when the sentence is attempted to be enforced, can be prevented from taking the objection that no offence was charged in the accusation, because no defect of that kind was urged at the trial. So far from the defect being waived, or he being then estopped from insisting upon the objection by his previous silence, I think he could justly claim that the whole proceeding was a nullity, a mere mockery of justice.

It is the established rule of the common law, which has prevailed in England and in this country since the revolution of 1688, if not for a period anterior to it, that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him. It is the law of every civilized community, and *in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed.* The information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him. As said by Chief Justice Gibson of the Supreme Court of Pennsylvania in *Hartmann* v. *Commonwealth*, 5 Penn. St. 60, 66: "Precision in the description of the offence is of the last importance to the innocent; for it is that which marks the limits of the accusation and fixes the proof of it. It is the only hold he has on the jurors, judges as they are of the fact and the law."

Mr. Justice Harlan, with whom concurred Mr. Justice Brewer, dissenting.

I do not think that this writ of error should be dismissed for want of jurisdiction.

The Supreme Court of Vermont, at its October term, 1885, decided the following cases: *State* v. *O'Neil*, No. 27, the pres-

ent case, in which the respondent was charged with selling intoxicating liquors contrary to law; *State* v. *O'Neil*, No. 28, in which he was charged with keeping intoxicating liquors with intent to sell, etc.; *State* v. *Four Jugs of Intoxicating Liquor, National Express Co., Claimant*, No. 25; *State* v. *Sixty-eight Jugs of Intoxicating Liquor, National Express Co., Claimant*, No. 26. They were disposed of at the same time, and in one opinion delivered by Chief Justice Royce. *State* v. *O'Neil*, 58 Vermont, 140, 150, 151, 166. It is shown by the report of the cases that O'Neil expressly invoked for his protection that clause of the Constitution of the United States which gives Congress power to regulate commerce among the States. His exception was in these words: "The State cannot prohibit or regulate interstate commerce." We give the very words of the exception, because of the statement in the opinion of this court that no such point was passed upon in this case by the Supreme Court of Vermont. 58 Vermont, 150. A like exception was taken by the claimant in cases Nos. 25 and 26, in these words: "Congress has exclusive power to regulate commerce among the States." 58 Vermont, 154. In disposing of this question, the court, in its opinion, common to all the cases before it, among other things, said: "If it were competent for *persons* or companies to become superior to state laws and police regulations, and to override and defy them under the shield of the Federal Constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the States to regulate the traffic in intoxicating liquors has been settled by the United States Supreme Court in the *License Cases*, 5 How. 577." The opinion closed with these words: "The result is that in the cases of the *State* v. *O'Neil*, numbers 27 and 28, the respondent takes nothing by his exceptions; and in the cases of the *State* v. *Intoxicating Liquor, National Express Company, Claimant*, numbers 25 and 26, the judgments are affirmed." And one of the assignments of error in this court is to the effect that the court below erred in adjudging that the statute of Vermont, in its application to the facts of this case, was not in conflict with the commerce

clause of the Constitution of the United States. How, then, can this court decline to consider the question, distinctly raised by O'Neil in the court below, as well as here, namely, that the transactions on account of which he was prosecuted constituted interstate commerce, which was not subject to regulation by the State? The defendant having expressly excepted to the judgment against him upon the ground that it was not consistent with the power of Congress over commerce among the States, and the Supreme Court of Vermont having adjudged that he could take nothing by his exception, how can it be said that this question was not presented to and was not determined by that court adversely to the accused?

But if it were true that the court below did not, in fact, pass upon, but ignored, this question, with respect to O'Neil, and restricted its observations to the cases in which the National Express Company was claimant, it would not follow that this court is without jurisdiction to determine it. We have often held that a judgment of the highest court of the State which failed to recognize a Federal right, specially set up and claimed, ought not to be disturbed, unless its *necessary effect* was to deny that right, or where it proceeded, in part, upon another and distinct ground, not involving a Federal question, but sufficient, *in itself*, to maintain the judgment without reference to that question. *San Francisco* v. *Itsell*, 133 U. S. 65, 66; *Beaupré* v. *Noyes*, 138 U. S. 397, 401. Now, it may be true, as I think it is, under the facts of this case, that the title to the liquors sold by O'Neil did not pass, and he did not intend it should pass, from him upon the delivery to the express company, in New York, of the jugs or vessels containing the liquors, and, therefore, that the sales were not, in law, consummated until the liquors were received in Vermont and paid for there by the vendee. Still, the question remained, whether the sending of the liquors from Whitehall, New York, to Rutland, Vermont, was or was not interstate commerce protected by the Constitution of the United States. The contention of the defendant in this court, as it was in the court below, is, that, even if the sales were not consummated until the liquors were delivered to the respective vendees, he had

the right, under that instrument, to send the liquors into Vermont, and deliver them there, in the original packages, that is, in jugs or other vessels, upon payment of the price charged. And the necessary effect of the judgment was to deny this right, thus distinctly asserted. The decision that the sales were consummated in Vermont, and, consequently, that the defendant violated the laws of that State, in doing what he did there, by his agents, is not, in itself, sufficient to support the judgment, except upon the theory that he had no right, under the Constitution of the United States, to send the liquors into Vermont to be there delivered in the original packages. It seems to me entirely clear, in any view of the case, that the court below necessarily determined, adversely to the defendant, a right specially set up and claimed by him under the Federal Constitution.

In view of what I have said, it is proper to state that, in my judgment, the sending by the defendant from Whitehall, New York, to Rutland County, Vermont, of intoxicating liquors, in jugs, bottles or flasks, to be delivered only upon the payment of the price charged for the liquors, were not, in any fair sense, transactions of interstate commerce protected by the Constitution of the United States against the laws of Vermont regulating the selling, giving away and furnishing of intoxicating liquors within its limits. The defendant, in effect, engaged in the business of selling, through agents, by retail, in Vermont, intoxicating liquors shipped by him, for that purpose, into that State from another State. What he did was a mere device to evade the statutes enacted by Vermont for the purpose of protecting its people against the evils confessedly resulting from the sale of intoxicating liquors. The doctrine relating to "original packages" of merchandise sent from one State to another State does not embrace a business of that character. But whether this be so or not is a question this court has jurisdiction to determine in the present case, and it is clearly the right of the defendant to have it determined. If the jugs, bottles or flasks, containing intoxicating liquors sent into Vermont from the defendant's place of business, over the border, were original packages, the shipment of which

into that State, prior to the passage of the Act of Congress of August 8th, 1890, c. 728, 26 Stat. 313, known as the Wilson statute, was protected by the Constitution of the United States against state interference until delivered to the consignees, he is entitled upon the principles announced in *Leisy* v. *Hardin*, 135 U. S. 100, to a reversal of the judgment.

But there is another reason why this writ of error should not be dismissed for want of jurisdiction. The defendant contended in the court below that the judgment of the Rutland County Court inflicted upon him, in violation of the Constitution of the United States, a punishment both cruel and unusual. It is not disputed that he distinctly made this point. And the question was decided against him in the court below. It is true the assignments of error do not, in terms, cover this point, but it is competent for this court to consider it, because we have jurisdiction of the case upon the grounds already stated. I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution. They were deemed so vital to the safety and security of the people, that the absence from the Constitution, adopted by the convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, Articles of Amendment would be submitted to the people, recognizing those essential rights of life, liberty and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the States. A

judgment, therefore, of a state court, even if rendered pursuant to a statute, inflicting or allowing the infliction of a cruel and unusual punishment, is inconsistent with the supreme law of the land. The judgment before us by which the defendant is confined at hard labor in a House of Correction for the term of 19,914 days, or fifty-four years and two hundred and four days, inflicts punishment, which, in view of the character of the offences committed, must be deemed cruel and unusual.

Without noticing other questions, I am of opinion that upon the ground last stated the judgment should be reversed.

Mr. Justice Brewer authorizes me to say that in the main he concurs with the views expressed in this opinion.

THE BLUE JACKET.

THE TACOMA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF WASHINGTON.

No. 241. Argued March 24, 25, 1892. — Decided April 4, 1892.

A collision occurred between a ship and a steam-tug while the navigation rules established by the act of March 3, 1885, c. 354, 23 Stat. 438, were in force. The tug was required to keep out of the way of the ship and the ship to keep her course. The tug ported her helm to avoid the ship, and that would have been effectual if the ship had not afterwards changed her course by starboarding her helm. If the ship had kept her course, or ported her helm, the collision would have been avoided. The change of course by the ship was not necessary or excusable. The tug did everything to avoid the collision and lessen the damage. The tug had a competent mate, who faithfully performed his duties although he had no license. Although the tug had no such lookout as was required by law, that fact did not contribute to the collision. The tug did not slacken her speed before the collision. There was no risk of collision until the ship starboarded, and then the peril was so great and the vessels were such a short distance apart that the tug may well be considered as having been *in extremis*, before the time when it became her duty to stop and reverse, so that any error of judgment in not sooner stopping and reversing was not a fault.

The case of *The Manitoba*, 122 U. S. 97, distinguished.
The tug was not in fault and the ship was wholly in fault.
The appeal being from the Supreme Court of the Territory of Washington, and that Territory having become a State, the case was remanded to the Circuit Court of the United States for the District of Washington, (Act of February 22, 1889, c. 180, 25 Stat. 676, 682, 683, §§ 22, 23,) for further proceedings according to law.

THE case is stated in the opinion.

Mr. John B. Allen for appellant.

Mr. John H. Mitchell for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

On the 11th of June, 1885, about two o'clock in the morning, the steam-tug Tacoma was towing the bark Colusa, of about 1200 tons burden, laden with lumber and bound on a voyage to San Francisco, California, from Port Townsend, in the Territory of Washington, to Cape Flattery, the bark being towed by a hawser about 150 fathoms long, and the stern of the tug being about 750 feet ahead of the stem of the bark. When the tug and the bark were about four miles to the north of Ediz Hook light, in the Straits of Fuca, in the Territory of Washington, they were steering west-southwest half west, and moving along a path west half south, at the rate of about two miles an hour by the land. The ship Blue Jacket, of San Francisco, was on her way from that city to Seattle, in the Territory of Washington, and when she was about two miles from the tug, and showed her red light about three-tenths of a point on the port bow of the tug, she was sighted by the lookout on the tug. The weather was cloudy but the air was clear, with a fresh breeze blowing from the west-southwest; and the tide was flood, running up the Straits of Fuca at the rate of three miles an hour, from west-southwest or west-southwest half west. The ship's mean course was east-northeast, but her course was really along a swinging path, deviating alternately to starboard and port about one-half of a point each way from her mean course,

and crossing the same about every one-half mile, at intervals of about every four minutes. She was running with a fair wind and tide, and going ahead at the rate of about eight miles an hour by the land.

The lookout on the ship first sighted the tug about half an hour before the collision hereinafter mentioned, about half a point on the starboard bow of the ship and five miles away, showing two white mast-head lights to the ship at that time and at all times up to the collision, and the red lights of the tug and the bark being seen by those on board of the ship from 10 to 12 minutes before the collision. When the tug was so sighted, she was reported at once to the master and mate of the ship. Two and one-half minutes before the collision, the tug being about one-third of a mile from the ship and half-a-point off her port bow, the ship bearing about one and three-eighths points off the port bow of the tug, and showing both her lights to the bark and her red light to the tug, and the bark bearing dead ahead from the ship, the tug, for the purpose of avoiding the ship, put her helm hard-a-port and swung to starboard; but the ship immediately thereafter, instead of keeping her course or putting her helm to port, put her helm hard-a-starboard and kept it in that position until the collision occurred. Neither the tug nor the bark, at any time up to the collision, showed to the ship any side or colored lights except their red lights. By putting her helm hard-a-starboard, the ship slewed rapidly around to her port until her course was changed to about north-northeast; and while the tug was still swinging to her starboard under a port helm, the two vessels came into collision, the ship striking the tug bow on, on the port side of the tug just abaft of midships, and damaging the tug seriously.

On the 3d of September, 1885, the Tacoma Mill Company, owner of the tug, filed a libel *in rem* against the ship, in the District Court of the Third Judicial District of Washington Territory, claiming to recover from the ship $12,000 as damages. Process was issued, and the ship was duly seized and due notice given. On the 4th of September, 1885, the master of the ship put in a claim to her, for D. O. Mills as her owner.

On the 29th of October, 1885, D. O. Mills, as such owner, filed a cross-libel *in rem*, in the same court, against the tug, to recover $900 damages. On the 29th of October, 1885, the master of the ship, on behalf of her owner, put in an answer to the libel of the Tacoma Mill Company.

On the 2d of April, 1886, the Tacoma Mill Company filed an amended libel against the ship, and on the same day the same company filed an answer to the cross-libel of D. O. Mills. The amended libel sets forth the particulars of the occurrences which preceded and attended the collision, and alleges that there was no negligence on the part of the tug, but that shortly after her helm was put hard-a-port, the ship, instead of keeping her course, as it was her duty to do, and which would have avoided the collision, negligently put her helm hard-a-starboard; that by that time the tug and the ship were so close together, and the course of the ship, then running free, was thereby so changed, that the tug could not keep out of her way; that the ship had not a proper lookout or watch; that no special circumstances existed which rendered necessary a departure from the steering and sailing rules prescribed by act of Congress; that the ship did not have her side-lights properly set, but they were so placed that they did not throw a uniform or unbroken light from right ahead to two points abaft the beam, or at all, and she did not, on the approach of the tug, show a lighted torch, as she should have done, on the point or quarter of the ship which the tug was approaching; and that, if those in charge of her, when they put her helm hard-a-starboard, had hauled her spanker boom midships and braced her after yards in on the port side, all of which they negligently failed to do, although they had abundant time so to do, the collision would have been avoided. The answer to the cross-libel makes the same allegations.

The cross-libel against the tug alleges that the latter, when about 1000 or 1500 feet away from the ship, and about two points off her starboard bow, hard-a-ported her helm and unskilfully threw herself across the bows of the ship, and rendered a collision imminent; that the tug had no colored lights set, and it was not discovered by those in charge of the navi-

gation of the ship that the tug had changed her course until she was within about 275 or 300 feet of the ship, and steering directly across her bows; that it was then apparent to those in charge of the navigation of the ship that if she kept her course or ported her helm she would collide with either the tug or the bark and perhaps both, and they, thinking and believing that those in charge of the navigation of the tug would stop and reverse her engine, which they should have done and which would have avoided the collision, the helm of the ship was immediately put hard-a-starboard, for the purpose of rendering the blow and the damages as light as possible, in case the vessels collided, and because it was believed that by so doing the ship would clear the tug; that that was all it was possible for the ship to do toward avoiding the collision, which occurred within two or three minutes after it appeared to the ship that the tug had changed her course; that the tug should have kept her course and passed to the starboard of the ship, which would have avoided the collision; that the tug should have exercised precautionary measures to prevent the collision from the time she sighted the ship, which she did not do; that the tug placed the ship in such a position that it was impossible for the ship to do anything that would avoid a collision; that the tug, when she saw that the collision was probable, should have stopped and reversed her engine, which she did not do, and which would have avoided the collision; that the tug should have had her green and red lights set, which she did not have, and which would have enabled the ship to observe her change of course; that the tug should have indicated her course by signals on her steam whistle, which she did not do; that at the time of the collision and for some time prior thereto, the person acting in the capacity of first officer of the tug had charge of her navigation and was acting also as wheelsman and lookout, and had no officer's license, and was so acting in violation of law, and was wholly incompetent and not a suitable person to occupy such a position; and that the tug did not have, before or at the time of the collision, a wheelsman or proper lookout to guard against the danger of a collision.

It also alleges that the collision was due to the negligence of the tug, and that there was no fault on the part of the ship. The answer to the libel contains substantially the same allegations as the cross-libel.

The record properly omits the proofs, but shows that on the 7th of March, 1887, the cause having been heard on the pleadings and proofs, the District Court filed its findings of fact and conclusions of law. The findings of fact were 29 in number, and were verbatim the same as the first 29 findings hereinafter set forth, made by the Supreme Court of the Territory on appeal. The first, second, and fourth conclusions of law made by the District Court were in terms identical with the first, second and fourth conclusions of law of the Supreme Court of the Territory, hereinafter set forth. The third conclusion of law made by the District Court was that the Tacoma Mill Company was entitled to recover from the claimants of the ship $11,043.75 and costs, and was entitled to a decree that the stipulators for the claimant of the ship pay that sum into court within ten days, with the costs; and that, in case they failed so to do, the company was entitled to a summary judgment against them, and each of them, for said amount and costs, and for an order for execution.

Prior to the filing of the findings of fact and conclusions of law by the District Court, proposed findings appear to have been presented to that court by the Tacoma Mill Company on behalf of the tug, and brought to the attention of the counsel for the ship, because on the 28th of February, 1887, a petition for a rehearing was filed in the District Court on behalf of the ship, and on the 4th of March, 1887, exceptions were filed by the ship to the whole or parts of findings of fact Nos. 3, 5, 6, 9, 10, 11, 12, 14, 16, 17, 20, 21, 22, 23, 24, 25, 26 and 27, and to all of the conclusions of law.

On the 8th of March, 1887, a decree was entered by the District Court, with the title of the libel and the cross-libel, dismissing the cross-libel at the cost of the cross-libellant, and decreeing that the Tacoma Mill Company recover from the claimant of the ship $11,043.75 and costs, and that the stipulators for the claimant of the ship pay that sum and the costs

into court within twenty days, and that in case they failed to do so a summary judgment should be entered against them, and each of them, on their stipulation, for the amount thereof, and execution should issue therefor to satisfy the decree. On the same day, the claimant of the ship and cross-libellant appealed in open court from the decree to the Supreme Court of the Territory.

The case was heard in the Supreme Court of the Territory, and on the 25th of July, 1888, it announced that the decision of the District Court was affirmed in full. A petition for a rehearing was then filed on behalf of the ship and was heard and denied. The opinion of the Supreme Court in the case is reported in 3 Washington Ter. 581, and was delivered by Justice Langford, and concurred in by his two associates. It says: "In this case the appeal is from both the findings of fact and the conclusions of law thereon. There is no contention but that the conclusions of law of the District Court were correct if the findings of fact were correct; but the sole contention is, that the District Court erred as to its findings of fact, and hence that conclusions of law predicated on such erroneous findings of fact were wrong, but only because the findings of fact were wrong. As this court refinds the facts as the District Court found them, (with the additional findings requested by the proctor for the appellants hereunto attached and adopted by this court,) all contention ceases except as to the error of fact. The only opinion, therefore, that could be written in this case, that would be germane to the question raised, would be an opinion which would give reasons as to why the findings of fact are correct deductions from the evidence. Such could not be useful or necessary, and hence no attempt will be made to give reasons for the findings of fact. But these findings of fact and conclusions of law thereon are all the decision which the case requires, and they are as follows." Then follow the findings of fact, 30 in number, and the 3 additional findings of fact requested on the part of the ship and found by the Supreme Court, and also its conclusions of law, all of which are set forth in the margin, the part in brackets at the close of the first additional finding of fact not

being contained in that additional finding as requested by the proctor for the ship, but being added by the court.[1]

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[1] 1. That the libellant, the Tacoma Mill Company, is and at all times mentioned in the pleadings in this cause was a corporation organized and existing under the laws of the State of California and duly authorized to do business in the Territory of Washington.

2. That said libellant, before and at the time of the collision mentioned in these findings, was and still is the owner and proprietor of the steam-tug Tacoma, with her steam-engines, boilers, machinery, tackle, apparel and furniture; which said steam-tug said libellant used in towing vessels from, to and between the various ports of Puget Sound and the Pacific Ocean, on the waters of Puget Sound and the Straits of Fuca and through the waters tributary and adjacent thereto, and where she was regularly run, daily and every day except Sunday, for the purposes aforesaid.

3. That on the eleventh day of June, 1885, at the hour of about two o'clock in the morning of said day, said steam-tug Tacoma, with her steam-engines, boilers, apparel, tackle and furniture on board, was towing the bark Colusa, of the port of Boston, of about twelve hundred tons burden, then and there lumber-laden and bound upon a voyage to San Francisco, California, from the port of Port Townsend, in said Territory of Washington, to Cape Flattery, and the said steam-tug, with said tow, was then about four miles to the north of Ediz Hook light, in the Straits of Fuca, steering west-southwest one-half west and moving along a path west one-half south at the rate of about two miles per hour by the land.

4. That at that time and up to the time when said ship put her helm hard-a-starboard, as hereinafter mentioned, said bark was being towed by said tug by means of a hawser about one hundred and fifty fathoms in length, and from the stern of the said tug to the stem of said bark the distance was about seven hundred and fifty feet, and during all the times mentioned herein said bark was steering the same course as said tug.

5. That at that time, and during all times up to the collision hereinafter mentioned, the weather was cloudy, the air was clear, and a fresh breeze was blowing from the west-southwest, and the tide was flooding, running up the Straits of Fuca at the rate of three miles per hour from west-southwest or west-southwest one-half west.

6. That said steam-tug at that time and up to the time of the collision hereinafter mentioned was tight, staunch, strong and in every respect well tackled, apparelled and appointed and had the usual complement of officers and men, and was also, except as hereinafter found, well manned.

7. That said tug at that time and at all times herein mentioned carried all the lights prescribed by law and carried the same in the manner prescribed by law, and the same were at all of said times properly set and brightly burning.

8. That said bark Colusa at all times carried all the lights prescribed by the law and carried the same in the manner prescribed by law, and the same were at all times properly set and brightly burning.

On the 14th of August, 1888, the Supreme Court entered a decree dismissing the cross-libel at the cost of the cross-

9. That at about ten minutes before two o'clock in the morning of said day, while said steam-tug was towing said bark Colusa at the place and in the manner hereinbefore stated and steering on the said course, the ship Blue Jacket, of San Francisco, whereof F. F. Percival was then and there master, and being then on her way from San Francisco to the port of Seattle, in the Territory of Washington, was first sighted by the lookout of said tug, said ship then being about two miles distant from said steam-tug and showing her red light about three-tenths of a point on the port bow of said steam-tug.

10. That the mean course of said ship at all the times mentioned in these findings up to the time her helm was put hard-a-starboard was east-northeast, but her course was really along a swinging path deviating alternately to starboard and port about one-half a point each way from said mean course, and crossing the same about every half mile, at intervals of about every four minutes up to the time her helm was put hard-a-starboard, as hereinafter stated, which was done when said ship was on the port side of said mean course.

11. That said ship was running with a fair wind and tide and at all times up to the time of the collision was going ahead at the rate of about eight miles per hour by the land.

12. That said steam-tug was first sighted by the lookout of said ship about half an hour before said collision and was then about one-half a point off the starboard bow of said ship and five miles away from her, showing two white mast-head lights to said ship at that time and at all times up to the time of said collision, the said tug steering at that time and at all times until her helm was put hard-a-port, as hereinafter stated, a course of west-southwest one-half west, but owing to the deflecting influence of wind and tide moving along a path in the direction of west one-half south; that said tug when so sighted by said lookout was at once reported to the master and mate of said ship.

13. That, owing to the improper manner in which said ship was steered and to the irregular course which she pursued in consequence of such improper management, said tug bore from said ship from time to time about as follows:

At twenty-three and three-quarters minutes before said collision (being three and five-sixths miles away), dead ahead.

At twenty-two and one-half minutes before said collision (being three and five-eighths miles away), dead ahead.

At twenty-one and one-quarter minutes before said collision (being three and three-sevenths miles away), one-half a point off the starboard bow.

At twenty minutes before said collision (being three and two-ninths miles away), one-half a point off the starboard bow.

At eighteen and three-quarters minutes before said collision (being three miles away), one-half a point off the starboard bow.

libellant, and decreeing that the Tacoma Mill Company recover from the claimant of the ship and from its stipulators

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At seventeen and one-half minutes before said collision (being two and three-quarters miles away), one-third of a point off the starboard bow.

At sixteen and one-quarter minutes before said collision (being two and five-eighths miles away), one-eighth of a point off the starboard bow.

At fifteen minutes before said collision (being two and two-fifths miles away), one-twelfth of a point off the starboard bow.

At thirteen and three-quarters minutes before said collision (being two and one-seventh miles away), dead ahead.

At twelve and one-half minutes before said collision (being two miles away), one-third of a point off the port bow, the ship bearing three-tenths of a point off the port bow of the tug and showing her red light to both the tug and bark, the bark bearing three-tenths of a point off the port bow of the ship.

At eleven and one-quarter minutes before said collision (being one and three-fourths miles away), one-half a point off the port bow, the ship bearing one-third of a point off the port bow of the tug and showing her red light to both the tug and the bark, and the bark bearing four-tenths of a point off the port bow of the ship.

At ten minutes before said collision (being one and four-sevenths miles away), five-eighths of a point off the port bow, the ship bearing four-tenths of a point off the port bow of the tug and showing her red light to both the tug and the bark, and the bark bearing from the ship five-ninths of a point off her port bow.

At eight and three-quarters minutes before said collision (being one and one-third miles away), one-half of a point off the port bow, the ship bearing one-half of a point off the port bow of the tug, showing her red light to both the tug and the bark, and the bark bearing one-half of a point off the port bow of the ship.

At seven and one-half minutes before said collision (being one and one-seventh miles away), one-sixth of a point off the port bow, the ship bearing two-thirds of a point off the port bow of the tug and showing her red light to both the tug and the bark, the bark bearing one-eighth of a point off the port bow of the ship.

At six and one-quarter minutes before said collision (being nine-tenths of a mile away), dead ahead, the ship bearing two-thirds of a point off the port bow of the tug and showing both of her lights to both the tug and the bark, the bark bearing one-tenth of a point off the starboard bow of the ship.

At five minutes before the said collision (being five-sevenths of a mile away), dead ahead, the ship bearing three-fourths of a point off the port bow of the tug and showing both her lights to the tug and her green light to the bark, the bark bearing one-sixth of a point off the starboard bow of the ship.

$12,121.02 and costs to be taxed, and that execution issue therefor. On the same day, in open court, the claimant of the

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At three and three-quarters minutes before said collision (being one-half of a mile away), dead ahead, the ship bearing five-sixths of a point off the port bow of the tug and showing both of her lights to the tug and her green light to the bark, the bark bearing one-sixth of a point off the starboard bow of the ship.

14. That two and one-half minutes before the said collision, said tug being about one-third of a mile distant from said ship and one-half a point off her port bow, the ship bearing about one and three-eighths points off the port bow of the tug and showing both her lights to the bark and her red light to the tug, and the bark bearing dead ahead from the ship, said tug, for the purpose of avoiding the ship, put her helm hard-a-port and swung to starboard, but the said ship immediately thereafter, instead of keeping her course or putting her helm to port, either of which she could and one of which she should have done, and either of which would have avoided said collision, carelessly, unskilfully and negligently put her helm hard-a-starboard and kept the same in that position until the said collision occurred.

15. That the red lights of both said tug and said bark were visible to and were seen by those on board of said ship from ten to twelve minutes before said collision.

16. That although said lights of both said tug and said bark were properly set and brightly burning, such were the relative positions of said ship, said tug and said bark that neither said tug nor said bark at any time up to the time of the collision showed the said ship any side or colored lights except said red lights.

17. That owing to the putting of said helm of said ship to starboard as aforesaid said ship slewed rapidly around to port until her course was changed to about north-northeast, and she then, at about 2 o'clock in the morning of said 11th day of June, while the tug was still swinging to starboard under a ported helm, collided with said tug, striking her "bow on" on the port side just abaft of midships, thereby causing great damage to the hull of said tug, her machinery, tackle, apparel and furniture.

18. That had said ship kept her course or had her helm been put to port at the time it was put to starboard said collision would have been avoided, and no injury would have been occasioned to either said ship, said tug or said bark.

19. That no special circumstance at any time mentioned herein existed which rendered a change of course on the part of said ship necessary or excusable.

20. That as soon as it was possible for those on board of said tug to discover that said ship had put her helm to starboard everything was done on said tug to avoid said collision and lessen the damage occasioned thereby, and at the time of said collision said tug, owing to said port helm, was heading about north-northwest.

ship and her owner D. O. Mills, the cross-libellant, and the stipulators, took an appeal to this court, which was allowed.

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21. That up to the time that said ship's helm was put to starboard as aforesaid no one on board of said tug had any reason to expect or anticipate any change of course on the part of said ship, and after the helm of said ship was so put to starboard nothing that said tug could have done would have averted said collision.

22. That the mate of said tug was a competent person for that position and faithfully performed his duties at all times mentioned in these findings, but he had no license.

23. That said collision was caused and all the damage resulting therefrom was occasioned solely by the negligence, want of skill and improper conduct of the officers and persons navigating said ship Blue Jacket, and not from any fault, negligence or improper conduct on the part of any person on board the said steam-tug Tacoma.

24. That the side lights of said ship Blue Jacket were at all times herein mentioned brightly burning, but were not placed or constructed so as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass or so fixed as to throw a light from right ahead to two points abaft the beam on the side of the ship on which said lights were respectively placed; but these facts in nowise contributed to said collision.

25. That said steam-tug Tacoma had no such lookout as is required by law; but this fact in nowise contributed to said collision.

26. That said ship was well officered and manned and had the usual number of officers and seamen on board.

27. That said steam-tug was damaged by said collision in the sum of seventy-five hundred dollars, and the said libellant has in consequence of said damage been obliged to expend and has expended in repairing the same the sum of seventy-five hundred dollars, the last of which said sum was so paid on or prior to the 15th day of August, 1885, and that said libellant is entitled to interest at the rate of ten per cent per annum upon said sum from said 15th day of August, 1885, to this day.

28. That said libellant, the Tacoma Mill Company, by reason of said collision, has sustained damages by being deprived of the services and use of said tug for the period of fifty days immediately following said collision, and the said services and use were during said period of fifty days reasonably worth the sum of forty-seven and fifty-hundredths dollars per day over and above all expenses of running and operating the said tug.

29. That on the 4th day of September, 1885, J. Furth and Bailey Gatzert entered into a stipulation, in accordance with the rules and practice of the said district court, in the sum of twenty-four thousand dollars, for the release of said ship Blue Jacket from arrest in this cause; which said stipulation was conditioned that said claimant should abide and pay the money awarded in the final decree rendered in this cause by the district court, or, in case of appeal, by the appellate court.

It was contended in the lower court, as set forth in the answer and the cross-libel on the part of the ship, that the col-

30. That on the 22d day of March, 1887, J. Furth and Bailey Gatzert entered into a stipulation, in accordance with the rules and practice of the said district court, in the sum of twenty thousand dollars upon an appeal from the said district court to this court; which said stipulation was conditioned that the said stipulators should pay all damages and costs that should be adjudged against the said ship on said appeal, and also that said ship should satisfy and perform the decree appealed from, in case it should be affirmed, and any judgment or order which this court might render or order to be rendered by the district court, not exceeding in amount or value the said sum of twenty thousand dollars.

Additional Findings Requested by the Proctor for the Appellants and Adopted by the Supreme Court.

1. The master of the tug went to bed a little after midnight preceding the collision, and the acting mate was alone in the pilot-house of the tug, and was the only officer in charge of the navigation of the tug and the only person in charge of the tug's wheel from midnight until one minute or less before the collision, when the captain arrived on deck [but this fact did not contribute to the collision].

2. The captain was awakened and arrived on deck about one-half a minute before the vessels came together, and, after inquiring what the trouble was, and being told a ship was coming into them, ordered the mate to stop and reverse, which order was only partly obeyed by the mate, who rang the bells in obedience to the order sufficient to stop the engines, but not to reverse them, and then let go of the bell-pull and of the wheel and ran out of the pilot-house to avoid danger to himself, which he supposed to be imminent, as the ship was then coming in contact with the tug.

3. For some time prior to and until the captain ordered the mate of the tug to stop and reverse, the engines of the tug were going ahead at full speed, and the tug was making the speed hereinbefore found of two miles an hour by the shore.

And from these findings of fact the court makes the following —

Conclusions of Law.

1. That said tug was not in fault or in anywise blamable for any damage resulting either to herself or said ship.

2. The said ship was in fault in this:

First. She did not keep a sufficiently steady helm, but allowed herself to swing alternately to port and starboard before she put her helm hard-a-starboard.

Second. She put her helm hard-a-starboard when she should have put it hard-a-port or kept her course.

3. That said libellant, the Tacoma Mill Company, is entitled to recover of and from F. F. Percival, the claimant in this cause, and from J. Furth

lision resulted through the fault of the tug, entitling the ship to damages. It is urged here that, although by finding 23 it is found that the collision and all resulting damages were "occasioned solely by the negligence, want of skill and improper conduct of the officers and persons navigating said ship Blue Jacket, and not from any fault, negligence or improper conduct on the part of any person on board the said steam-tug Tacoma," yet there are express and specific findings which not only fail to sustain the general deduction in finding 23, but demonstrate that the faults or misconduct resulting in the collision were mutual, if not entirely those of the tug, and that such findings, like special verdicts, overcome the general findings and are controlling; that it is found by finding 24 that the side lights of the ship were at all times brightly burning, but were not placed or constructed so as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, or so fixed as to throw a light from right ahead to two points abaft the beam on the side of the ship on which said lights were respectively placed, but that those facts in nowise contributed to the collision; that it is found by finding 26 that the ship was well officered and manned, and had the usual number of officers and seamen on board; that it is found by finding 12 that the tug was first sighted by the lookout of the ship about half an hour before the collision, at five miles distance; that that demonstrates the vigilance of the lookout of the ship; that it is found by finding 10 that the mean course of the ship up to the time her helm was put hard-a-starboard was east-northeast, but her course was really along a swinging path deviating alternately to starboard and port about one-half a point each way from said mean course, and crossing the same about every half-mile, at intervals of about

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and Bailey Gatzert, his stipulators, the sum of twelve thousand one hundred and twenty-one dollars & 2-100 ($12,121.02) and its costs and disbursements to be taxed, and is entitled to an order that execution issue upon said judgment against the goods, chattels and lands of said claimant and stipulators.

4. That said libellant is entitled to a decree dismissing the cross-libel at the costs of the cross-libellant.

every four minutes, up to the time her helm was put hard-a-starboard, which was done when the ship was on the port side of said mean course; and that by finding 2 of the conclusions of law it was found that the ship was in fault in that (1) she did not keep a sufficiently steady helm, but allowed herself to swing alternately to port and starboard before she put her helm hard-a-starboard, and (2) that she put her helm hard-a-starboard when she should have put it hard-a-port or kept her course.

It is urged for the ship that the equality of deviations of about one-half a point to the right and left of her mean course, and the uniformity of their occurrence, suggests that they were unavoidable and were constantly being corrected; that this was due to the fact that she was moving with the wind and was doubtless receiving it somewhat irregularly, as she was fifty miles from the ocean and was borne with a three-mile tide, forced through a contracted channel; that the Supreme Court of the Territory attached little if any significance to its three additional findings of fact, and did not consider their effect upon any of the findings which preceded them; and that the specific findings overcome the conclusion in finding 23, that the collision was not occasioned by any fault, negligence or improper conduct on the part of any person on board of the tug, and the conclusion in finding 20, that when the collision was impending everything was done on the tug to avoid it and lessen the damage.

Attention is also called to the fact that it is found in finding 22, that, although the mate of the tug was a competent person for the position and faithfully performed his duties at all times mentioned in the findings, yet he had no license; and that it is found in finding 25 that the tug had no such lookout as is required by law, although that fact in nowise contributed to the collision. Attention is also called to the findings in additional finding 1, and to the fact found in additional finding 3, that until the captain of the tug ordered her mate to stop and reverse her engine, as set forth in additional finding 2, the tug was going ahead at full speed and making two miles an hour by the shore against a three-mile tide; and that nothing was done in slowing, stopping or reversing

her engine until that was done which is set forth in additional finding 2.

It is also urged that if the ship was moving in a swinging path and was in fault in so doing, the tug had been afforded ample opportunity of observing the ship's course and had many miles of sea room in which to give her a wide berth, instead of which the tug held to her course with her engine at full speed until the vessels were brought near to each other; and that such conduct on her part, with the fact found in finding 25 that she had no such lookout as is required by law, while an unlicensed mate had the sole control of her, and her captain was asleep, showed the grossest recklessness. Attention is also called to the facts, that the course of the ship, subject to the swinging irregularity before mentioned, was, until about two and a half minutes before the collision, east-northeast, while the tug was steering west-southwest one-half west, and was moving along a path west one-half south; that the combined speed of the two vessels in approaching each other was ten miles an hour by the land; that the finding is that the vessels were about one-third of a mile apart, and the tug one-half a point off the ship's port bow, and the ship bearing one and three-eighths points off the port bow of the tug, when the tug put her helm hard-a-port, and swung to starboard, and that immediately thereafter the ship put her helm hard-a-starboard, the effect of which was to change the ship's course to about north-northeast, and that of the tug to about north-northwest, and while the vessels were on these converging courses, the ship struck the tug bow on, on the port side of the tug, just abaft of midships; that these findings demonstrate that if the tug had slowed on nearing the ship, or had stopped and reversed her engine after the ship changed her course, the latter would have crossed the tug's course in advance of the tug without injury to either vessel; and that, if there had been a competent lookout on the tug, or if her captain had come on deck two minutes instead of one-half a minute before the collision, and had then given the order to stop and reverse, and that order had been promptly obeyed, or if the mate, at any time in several minutes, had done what the captain at the

last instant recognized as the tug's duty, namely, to stop and reverse, the accident would have been avoided.

It is also said for the ship that, for the purposes of this appeal, it may be considered that she was in fault in not keeping her course, although the conduct of those in charge of the tug, as established by the findings of fact, goes far to show that the ship's situation was one of embarrassment, and was reasonably believed to be one of extremity, requiring her to change her course to avoid collision, yet those in charge of the tug cannot escape the responsibility of their negligence and misconduct in failing to have a proper lookout, and recklessly keeping on at full speed until the vessels were so near together that the mate of the tug abandoned the wheel and the pilot-house, only before doing so ringing the bells sufficiently to stop the engine but not to reverse it. It is also urged that the determination of eighteen relative positions of the colliding vessels, given in findings 13 and 14, beginning twenty-three and three-quarters minutes and ending two and one-half minutes before the collision, must all fail, if there was any mistake in the premises or calculation of the court, and that the conclusion must be that the facts thus found are theoretical and speculative. It is also contended that the only misconduct to be charged against the ship, in the light of the special findings, was in changing her course; but that that was to be excused by the misconduct of those in charge of the tug, leading the ship into embarrassment and causing those in charge of her to believe that she was in extremity and was compelled to change her course; and that, therefore, she ought to be relieved from liability, while the tug cannot escape an apportionment of the damages to which her fault contributed, including those suffered by the ship and set forth in her answer and her cross-libel.

But we are of opinion that the foregoing contentions are of no avail in favor of the ship, against the findings of fact of the Supreme Court of the Territory. We think that the additional findings made by that court do not modify the findings made by the District Court, and that, therefore, the findings of fact and conclusions of law made by the two courts are substan-

tially identical. There is no bill of exceptions, and, therefore, the only question is whether the findings of fact made by the Supreme Court support the conclusions of law which it made.

The navigation rules in force June 11, 1885, when this collision occurred, were those established by the act of March 3, 1885, c. 354, 23 Stat. 438. That statute provides as follows:

"Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

"Art. 18. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse, if necessary."

"Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

"Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

"Art. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case."

In the present case, therefore, the steam-tug was required to keep out of the way of the ship, and the ship was required to keep her course. The tug adopted proper measures, by porting her helm, to avoid the ship, and those measures would have been effectual if the ship had not changed her course by starboarding her helm. Finding 14 finds that $2\frac{1}{2}$ minutes before the collision, when the tug and the ship were about one-third of a mile apart, and the tug bore about one-half a point off the port bow of the ship, and the ship bore about $1\frac{3}{8}$ points off the port bow of the tug and showed both of her lights to the bark and her red light to the tug, and the bark bore dead ahead from the ship, the tug, for the purpose of avoiding the ship, put her helm hard-a-port and swung to starboard, and that the

ship immediately thereafter, instead of keeping her course or putting her helm to port, either of which she could have done, and one of which she should have done, and either of which would have avoided the collision, negligently put her helm hard-a-starboard, and kept it in that position until the collision occurred. It is also found, by finding 18, that if the ship had kept her course or her helm had been put to port at the time it was put to starboard, the collision would have been avoided; by finding 19, that no special circumstance existed at any time mentioned, which rendered a change of course on the part of the ship necessary or excusable; by finding 20, that as soon as it was possible for those on board of the tug to discover that the ship had put her helm to starboard, everything was done on the tug to avoid the collision and lessen the damage; by finding 21, that up to the time the helm of the ship was put to starboard no one on board of the tug had any reason to expect or anticipate any change of course on the part of the ship, and that after the ship's helm was put to starboard, nothing that the tug could have done would have averted the collision; by finding 22, that the mate of the tug was a competent person for that position, and faithfully performed his duties at all times mentioned in the findings, although he had no license; by finding 23, that the collision was caused and all the damage resulting therefrom was occasioned solely by the negligence, want of skill and improper conduct of the officers and persons navigating the ship, and not from any fault, negligence or improper conduct on the part of any person on board of the tug; by finding 24, that no misplacement or fault of construction in the side lights of the ship contributed to the collision, and that they were at all times brightly burning; and by finding 25, that, although the tug had no such lookout as was required by law, that fact in nowise contributed to the collision.

It is well settled that the absence of a lookout is not material, where the presence of one would not have availed to prevent a collision. In the case of *The Nacoochee*, 137 U. S. 330, the collision was between a steamer and a schooner, and the claim was made that the schooner was in fault in sailing too

shorthanded in a fog and having only two men on deck, one of them forward, charged with the double duties of a lookout and of blowing the horn, and one astern, at the wheel. It was not found by the Circuit Court as a fact that the absence of another lookout contributed to the collision, nor were there any facts found which could justify that conclusion, either as fact or law. So far as the findings were concerned, the man forward properly discharged his double duties. He blew the fog-horn, and it was heard on board of the steamer; and it was not found that he did not blow it properly, or that he could have performed the duties of a lookout better than he did, or that any different manner of performing those duties, either by him or by an additional lookout, could or would have made any difference in the result, or that the steamer could or would have been seen by the schooner any sooner than she was seen. This court held that, under all the circumstances and in view of the actual findings, it could not be said that there was any lack of vigilance on the part of the schooner in the matter of a lookout; and the cases of *The Farragut*, 10 Wall. 334; *The Fannie*, 11 Wall. 238, 243; and *The Annie Lindsley*, 104 U. S. 185, 191, were cited in support of that view.

In the present case, it is found that the lookout of the tug first sighted the ship at about two miles distant, and that the red light of the ship was then seen about three-tenths of a point on the port bow of the tug; and it is also found that although the tug had no such lookout as was required by law, that fact in nowise contributed to the collision.

The provision of article 24 of the act of March 3, 1885, is that a vessel is not to be exonerated from the consequences of any neglect to keep a proper lookout. It does not say that a vessel shall, because of not keeping a proper lookout, be visited with the consequences of a collision. If the collision does not result as a consequence of neglecting to keep a proper lookout, the vessel is not thereby made responsible for the consequences of the collision, and the exemption of the tug necessarily results from the finding as a fact that the absence of the proper lookout in nowise contributed to the collision.

As it is found as a fact that no special circumstance at any

time existed which rendered a change of course on the part of the ship necessary or excusable, under article 23 of the statute, she cannot have any benefit from that article. *The Maggie J. Smith*, 123 U. S. 349, 354.

We think that the keeping on of the tug at the full speed of two miles an hour by the shore, and her not stopping or reversing her engine until the captain, coming on deck, ordered the mate to do so, was not a fault on the part of the tug. Knowing that the ship was a sailing vessel, from her showing to the tug only her red light and no white light, and further knowing that it was the duty of the tug to avoid the ship and of the ship to keep her course, and supposing that the ship would keep her course, and the tug having ported her helm in discharge of her duty of avoiding the ship, she naturally kept on without stopping or reversing, because, under article 18, it was her duty to slacken her speed, or to stop and reverse, if necessary, only if her approach to the ship involved risk of collision. There was no risk of collision involved until the ship starboarded, which she did only after the tug had hard-a-ported her helm and had swung to starboard; and then the peril was so great and the vessels were such a short distance apart that the tug may well be considered as having been *in extremis*.

By finding 14, it is found that the tug put her helm hard-a-port and swung to starboard only $2\frac{1}{2}$ minutes before the collision, and when the vessels were about one-third of a mile apart. They were approaching each other at the rate of about ten miles an hour, the tug going about two miles an hour by the land, and the ship about eight miles an hour by the land. The approach was at the rate of a mile in about six minutes. As the tug began to port only $2\frac{1}{2}$ minutes before the collision, and had to get her helm hard-a-port and swing to starboard, before the ship starboarded, then got her helm hard-a-starboard, and then changed her course so materially as to attract the attention of the tug, the fair deduction from the findings is that the tug was in the situation of *in extremis* before the time when it became her duty to stop and reverse. It was the fault of the ship in changing her course that put the tug in that situation, and any error of judgment at that

time, in the particular mentioned, cannot be imputed as a fault to the tug. *The Benefactor*, 102 U. S. 216; *The Elizabeth Jones*, 112 U. S. 514, 526, and cases there cited; *The Maggie J. Smith*, 123 U. S. 349.

As was held in *The Bywell Castle*, 4 Prob. Div. 219, "where one ship has, by wrong manœuvres, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind."

It is not found as a fact that the collision would have been avoided or mitigated if the tug had stopped and reversed when she discovered that the ship had put her helm hard-a-starboard and changed her course. On the contrary, finding 21 says that after the ship's helm was put to starboard, nothing that the tug could have done would have averted the collision; and finding 20 says that as soon as it was possible for those on board of the tug to discover that the ship had put her helm to starboard, everything was done on board of the tug to avoid the collision and lessen the damage.

We do not think that the decision in the case of *The Manitoba*, 122 U. S. 97, applies to the present case. That was a collision between two steam vessels on Lake Superior. The two vessels saw the white and the green lights of each other, and only those lights, and continued to approach each other on nearly parallel courses. When they were about from $1\frac{1}{2}$ to 2 miles apart, the Manitoba had the Comet's green light about three-quarters of a point on her starboard bow, and then starboarded her wheel half-a-point and continued her course without change until just before the collision. In the meantime, the Comet ported her wheel for the second time half-a-point, and the two vessels thus continued to approach each other, showing their green and white lights only, until they had come within from 400 to 500 feet of each other, the Comet being then from 200 to 300 feet on the starboard side of the Manitoba. If each had kept her course, they would have passed without colliding; but at that juncture the Comet ported her wheel, displayed her red light and suddenly sheered across the course of the Manitoba, the latter thereupon starboarded

her wheel, and the collision ensued. The combined speed of the two vessels was about twenty miles an hour. Neither of the vessels sounded any signal of the whistle, indicating the side she intended or desired to take, nor did either of them reverse her engine or slacken her speed until the collision was inevitable; but the Manitoba reversed her engine just before or about the time of the collision. The fact that the two vessels were moving on nearly parallel, opposite, but slightly converging lines, was manifest to the officers of both for some considerable time before the Comet ported. The Circuit Court found as follows: "The relative courses of these vessels, and the bearing of their lights, and the manifest uncertainty as to the Comet's intentions, in connection with all the surrounding facts, called for the closest watch and the highest degree of diligence, on the part of both, with reference to the movements of the other; and it behooved those in charge of them to be prompt in availing themselves of any resource to avoid, not only a collision, but the risk of such a catastrophe. If the requisite precautions had been observed by both or by either of said vessels, the collision, in the opinion of the court, would not have happened." The Circuit Court found that the Comet was in fault for putting her wheel hard-a-port and endeavoring to cross on the port side of the Manitoba; that the Manitoba was in fault in ignoring the fact that the Comet was approaching under a port wheel, and that the courses of the vessels were convergent and involved risk of collision, and in failing to take proper precaution in time to prevent the collision; and that the Manitoba was further in fault in not indicating her course by her whistle, and in not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby. It apportioned the damages. The Manitoba appealed to this court because she had been found to be in fault. As the answer and the cross-libel of the Manitoba charged as a fault in the Comet that she did not stop and reverse in approaching the Manitoba, when there was risk of collision, this court said, that if there was risk of collision in the approach of the Comet towards the Manitoba, prior to the sudden sheer of the Comet, it was a risk affecting

the Manitoba equally with the Comet, and imposing upon her the same duties as it imposed on the Comet, of slackening speed, or, if necessary, stopping and reversing. This court affirmed the finding, as a conclusion of law, that the Manitoba was in fault in not indicating her course by her whistle, and in not slowing up, and in failing to reverse her engine until it was too late to accomplish anything thereby.

The difference between the case of *The Manitoba* and the present case involves the vital point, that, in the former, the question was between two steam vessels, while in the latter, it is between a steam vessel and a sailing vessel. In the case of *The Manitoba*, the courses of the two steam vessels were not such as to make it the duty of the one more than of the other to avoid the other, or to make it the duty of the one rather than of the other to keep her course; and there was, in regard to the courses of both the steam vessels, such risk of collision that the obligation was upon both to slacken speed, or, if necessary, stop and reverse. But in the present case, the duty was wholly on the ship to keep her course, and wholly on the tug to keep out of the way of the ship; and there was no duty imposed on the tug to stop and reverse until, as above shown, she was in the very jaws of the collision.

The decree of the Supreme Court of the Territory of Washington is

Affirmed, and the case is remanded to the Circuit Court of the United States for the District of Washington, (Act of February 22, 1889, c. 180, 25 *Stat.* 676, 682, 683, §§ 22, 23,) *for further proceedings according to law.*

WATERMAN *v.* BANKS.

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

No. 190. Argued March 7, 8, 1892. — Decided March 28, 1892.

J. S. W. having advanced to his brother R. W. W. moneys to aid him in developing mines, the title to which was in dispute, and being about to

Statement of the Case.

advance further sums for the same purpose, the latter executed and delivered to him an agreement as follows : "San Bernardino, Cal., May 14th, 1881. — For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that at any time within twelve months from this date, upon demand of J. S. Waterman or his heirs, administrators or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths ($\frac{24}{100}$) of the following mines, known as the Alpha, Omega, Silver Glance and Front, each being 600 feet wide by 1500 ft. long, and the same interest in all lands that may be located or *has* been located for the development of the above mines, with such machinery and improvements as *is* to be placed upon same, all subject to the same proportion of expenses, which is to be paid out of the development of the above property, all situated near the Grape Vine, in the county of San Bernardino, State of California." *Held,*

(1) That, taken in connection with the evidence, this conveyed to J. S. W. no present interest in the property, but only the right to acquire such an interest within a period of "twelve months from this date."

(2) That time was of the essence in such a contract for acquisition.

The principle that time may become of the essence of a contract for the sale of property from the very nature of the property itself is peculiarly applicable to mineral properties which undergo sudden, frequent and great fluctuations in value, and require the parties interested in them to be vigilant and active in asserting their rights.

The court stated the case as follows :

This appeal brings up for review a decree requiring R. W. Waterman, the original defendant, to convey, free from incumbrance, to Abbie L. Waterman, the original plaintiff, and the widow and assignee of J. S. Waterman, an undivided twenty-four one-hundredths of certain mining property in San Bernardino County, California, and, also, to pay to her the sum of $42,987.22, which was adjudged to be the amount of profits derived from that property, with the interest that accrued thereon prior to January 10, 1888. 27 Fed. Rep. 827.

J. S. Waterman and R. W. Waterman were brothers; the former, of large wealth, and a citizen of Illinois, and the latter, of limited means and a citizen of California, engaged with one Porter in "prospecting" and developing mining property. R. W. Waterman and Porter having acquired certain mining claims or interests in San Bernardino County, California, the

former wrote a letter to his brother, under date of April 5, 1881, which seems to be the beginning of the transactions out of which the present litigation arose. The writer said: "Porter finished assay yesterday, and will start in tomorrow. The mine improves all the time. It goes beyond our most sanguine expectations. The chimney will extend somewhere about 800 or 1000 feet, and is worth itself millions. The assay for the dump, after picking out the best ore and assay, the average of the poorest is over $50 and, so far as we can see, the entire mass is very rich. . . . Now, we can fight all of them, pay all expenses and make a million a year, but I don't anticipate much, if any trouble. . . . You let Mr. Porter have some money to pay his expenses without his asking for it. He is one of the most modest men I ever saw. I want you to have a talk with Jane about your joining me and having an interest in the mine. It will include the four claims, the Alpha, Omega, Front and Silver Glance. They are — what there is of it, and either one is enough to form a company. I propose to let you have $\frac{24}{100}$ of my interest of $\frac{75}{100}$ — you give up my indebtedness and give me to pay off any debts that I have incurred in mining, say $2000. That $\frac{24}{100}$ is worth $250,000, and may be $\frac{1}{2}$ a million to sell outside of this. All the money you get to buy machinery or advance in any way shall be paid from the first earnings of the mill. You might be at the head of the affair financially, and otherwise; each one of us to have his part, but you be at the head. . . . You speak to Porter about our partnership. I know he is all O. K. and will not pretend to own but $\frac{1}{4}$; yet try him. I presume he would give you a share of his if you raise the money for us."

It does not appear that any formal reply was made to this letter. But it does appear that J. S. Waterman was in California the succeeding month, and took from his brother an obligation of which the following is a copy:

"San Bernardino, Cal., *May* 14, 1881.

"For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that at any time within twelve months from this date, upon de-

mand of J. S. Waterman or his heirs, administrators or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four one-hundredths ($\frac{24}{100}$) of the following mines, known as the Alpha, Omega, Silver Glance and Front, each being 600 feet wide by 1500 ft. long, and the same interest in all lands that may be located or *has* been located for the development of the above mines, with such machinery and improvements as *is* to be placed upon same, all subject to the same proportion of expenses, which is to be paid out of the development of the above property, all situated near the Grape Vine, in the county of San Bernardino, State of California.

"R. W. Waterman."

This was the obligation, the specific performance of which was required by the decree below.

An obligation of like character as to date and terms was taken by J. S. Waterman from Porter with respect to an undivided three one-hundredths of the same property.

Prior to, but, perhaps, in expectation of, the execution of these writings, J. S. Waterman advanced to his brother and Porter the sum of $1817, and, subsequently, other sums, the aggregate amount of advancements, on the 22d day of November, 1881, being $26,317, exclusive of interest. For each sum so advanced, J. S. Waterman took the notes of R. W. Waterman and Porter. It also appeared that when the writings of May 14, 1881, were given, R. W. Waterman was indebted to J. S. Waterman in the sum of $11,750.53 for moneys loaned. But R. W. Waterman contended that if all matters of business between them had been settled, he would not have been then indebted to his brother in any sum whatever.

J. S. Waterman died July 19, 1883, having made a will, which was dated November 28, 1870. That will provided, among other things, that any and all notes, bills, accounts, agreements or other evidence of indebtedness against any of his brothers, held by the testator at his decease, be cancelled by his executors and delivered up to the maker or makers without payment of the same or any part thereof, except two

notes against John C. Waterman, secured by a deed of trust on lands, which were to be collected and equally divided between his brothers and sisters, and the children of such as had died. By a codicil to the will, of date December 7, 1872, his brother R. W. Waterman was substituted as executor in place of George S. Robinson.

Upon the paper of May 14, 1881, given by R. W. Waterman, appears the following endorsement: "I hereby assign the within to Mrs. Abbie L. Waterman. J. S. Waterman. M'ch, 1883. I hereby agree to execute the within agreement on demand." In March, 1883, the paper with this endorsement upon it was presented to R. W. Waterman, and he refused to sign it. At that time there was a balance of about $11,000 due J. S. Waterman on the notes given by R. W. Waterman and Porter. Porter signed a similar endorsement on the writing of May 14, 1881, executed by him. But the evidence satisfactorily shows that he did this only to indicate his willingness that that paper should stand as security simply for the moneys advanced by J. S. Waterman.

All the moneys advanced to R. W. Waterman and Porter were repaid out of the proceeds of the mining property before the institution of this suit, the principal part before and the balance after the death of J. S. Waterman.

No demand was made upon R. W. Waterman or Porter at any time within twelve months after May 14, 1881, for a conveyance, nor until after the death of J. S. Waterman.

This suit and the decree below proceeded upon the general ground that the writing of May 14, 1881, was intended to pass, and was accepted as passing, a present interest of twenty-four one-hundredths in the property covered by its provisions, and required R. W. Waterman to convey such interest at any time, before or after the expiration of twelve months from that date, on the demand by J. S. Waterman, his heirs, administrators or assigns of a conveyance. The defendant disputed this interpretation of that instrument and insisted that it was given and accepted only as security for such moneys as J. S. Waterman might advance for the development or management of this property.

Argument for Appellee.

Mr. George F. Edmunds for appellant. *Mr. H. M. Willis* was on the brief for same.

Mr. Charles C. Bonney, (with whom was *Mr. E. W. McGraw* on the brief,) for appellee.

The court will not hold itself too strictly bound by technicalities or literal expressions, but will construe, interpret and apply the contract, as far as the circumstances will permit, according to the justice of the case. *Bank of Alexandria* v. *Linn*, 1 Pet. 376.

The fact that the complainant's assignor had fully performed the contract on his part will be deemed a powerful aid to the granting of the relief sought. *Brashier* v. *Grantz*, 6 Wheat. 528, 534. The consideration having been fully paid and performed, the delay of the purchaser in calling for the deeds was wholly immaterial. *Walton* v. *Coulson*, 1 McLean, 120; *Hearst* v. *Pujol*, 44 California, 230.

The right to an account for a proper share of the profits of the mines, is in equity beyond controversy; otherwise the delinquent party would be protected in taking advantage of his own wrong. *Warrell* v. *Munn*, 38 N. Y. 137; *Nelson* v. *Bridges*, 2 Beavan, 239; *Barnum* v. *Landom*, 25 Connecticut, 137.

From the making of the contracts to the completion of the payment of the consideration, the vendors held the interest covered by the contracts, as security for performance by the vendee. From the date of that completion the vendors have held the legal title to that interest as trustees of the purchaser, and subject to an account for the rents and profits derived from it. *Willis* v. *Wozencraft*, 22 California, 607; *Love* v. *Watkins*, 40 California, 547.

The supposed "option" in the contract is not a fact but a fiction. The true meaning of the agreement is that within twelve months from the date of the contract, or at any time upon demand, the deed shall be made. The transposition of the words "at any time" was doubtless a merely clerical error, and is easily corrected by a proper construction. But

if the contract had in fact given an option, as appellants contend, *the payment of the consideration* by James S. Waterman would have matured that option and made the contract absolute. *Bell* v. *Quarles*, 5 Yerger, 463; *Tinney* v. *Ashley*, 15 Pick. 546; *S. C.* 26 Am. Dec. 620; *Fleming* v. *Harrison*, 2 Bibb, 171; *S. C.* 4 Am. Dec. 691.

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

We cannot assent to the view taken by the court below. The bill alleges — and the evidence fully sustains the allegation — that when the writing in question was given, the title to this property was in dispute, and that its development and improvement involved the expenditure of large sums, great risk of the total loss of everything invested in it and uncertainty of profit. Under these circumstances, J. S. Waterman, according to the decided preponderance of the evidence, did not wish to become a part owner of the property or to incur the responsibility of developing and managing it in conjunction with his brother and Porter. He was entirely willing, indeed, anxious, to assist his brother, but was not willing, at the outset, to take an interest in the property, or to become connected with them in business. His chief concern then was to secure the repayment of sums advanced and to be advanced by him to his brother and Porter for the development of the property, postponing to a future time the decision of the question as to whether he would take an interest in the property as suggested in the letter of April 5, 1881. If it proved to be valuable, he would incur no responsibility by becoming a part owner and uniting with his brother and Porter in its development and management. If it proved to be worthless, and if his brother and Porter were unable to meet their notes, he would only lose, and, as he possessed large wealth, could afford to lose, the sums advanced by him. These were the objects he had in view when he prepared and obtained from his brother the writing of May 14, 1881. That writing evidently contemplated that "out of the development of the above property," that is, out of its earnings, were to be paid

the expenses incurred in providing machinery, in making improvements, etc. These expenses were to be met, in the first instance, by the moneys advanced by J. S. Waterman to his brother and Porter. They could not have been otherwise paid; for the resources of R. W. Waterman and Porter were very limited, and the property had not then been sufficiently developed to become itself the basis of borrowing large sums from banks or from individual lenders of money. All this is manifest from the facts in the case.

But it is clear from the face of the writing, without calling to our aid the circumstances under which it was executed, that J. S. Waterman did not stipulate for a present interest in the property. It was drawn so as not to give him an interest, as owner, during the period supposed to be required for its development. While intended by the parties as security for moneys advanced and to be advanced by J. S. Waterman, it contains no word or clause indicating a purpose to create, as of its date, the relation of purchaser and vendor between him and R. W. Waterman. It gave the former, his heirs, administrators and assigns, an option to demand a conveyance within a prescribed period, thus making time of the essence of the agreement. If a conveyance was not demanded within that period, the obligation of R. W. Waterman to make one ceased altogether. Such was the contract; and the suggestion that the transposition of the words, "at any time," was a mere clerical error, to be corrected by construction, is simply an appeal to the court to make for the parties an agreement they did not choose to make for themselves and then decree its specific performance. No principle of equity would support such a decree. *Hepburn* v. *Dunlop*, 1 Wheat. 179. The demand for a conveyance within a given time — looking alone at the writing — was made by the parties a condition precedent to the acquisition by J. S. Waterman of an interest in the property. R. W. Waterman did not agree to convey except upon the performance of that condition precedent. The condition being lawful, it is not competent for the court to dispense with its performance.

The principles by which a court of equity is governed in cases of this character are well settled. Mr. Justice Story says

that "notwithstanding the rule is well established in courts of equity, that time will not be regarded as indispensable, in regard to decreeing specific performance of contracts for the actual sale of lands on one side and the actual purchase on the other, it is different where the contract gives a mere election to purchase upon certain conditions. Accordingly, where upon a lease, with the right of purchase within seven years, upon giving three months' notice, and paying a fixed sum at the expiration of such notice, and the lessee gave the requisite notice, but did not pay the money in time, a bill for specific performance was dismissed. And a similar decision was made by the Lord Chancellor, where his lordship said: 'The things required must be done in the order of sequence stipulated. These were notice and the payment of the money, on a day certain.'" Story, Eq. Jur. § 777 a. In *Potts* v. *Whitehead*, 20 N. J. Eq. (5 C. E. Green), 55, 57, 59, which was a suit for the specific performance of a contract to convey land — the owner stipulating, for the consideration of one dollar, that the complainant should have, for thirty days, the refusal of the lands — the court said: "The paper signed by the defendant is not a contract, but on its face, and by its very terms, only a refusal or offer of the lands to the complainant at a certain price; this is not disputed by the counsel of the complainant. This, like all such offers, was not binding, and could not be converted into a contract, unless accepted within the thirty days. Whether, when such an offer is made for a mere nominal consideration, the person offering can withdraw it within the time specified, it is not necessary to consider, as it was not withdrawn, and, like all such offers, it would be binding if accepted within the time, and before it was withdrawn." Again: "There can be no question but that when an offer is made for a time limited in the offer itself, no acceptance afterwards will make it binding. Any offer without consideration may be withdrawn at any time before acceptance; and an offer which in its terms limits the time of acceptance is withdrawn by the expiration of the time."

The rule is well expressed in *Lord Ranelagh* v. *Melton*, 2 Drewry & Smale, 278, 281, where it was said: "No doubt if

an owner of land and an intending purchaser enter into a contract constituting between them the relation of vendor and purchaser, and there is a stipulation in the contract that the purchase money shall be paid and the contract completed on a certain day, this court in ordinary cases has established the principle that time is not of the essence of the contract and that the circumstances of the day fixed for the payment of the money and the completion of the purchase being past does not entitle either party to refuse to complete. On the other hand, it is well settled that when there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The court regards it as the case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit."

In *Taylor* v. *Longworth*, 14 Pet. 172, 174, the principle was recognized that time may become of the essence of a contract for the sale of property not only by the express stipulation of the parties, but from the very nature of the property itself. This principle is peculiarly applicable where the property is of such character that it will likely undergo sudden, frequent or great fluctuations in value. In respect to mineral property it has been said, that it requires, and of all properties, perhaps, the most requires, the parties interested in it to be vigilant and active in asserting their rights. *Prendergast* v. *Liston*, 1 Yo. & Coll. Ch. 110; *Doloret* v. *Rothschild*, 1 Sim. & St. 590, 598; Fry on Specific Performance, §§ 714, 715; Pomeroy on Contracts, §§ 384, 385; *Brown* v. *Covillaud*, 6 California, 566, 572; *Green* v. *Covillaud*, 10 California, 317, 324; *Magoffin* v. *Holt*, 1 Duvall, 95.

That J. S. Waterman did not, in fact, accept the writings of May 14, 1881, as passing to him a present interest in the property, but at the utmost, as security for the moneys

advanced and to be advanced by him, with a right reserved, or the option given, to demand a conveyance within a certain time, is established by many facts and circumstances disclosed by the evidence.

When those writings were given, the title of R. W. Waterman and Porter to this mining property was disputed by one Miller. This fact was well known to J. S. Waterman. In a suit brought by Miller he was examined as a witness for R. W. Waterman for the purpose of contradicting the evidence of Miller. His cross-examination as taken down, at the time, by the official reporter of the court, was as follows: "Q. Have you any pecuniary interest in this litigation? A. No, sir. Q. Have you any interest in any of these mines out there? A. No, sir. Q. Or in the mill? A. No, sir. Q. Haven't you made advances of money the repayment of which is dependent principally upon your brother and Porter retaining these mines and working them? A. Yes, sir; I loaned them money. Q. And you understand that their ability to pay depends in a great measure, if not entirely, upon their retaining these mines and working them successfully? A. That hasn't been talked over. Q. Isn't that your understanding of it? A. That is the understanding; they would have to pay out of the mines. Q. They would have no other mines to pay you from? A. They have other mines. Q. Do you think they have other mines that would respond? A. I think Mr. Porter has, or either one of them. I merely have their promise to pay, no security. Q. Haven't you been up the country examining mills and machinery for their use? A. Yes, sir. Q. Haven't you taken an active interest in their mining operations? A. I purchased the mill; yes, sir. I became security for them."

The learned counsel for the plaintiff, referring to this evidence, observes: "But it is said, that subsequently to the date of the contracts, James S. Waterman admitted that he had no interest in the mines, but it does not appear that he was then the owner of the contracts. It may be presumed from the evidence that he had previously assigned them to complainant." But it does appear, conclusively, that the above

statement by James S. Waterman, under oath, that he had no interest in the mines, was made subsequent to the execution of the writings of May 14, 1881, after he had advanced to R. W. Waterman and Porter nearly twenty-four thousand dollars, but long before the assignment of the writing of May 14, 1881, to his wife. The assignment to Mrs. Waterman was in March, 1883 — it is so alleged in the bill — while the cross-examination of J. S. Waterman in Miller's suit took place in August or September, 1881. This latter fact is proved by several witnesses, some of whom participated in the trial as attorneys, and from numerous letters which passed between R. W. Waterman and J. S. Waterman shortly after the writings of May 14, 1881, were executed. R. W. Waterman wrote to his brother, under date of July 16, 1881, "I expect you will have to come out next mo., that suit must come off, I am tired of holding witnesses;" under date of July 22, 1881, "Things are transpiring which I fear will make us work to beat Miller. . . . If the suit comes off you must be here;" under date of July 30, 1881, "I shall do all I can to get this trial on right away, and you must hold yourself in readiness to come out at a moment's warning. . . . I will telegraph you when wanted;" under date of August 2, 1881, "It [the suit] is set for the first Monday in September, and you must be here. The lawyers say that your evidence is very important, and your presence will help very much;" under date of August 3, 1881, "I wrote you my suit came off in Sept., they changed the time, 'tis the 30th of August, and you must be here, Rowell and Willis say 'tis very necessary;" under date of August 10, 1881, "Hope nothing will prevent your being out at the suit;" under date of August 15, 1881, "I am at Rowell's office; he says you must be here; my case is set for the 30th of August and Porter's for September 3, don't fail us;" under date of August 15, 1881, "The suits are set for the 30th of August and 3d of September; come the northern route;" under date of August 20, 1881, "I really hope you will be able to be here at the suit, 'tis set for Aug. 30, and Porter's for Sept. 3, and can't be put off." To R. W. Waterman's letter of July 30, 1881, J. S. Waterman replied, "I shall

hold myself in readiness, but you see Rowell and Willis before you send;" and in a letter of August 8, 1881, he said, "Try and not send for me till the last of the month or 1st of Sept."

It thus appears that J. S. Waterman, in response to these urgent requests of his brother to attend the trial of the Miller suit, went to California, and stated, under oath, when the execution and object of the writings of May 14, 1881, must have been fresh in his recollection, that he had no interest in the mines in question in that suit, and which are the identical mines referred to in those writings. How can the theory of this suit, namely, that J. S. Waterman acquired a present interest by the writings of May 14, 1881, be sustained consistently with his oath in the Miller suit? He was, as we infer from the record, a gentleman of intelligence, and it must be assumed that he knew what he was saying when he testified in August, 1881, that he had no pecuniary interest in the litigation between Miller and his brother, involving the title to this property, and no interest in the mines themselves.

To all this may be added the fact, established by several witnesses, that J. S. Waterman declared, in their presence, on different occasions, that he did not have an interest in this property, and only desired to secure the repayment of such sums as he advanced to his brother and Porter on account of it.

The only fact that is apparently inconsistent with the view we have taken of the evidence is the offer made by R. W. Waterman in his letter of April 5, 1881, that his brother should take an interest in these mining claims. But it does not appear that this offer, as made, was accepted. On the contrary, the decided preponderance of evidence shows that, upon full consideration, he declined to take a present interest in the property as one of its owners; that, at the outset, he only sought to be secured in respect to the money he might advance to his brother and Porter; and that the writings of May 14, 1881, were intended by the parties simply as security for the moneys so advanced, with an option to J. S. Waterman to demand a conveyance of the respective interests described, within a time limited.

As the moneys advanced by J. S. Waterman to R. W. Waterman and Porter were all repaid before the commencement of this suit, and as no conveyance was demanded from R. W. Waterman within the time limited by his obligation, the plaintiff was not entitled to the relief asked.

One other point requires notice at our hands. An interlocutory decree was rendered declaring the plaintiff to be entitled to the relief asked, and the cause was referred to the master to state the accounts between the parties in respect to the use of the property, and the profits derived from it. The master made his report, and the final decree recites that each party waived the right to except to it. This waiver is relied upon as showing that the final decree was by consent, and, therefore, not to be questioned in this court. This contention is overruled. The waiving of exceptions to the master's report meant nothing more than that the appellant did not dispute its correctness in respect to the amount of the profits realized from the property. This waiver had no reference to the fundamental inquiry as to whether the plaintiff was entitled to a conveyance. But as, for the reasons stated, R. W. Waterman was not bound to convey — the time having elapsed in which a conveyance could be rightfully demanded — the entire decree falls.

The decree is reversed and the cause remanded with directions to dismiss the bill.

PORTER *v.* BANKS. Appeal from the Circuit Court of the United States for the Northern District of California. No. 191. Argued with and decided at the same time as No. 190, *ante*, 394. MR. JUSTICE HARLAN. The decree in this case required the specific execution by Porter of a written obligation to J. S. Waterman, similar in all respects to that of R. W. Waterman, referred to in the foregoing opinion, except that the interest which Porter agreed to convey was (3-100) three one-hundredths of the same property; also to pay to the original plaintiff, Abbie L. Waterman, the sum of $5373.40 as the profits

of the property agreed to be conveyed with the interest that accrued thereon prior to January 10, 1888. The facts in this case do not materially differ from those in the above case, and for the reasons stated in the above opinion the decree in this case must also be *Reversed.*

Mr. George F. Edmunds for appellant.

Mr. Charles C. Bonney for appellee.

GRAND TRUNK RAILWAY COMPANY *v.* IVES.

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

No. 134. Argued January 4, 5, 1892. — Decided April 4, 1892.

When, in an action brought against a railroad company in Michigan by the administrator of a person killed by one of its trains, to recover damages for the killing, the record in this court fails to show that any exception was taken at the trial, based upon the lack of evidence to show that he left some one dependent upon him for support, or some one who had a reasonable expectation of receiving some benefit from him during his lifetime, as required by the laws of that State, (Howell's Ann. Stat. §§ 3391, 3392,) the objection is not before this court for consideration.

The terms "ordinary care," "reasonable prudence," and similar terms have a relative significance, depending upon the special circumstances and surroundings of the particular case.

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury; but where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law, for the court.

The running of a railroad train within the limits of a city at a greater speed than is permitted by the city ordinances, is a circumstance from which negligence may be inferred in case an injury is inflicted upon a person by the train.

Whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury; although in some cases it has been held to be a question of law for the court.

Where the statutes of a State make provisions in regard to flagmen at

crossings, this court will follow the construction given to such statutes by its courts; and, so following the decisions of the courts of the State of Michigan, it is held that the duty to provide flagmen or gates, or other adequate warnings or appliances, may exist outside of the statute if the situation of the crossing reasonably requires it.

The giving of an erroneous instruction which was not prejudicial to the objecting party is not reversible error.

In an action against a railroad company to recover for injuries caused by the negligence of its servants the determination of the fact of whether the person injured was guilty of contributory negligence is a question of fact for the jury.

In such case if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, an action for the injury cannot be maintained unless it further appear that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.

In determining whether the injured party in such case was guilty of contributory negligence, the jury is bound to consider all the facts and circumstances bearing upon the question, and not select one particular fact or circumstance as controlling the case to the exclusion of all others.

THE case is stated in the opinion.

Mr. Otto Kirchner for plaintiff in error.

Mr. Don M. Dickinson for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

This was an action by Albert Ives, Jr., as administrator of the estate of Elijah Smith, deceased, against the Grand Trunk Railway Company of Canada, a Canadian corporation operating a line of railroad in Michigan, to recover damages for the alleged wrongful and negligent killing of plaintiff's intestate, without fault on his own part, by the railway company, at a street crossing in the city of Detroit. It was commenced in a state court and was afterwards removed into the Federal court on the ground of diverse citizenship. The action was brought under §§ 3391 and 3392 of Howell's Annotated Statutes of Michigan, and, as stated in the declaration, was for the benefit of three daughters and one son of the deceased, whose names were given.

There was a trial before the court and a jury, resulting in a verdict and judgment in favor of the plaintiff for $5000, with interest from the date of the verdict to the time the judgment was entered. The plaintiff offered to remit the interest, but the court refused to allow it to be done. The defendant then sued out this writ of error.

On the trial, the plaintiff, to sustain the issues on his part, offered evidence tending to prove the following facts: Elijah Smith, plaintiff's intestate, at the time of his death in May, 1884, was about seventy-five years of age, and had been residing on a farm, a few miles out of the city of Detroit, for several years, being engaged in grape culture. It was his custom to make one or more trips to the city every day during that period. In going to the city he travelled eastwardly on a much travelled road, known as the "Holden road," which, continued into the city, becomes an important and well-known street running east and west. Within the limits of the city the street was crossed obliquely, at a grade, by the defendant's road and two other parallel roads coming up from the southwest, which roads, in the language of the defendant's engineer, curve "away from a person coming down the Holden road." At the crossing the Holden road is sixty-five and one-half feet wide. The defendant's right of way is forty feet wide, and the right of way of all the parallel railways at that place is one hundred and sixty feet wide.

For a considerable distance, at least three hundred feet, along the right side of the road going into the city there were obstructions to a view of the railroad, consisting of a house known as the "McLaughlin house," a barn and its attendant outbuildings, an orchard in full bloom, and, about seventy-six feet from the defendant's track, another house known as the "Lawrence house." Then there were some shrub bushes, or, as described by one witness, some stunted locust trees and a willow, a short distance from the line of the right of way. So that, it seems, from all the evidence introduced on this point, it was not until a traveller was within fifteen or twenty feet of the track, and then going up the grade, that he could get an unobstructed view of the track to the right. One

witness testified that if he was in a buggy, his horse would be within eight feet of the track before he could get a good view of it in both directions.

On the morning of the fatal accident, Mr. Smith and his wife were driving down the Holden road into Detroit, in a buggy with the top raised, and with the side curtains either raised or removed. Opposite the Lawrence house they stopped several minutes, presumably to listen for any trains that might be passing, and while there a train on one of the other roads passed by going out of the city. Soon after it had crossed the road, and while the noise caused by it was still quite distinct, they drove on towards their destination. Just as they had reached the defendant's track, and while apparently watching the train that had passed, they were struck by one of the defendant's trains coming from the right at the rate of at least twenty — some of the witnesses say forty — miles an hour, and were thrown into the air, carried some distance, and instantly killed. This train was a transfer train between two junctions, and was not running on any schedule time. The plaintiff's witnesses agree, substantially, in saying that the whistle was not blown for this crossing nor was the bell rung, and that no signal whatever of the approach of the train was given until it was about to strike the buggy in which Mr. Smith and his wife were riding. The train ran on some four hundred feet or more after striking Mr. Smith before it could be stopped.

It further appeared that an ordinance of the city of Detroit required railroad trains within its limits to run at a rate not exceeding six miles an hour; and it likewise appeared that there was no flag-man or any one stationed at this crossing to warn travellers of approaching trains.

Most of the witnesses for the defence, consisting, for the main part, of its employés aboard the train at the time of the accident, testified, substantially, that the ordinary signals of blowing the whistle and ringing the bell were given before reaching the crossing, and that, in their opinion, the train was not moving faster than six miles an hour. It must be stated, however, that some of the defendant's witnesses the brake-

man, among others, would not say that the ordinary signals were given, nor would they testify that the train was not moving faster than at the rate prescribed by the city ordinance; and one of its witnesses, in particular, testified that the train was moving "about 20 miles an hour, perhaps a little faster."

A witness called by the plaintiff in rebuttal, an engineer of forty-five years' standing, who was examined as an expert, testified that if the train ran on after striking Mr. Smith the distance it was said to have gone before it could be stopped, it must have been going at the rate of twenty-five or thirty miles an hour; and that if it had been going but six miles an hour, as claimed by the defendant, it could have been stopped in the length of the engine, and even without brakes would not have run more than thirty-five feet, if reversed.

The foregoing embraces the substance of all the evidence set forth in the bill of exceptions on the question of how the fatal accident occurred, and with respect to the alleged negligence of the defendant, in the premises, and also the alleged contributory negligence of Mr. Smith.

At the close of the testimony the defendant submitted in writing a number of requests for instructions to the jury, which, if they had been given, would have virtually taken the case from the jury and would have authorized them to bring in a verdict in its favor. The court refused to give any of them, in the language requested, but gave some of them in a modified form and embraced others in the general charge. The refusal to give the instructions requested was excepted to, and exceptions were also noted to various portions of the charge as given. As those exceptions are substantially embodied in the assignment of errors, they will not be further referred to here, but such of them as we deem material will be considered in a subsequent part of this opinion.

The first point raised by the defendant and urgently insisted upon, as being embraced in the assignment of errors, is, that there is no evidence in this record that Mr. Smith left any one dependent upon him for support, and that, therefore, no right of action could be in the plaintiff, as his administrator, under

the Michigan statutes, against the defendant, for causing his death.

Sections 3391 and 3392 of Howell's Annotated Statutes of Michigan, under which this action was brought, provide as follows:

"SEC. 3391. Whenever the death of a person shall be caused by wrongful act, neglect or default of any railroad company, or its agents, and the act, neglect or default is such as would (if death had not ensued) entitle the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"SEC. 3392. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons, and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just, to the persons who may be entitled to such damages when recovered: *Provided*, nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this State."

According to the decisions of the Supreme Court of Michigan bearing upon the construction of these sections, a right of action will not arise for the negligent killing of a person by a railroad company, unless the deceased left some one dependent upon him for support, or some one who had a reasonable expectation of receiving some benefit from him during his lifetime. *Chicago & Northwestern Railway* v. *Bayfield*, 37 Michigan, 205; *Van Brunt* v. *Railroad Co.*, 78 Michigan, 530; *Cooper* v. *Lake Shore &c. Railway*, 66 Michigan, 261.

But it seems to us that no question concerning this phase of the case can arise here upon this record. The declaration averred that the action was brought for the benefit of three

daughters and one son of the deceased, whose names were given; and the defendant's plea was merely in the nature of a plea of the general issue, stating simply that the defendant "demands a trial of the matters set forth in the plaintiff's declaration." It is true, that, so far as appears from this record, the only evidence with respect to the beneficiaries of the suit named in the declaration was brought out, apparently incidentally, one of plaintiff's witnesses, Mrs. Briscoe, stating that she was the daughter of the deceased, and another witness stating that sometimes Mr. Smith's son went to town to attend to the sale of his farm products.

We should bear in mind, however, that it is not for this court to say that the entire evidence in the case is set forth in the bill of exceptions, for that would be to presume a direct violation of a settled rule of practice as regards bills of exceptions, viz., that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial. A bill of exceptions should not include, nor, as a rule, does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it is necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature. If such evidence be admitted without objection, and no point be made at the trial with respect to the matter it was intended to prove, we know of no rule of law which would require that even the substance of it should be embodied in a bill of exceptions subsequently taken. On the contrary, to encumber the record with matter not material to any issue involved has been repeatedly condemned by this court as useless and improper. *Pennock* v. *Dialogue*, 2 Pet. 1, 15; *Johnston* v. *Jones*, 1 Black, 209, 219, 220; *Zeller's Lessee* v. *Eckert*, 4 How. 289, 297.

But, as the record fails to show that any exception was taken at the trial based upon the lack of any evidence, in this particular, we repeat, it is not properly presented to this court for consideration. If the defendant deemed that the court below

erroneously made no reference in its charge to the jury to the lack of any evidence in the record respecting the existence of any beneficiaries of the suit, it should have called that matter to the attention of the court at that time, and insisted upon a ruling as to that point. Failing to do that, and failing also to save any exception on that point, it must be held to have waived any right it may have had in that particular. The only exception taken on the trial and embodied in the assignment of errors that can, by any latitude of construction, be held to refer to this point is the eighth request for instructions, which was refused, and which refusal is made the basis of the sixth assignment of errors. That request is as follows: "The court is requested to instruct the jury that under the evidence in this case the plaintiff is not entitled to recover, and their verdict must be for defendant." But the context and the reason given by the court for its refusal to give the instruction clearly show that that request was not aimed at this point, but related solely to the question of negligence on the part of the defendant company and the alleged contributory negligence of the party killed. That this request for instructions meant what the court understood it to mean, and had no reference whatever to the question of evidence respecting the existence of the beneficiaries named in the declaration, is further shown by the fact that the court in its general charge assumed that such evidence had been introduced, and also by the fact that the ninth request of the plaintiff in error for instructions to the jury likewise proceeded on that assumption. That request is as follows: "The damages in cases of this kind are entirely pecuniary in their nature, and the jury must not award damages beyond the amount *the evidence shows the children would probably have realized from deceased had he continued to live.* Nothing can be given for injured feelings or loss of society."

Furthermore, this assignment of error is too broad and general, under the 21st rule of this court, to bring up such a specific objection as it seeks to do. This court should not be put to the labor and trouble of examining the whole of the evidence to see whether there was enough for the verdict

below to have rested upon. But any objection made to the non-existence of evidence to support the verdict and judgment below should, in the language of the rule, "set out separately and particularly each error asserted and intended to be urged." *Van Stone* v. *Stillwell & Bierce Manufacturing Co.*, 142 U. S. 128. In our opinion, therefore, this point raised by the plaintiff in error is without merit. As to whether, as a matter of fact, there was evidence respecting the existence of any beneficiaries to this action, we do not, of course, express any opinion. In the view above taken of the matter, it is not necessary to decide that point. The legal presumption is that there was; and we shall proceed to consider the other assignments of error upon that presumption.

These assignments of error, so far as we can consider them, properly relate to but two questions: (1) Whether there was negligence on the part of the railroad company in the running of the train at the time of the accident; and (2) Whether, even if the company was negligent in this particular, the deceased was guilty of such contributory negligence as will defeat this action.

With respect to the first question, as here presented, the court charged the jury, substantially, that negligence on the part of either the railroad company or the deceased might be defined to be "the failure to do what reasonable and prudent persons would ordinarily have done, under the circumstances of the situation, or doing what reasonable and prudent persons, under the existing circumstances, would not have done;" that the law did not require the railroad company to adopt and have in use, at public crossings, the most highly developed and best methods of saving the life of travellers on the highway, but only such as reasonable care and prudence would dictate, under the circumstances of the particular case; and that the question of negligence, or want of ordinary care and prudence, was one for the jury to decide. In this connection the court gave to the jury the following instruction, which, it is claimed, was erroneous:

"You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them,

according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court. *Railroad Co.* v. *Pollard*, 22 Wall. 341; *Delaware &c. Railroad* v. *Converse*, 139 U. S. 469; *Thompson* v. *Flint &c. Railway*, 57 Michigan, 300; *Lake Shore &c. Railway* v. *Miller*, 25 Michigan, 274; *Railway* v. *Van Steinberg*, 17 Michigan, 99, 122; *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, 212; *Marietta &c. Railroad Co.* v. *Picksley*, 24 Ohio St. 654; *Pennsylvania Railroad* v. *Ogier*, 35 Penn. St. 60; *Robinson* v. *Cone*, 22 Vermont, 213; *Jamison* v. *San Jose &c. Railroad*, 55 California, 593; Red-

field on Railways (5th ed.) § 133, ¶ 2; 16 Am. & Eng. Enc. Law, Tit. "Negligence," 402, and authorities cited in note 2. We do not think, therefore, that this instruction was erroneous in any particular.

It is further urged that the court erred in giving to the jury the following instruction:

"If you find from the evidence in this case that the railroad train which killed Elijah Smith was moving at a rate of speed forbidden by the city ordinances, . . . the law authorizes you to infer negligence on the part of the railroad company as one of the facts established by the proof."

It is said that no evidence was introduced with respect to an ordinance of the city regulating the speed of railway trains. Counsel, in this matter, labor under a misapprehension. The bill of exceptions states that "the ordinance of the city of Detroit prohibiting the running of railroad trains, within the limits of the city, at a greater rate of speed than six miles per hour," was admitted in evidence, over the defendant's objections. And as there was a great deal of evidence introduced on behalf of the plaintiff that the train which killed Mr. Smith was running at a much more rapid rate than the ordinance permitted, the instruction quoted was applicable, and, under the authorities, was as favorable to the defendant as it had the right to demand. Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence, *per se*. *Schlereth* v. *Missouri Pac. Railway*, 96 Missouri, 509; *Virginia &c. Railway* v. *White*, 84 Virginia, 498. But, perhaps, the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence. *Union Pac. Railway* v. *Rassmussen*, 25 Nebraska, 810; *Blanchard* v. *Lake Shore &c. Railway*, 126 Illinois, 416; *Meloy* v. *Chicago &c. Railway*, 77 Iowa, 743; *Savannah &c. Railway* v. *Flannagan*, 82 Georgia, 579; *Peyton* v. *Texas &*

Pac. Railway, 41 La. Ann. 861. At any rate, the charge of the court, in this particular, was not unfavorable to the defendant, under the law. *Haas* v. *Chicago &c. Railroad*, 41 Wisconsin, 44; *Vicksburg &c. Railroad* v. *McGowan*, 62 Mississippi, 682; *Philadelphia &c. Railroad* v. *Stebbing*, 62 Maryland, 504; *McGrath* v. *New York &c. Railroad*, 63 N. Y. 522; *Houston &c. Railroad* v. *Terry*, 42 Texas, 451; *Bowman* v. *Chicago &c. Railroad*, 85 Missouri, 533; *Crowley* v. *Burlington &c. Railroad*, 65 Iowa, 658; *Keim* v. *Union R. & T. Co.*, 90 Missouri, 314; *Ellis* v. *Lake Shore &c. Railroad*, 138 Penn. St. 506; 4 Am. & Eng. Enc. Law, Tit. "Crossings," 934, and authorities cited in notes 8 and 10.

One of the chief assignments of error, and, perhaps, the one most strongly relied on to obtain a reversal of the judgment below, is, that the court erred in giving the following instruction:

"So if you find that because of the special circumstances existing in this case, such as that this was a crossing in the city much used and necessarily frequently presenting a point of danger, where several tracks run side by side, and there is consequent noise and confusion and increased danger; that owing to the near situation of houses, barns, fences, trees, bushes or other natural obstructions which afforded less than ordinary opportunity for observation of an approaching train, and other like circumstances of a special nature, it was reasonable that the railroad company should provide special safeguards to persons using the crossing in a prudent and cautious manner, the law authorizes you to infer negligence on its part for any failure to adopt such safeguards as would have given warning, although you have a statute in Michigan which undertakes by its provisions to secure such safeguards in the way the statute points out. The duty may exist outside the statute to provide flagmen or gates or other adequate warnings or appliances, if the situation of the crossing reasonably requires that — and of this you are to judge — and it depends upon the general rule that the company must use its privilege of crossing the streets on its surface grade with due and reasonable care for the rights of other persons using the highway with proper care and caution on their part.

"So if you find that the train hands kept no proper lookout and managed the train without due caution and reasonable care, you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

That this instruction is in harmony with the general rule of law obtaining in most of the States, and at common law, we think there can be no doubt. The general rule is well stated in *Central Passenger Ry. Co.* v. *Kuhn*, 86 Kentucky, 578, 589, as follows: "The doctrine with reference to injuries to those crossing the track of a railway, where the right to cross exists, is that the company must use such reasonable care and precaution as ordinary prudence would indicate. This vigilance and care must be greater at crossings in a populous town or city than at ordinary crossings in the country; so what is reasonable care and prudence must depend on the facts of each case. In a crossing within a city, or where the travel is great, reasonable care would require a flagman constantly at the crossing, or gates or bars, so as to prevent injury; but such care would not be required at a crossing in the country, where but few persons passed each day. The usual signal, such as ringing the bell and blowing the whistle, would be sufficient;" citing Thompson on Negligence, 417; *Louisville &c. Railroad* v. *Goetz*, 79 Kentucky, 442. And it was accordingly held in that case that a railroad company which had failed to provide a flagman or gates, during the night time when many trains were passing, at a crossing in a thickly populated portion of the city of Louisville, buildings being situated near the track at that point, was guilty of "negligence of the most flagrant character." See also, to the same effect, *St. Louis &c. Railroad* v. *Dunn*, 78 Illinois, 197; *Bentley* v. *Georgia Pac. Railway*, 86 Alabama, 484; *Western Atlantic Railroad* v. *Young*, 81 Georgia, 397; *Troy* v. *Cape Fear &c. Railroad*, 99 N. C. 298; *Bolinger* v. *St. Paul &c. Railroad*, 36 Minnesota, 418.

It is also held, in many of the States, (in fact, the rule is well nigh, if not quite, universal,) that a railroad company, under certain circumstances, will not be held free from negligence, even though it may have complied literally with the

terms of a statute prescribing certain signals to be given, and other precautions to be taken by it, for the safety of the travelling public at crossings. Thus in *Chicago &c. Railroad* v. *Perkins*, 125 Illinois, 127, it was held that the fact that a statute provides certain precautions will not relieve a railway company from adopting such other measures as public safety and common prudence dictate. And in *Thompson* v. *New York &c. Railroad*, 110 N. Y. 636, it was held that the giving of signals required by law upon a railway train approaching a street crossing does not, under all circumstances, render the railway company free from negligence, especially where the evidence tends to show that the train was being run at an undue and highly dangerous rate of speed through a city or village. See also *Louisville &c. Railway* v. *Commonwealth*, 13 Bush, 388; *Weber* v. *N. Y. Central Railroad*, 58 N. Y. 451. The reason for such rulings is found in the principle of the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another, in any way. As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous, is a question of fact for a jury to determine, under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence; although in some cases it has been held that it is a question of law for the court. It seems, however, that before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or gates at a crossing, it must be first shown that such crossing is more than ordinarily hazardous: as, for instance, that it is in a thickly populated portion of a town or city; or, that the view of the track is obstructed either by the company itself or by other objects proper in themselves; or, that the crossing is a much travelled one and the noise of approaching trains is rendered indistinct and the ordinary signals difficult to be heard by reason of bustle and confusion incident to railway or other business; or,

by reason of some such like cause: and that a jury would not be warranted in saying that a railroad company should maintain those extra precautions at ordinary crossings in the country. The following cases are illustrative of various phases of the rules we have just stated: *Eaton* v. *Fitchburg Railroad*, 129 Mass. 364; *Bailey* v. *New Haven Railroad*, 107 Mass. 496; *Pennsylvania Railroad* v. *Matthews*, 36 N. J. Law, 531; *Pennsylvania Railroad* v. *Killips*, 88 Penn. St. 405; *Kansas Pac. Railroad* v. *Richardson*, 25 Kansas, 391; *State* v. *Philadelphia &c. Railroad*, 47 Maryland, 76; *Welsch* v. *Hannibal &c. Railroad*, 72 Missouri, 451; *Frick* v. *St. Louis &c. Railroad*, 75 Missouri, 595; *Pittsburgh &c. Railway* v. *Yundt*, 78 Indiana, 373; *Hart* v. *Chicago &c. Railway*, 56 Iowa, 166; *Kinney* v. *Crocker*, 18 Wisconsin, 74.

But it is insisted that these rules are none of them applicable to this case, because the whole subject of signals and flagmen, gates, etc., at crossings in Michigan is regulated by statute. The claim is put forth that, under the statute of Michigan, (3 How. Stat. § 3301,) an officer of the State, known as the railroad commissioner, is charged with the duty of determining the necessity of a flagman at any and all crossings in the State, and that, unless an order had been made by him requiring a railroad company to station a flagman at any particular crossing, the failure on the part of the company to provide such flagmen could not even be considered as evidence of negligence; and that in this case no such order by the commissioner is shown to have been made. *Battishill* v. *Humphreys*, 64 Michigan, 494; *Guggenheim* v. *Lake Shore &c. Railway*, 66 Michigan, 150; and *Freeman* v. *Railway Company*, 74 Michigan, 86, are relied on as sustaining this contention.

If the construction of this statute by the Michigan courts be as claimed by the defendant, of course this court would feel constrained to adopt the same construction, even if we thought it in conflict with fundamental principles of the law of negligence to which we have referred in a preceding part of this opinion, obtaining in other States. *Meister* v. *Moore*, 96 U. S. 76; *Bowditch* v. *Boston*, 101 U. S. 16; *Flash* v.

Conn, 109 U. S. 371; *Bucher* v. *Cheshire Railroad Co.*, 125 U. S. 555; *Detroit* v. *Osborne*, 135 U. S. 492.

But do the Michigan cases cited sustain the defendant's contention? We think not; but rather that they support the rule laid down by the court below in the charge excepted to. In *Battishill* v. *Humphreys*, the court below had refused to instruct the jury, upon a request by the plaintiff in error, that "the railroad law of this State (art. 4, § 3) lays upon the railroad commissioner of the State the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railway; and upon the testimony and under the pleadings in this case, the absence of a flagman at Summit avenue is no evidence of any negligence upon the part of the receivers."

Such refusal having been assigned as error, the Supreme Court of the State held that the instruction should have been given, and accordingly reversed the judgment below. In the opinion the court said:

"I think the second request of the defendants should have been given. No reference was made to this matter in the charge of the court; and it may well be considered, when a request is specifically made, and it is refused, that the jury will take such refusal as a liberty to infer that the request is wrong in law, unless some explanation is made by the court of the reasons for such refusal to rebut such natural inference. . . . Evidence of this nature was introduced, and the request which ought to have been given denied, and we cannot say it did not have some influence upon the jury in determining the question of the negligence of the company."

If this decision stood alone there would be much force in the contention of the defendant in this case; but the other decisions referred to have explained it, and apparently qualified the broad doctrine laid down in it, bringing the rule in Michigan in harmony with the generally accepted rule obtaining elsewhere.

Thus in *Guggenheim* v. *Lake Shore Railway*, although it was stated in the opinion that "the railroad company is not compelled to keep a watchman or flagman at every street or

road-crossing where a jury, upon a trial like this, might think it necessary to have one stationed;" and that "this matter is regulated under the statutes of our State by the railroad commissioner;" yet it was held that when the company itself so obstructs its track that its trains cannot be seen by travellers approaching a crossing, or so that the ordinary signals required by statute will not be sufficient to warn travellers of the approach of trains, "some additional warning must be given, and there are cases where a flagman would be necessary to acquit the company of negligence." And it was further held that the trial court was right in instructing the jury that it was the duty of the company to give to the traveller on the highway due and timely warning of the coming of its trains and the approaching danger "either by bell or whistle, or both, or by some other means, and in such a way as to give him an opportunity, by the exercise of due diligence and care, to meet and guard himself from danger;" thus showing that a duty on the part of the railway company to provide against accidents at crossings may and does exist outside of the statute.

But the case of *Freeman* v. *Railway Company*, which, so far as we have examined, is the latest adjudication of the Supreme Court of Michigan on the subject, contains the most thorough discussion of the general question of any of those referred to by the defendant; and, so far from sustaining its contention, is directly opposed to it and in line with the instruction given by the court below in this case. In that case one of the questions considered by the court was, whether it was negligence on the part of the railway in not providing a flagman at the crossing of Genesee street in the city of Marquette, the railroad commissioner not having required it to station one there. The facts in relation to the hazardous nature of the crossing are referred to particularly in the opinion of the court from which we quote. In considering the question the court went very fully into the merits of it, in all its bearings, and said: "The contention of the defendant is that it was not negligence. It is claimed that under the statutes of this State the duty of determining where flagmen shall be stationed devolves upon the railroad commissioner; and that in

order to hold defendant liable for such negligence in this case, it should have appeared in proof that the railroad commissioner had ordered a flagman to be stationed at this crossing, and that his orders were not obeyed; or that the crossing was such an exceptionally dangerous one that a common law duty was imposed on the defendant to keep a flagman at that point; and that no showing of this kind was made."

Replying to this contention, the court said: "We think the judge below ruled correctly on this point and in accordance with our previous decisions. The jury were instructed, substantially, that it is not the law of this State that at every road or street crossing in a village or city a railroad company is bound to place a flagman. The law puts upon the railroad commissioner the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad, and the absence of a flagman at Genesee street crossing, where the accident occurred, is of itself no evidence of negligence upon the part of the defendant. And the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the railroad company should place a flagman there, or his equivalent. That before the jury could find this it must be made to appear to them that the danger at the crossing was altogether exceptional — that there was something about the case rendering ordinary care on the part of the witness Grant, (the driver of the carriage which was run over and broken up at the crossing,) an insufficient protection against injury, and therefore made the assumption of the burden of a flagman on the part of the railroad company a matter of common duty for the safety of people crossing. 'You have, as I said before, been at this crossing. You have seen the situation. You have seen its relation to travel and to the city; and it is for you to determine, if you reach that point, under all the circumstances of the case, whether or not it was negligence, under the instructions I have given you and the evidence, not to have a flagman there.'"

The Supreme Court then went on to say: "If any fault can be found with this charge, it was too favorable to the defendant, in that it connected the necessity of keeping a flagman

at the crossing, with the use of ordinary care on the part of Grant. The duty of retaining a flagman at this point did not depend on the question whether Grant, in this particular instance, could by common prudence have avoided this collision or not. It depended rather upon the situation of the crossing, its relation to the travel upon the street generally, and the facilities afforded, not only the travellers on the street, but the trainmen on the cars, to avoid collisions and accidents of this kind, without a flagman to give warning of approaching trains.

"I think the jury were warranted in finding it to be negligence in the defendant in not providing a watchman at this point. It seems that to the south from Genesee street there was a steep up-grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passers on the street, without warning of the train's approach. A train coming from the north could not be seen at all by those travelling on the street in the direction Grant was driving, until the traveller was within 40 feet of the track, and the train within from 150 to 175 feet of the centre of the street. And the engineer on the train, being lower down in his cab than a man in a buggy, could not get his eye into Genesee street west of the track, as was the fact in this case, until the locomotive was within 60 or 75 feet from the crossing, and then his vision would only extend 40 or 50 feet west of the track on the street. Under such circumstances, a train ought to run over this crossing so that it could be stopped at once, or a flagman ought to be stationed where he could give warning of its approach. When an engineer, at a distance beyond 75 feet from the crossing of a street in a city like Marquette, cannot see into the street except the straight line thereof where the track crosses, and the traveller cannot see even the top of the locomotive until he gets within 40 feet of the track, something more than ordinary pains to prevent accidents is incumbent both on the railroad company and also on the traveller, if such traveller is acquainted with the situation.

"In *Battishill* v. *Humphreys*, we held, under the pleadings and testimony in the case, that the absence of a flagman at Summit avenue crossing in Detroit could not be considered negligence in the railroad company, as the railroad commissioner had not determined that it was necessary to maintain one there. *But nothing was said or intended to be said, in that opinion, that there could be no negligence, in any case, in not maintaining a flagman at a street crossing unless such commissioner had ordered one to be stationed there.* In *Guggenheim* v. *L. S. & M. S. Ry. Co.* the law in this respect is laid down substantially as the Circuit Judge in this case instructed the jury."

We have quoted extensively from the opinion in the case last referred to because it seems to us a complete refutation of the contention of the defendant herein, and states the law, on this point, substantially as the court below did in its charge to the jury in this case, and because, also, the facts and circumstances relative to the railroad crossing there were so very similar to those in this case, that it makes it a very strong authority in support of the judgment below. The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is, that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company, at a crossing, in every particular case which may afterwards arise. For, as already stated, each case must stand upon its own merits and be decided upon its own facts and circumstances; and these are the features which make the question of negligence primarily one for the jury to determine, under proper instructions from the court. We think, therefore, that, in that portion of the charge which we have been discussing, the court below committed no error to the prejudice of the defendant.

But it is claimed that the last paragraph of that portion of the charge last above quoted, referring to the question whether

or not the trainmen kept a proper lookout and managed the train in a prudent and cautious manner, was erroneous, because, so it is claimed, "there was no evidence that the train hands kept no proper lookout, etc." This contention is also without merit. There was evidence that the ordinary signals of blowing the whistle and ringing the bell at the crossing were not given, and that the train was running at a more rapid rate than was permitted by the city ordinance. If the jury believed that evidence they must necessarily have found that the trainmen did not keep a proper lookout, and did not manage the train in a prudent and careful manner. The instruction complained of was certainly not prejudicial to the defendant in this particular, since it referred to matters concerning which evidence had been admitted, and was correct on principle. The most that can be said against it is that the substance of it had perhaps been given in another portion of the charge, and the court below need not have given it; but the giving it in different language, while not necessary, and while also correct practice might require that it be not given, was not reversible error. So far, then, as the instructions of the court below, upon the first question, as above arranged, are concerned, we conclude there was no error prejudicial to the defendant. And this leads to a consideration of the question of the alleged contributory negligence on the part of the deceased.

It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses, shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part the accident would not have happened; and it is, therefore, contended that the court below should, as matter of law, have so determined, and it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so

also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other. This rule is sustained by the Michigan authorities, (*Mynning* v. *Detroit &c. Railroad*, 64 Michigan, 93; *Underhill* v. *Chicago &c. Railway*, 81 Michigan, 43; *Baker* v. *Railroad Co.*, 68 Michigan, 90; *Engel* v. *Smith*, 82 Michigan, 1;) and its correctness is apparent from an examination and analysis of the generally accepted definitions of contributory negligence, as laid down by the courts and by text-writers. Without going into a discussion of these definitions, or even attempting to collate them, it will be sufficient for present purposes to say that the generally accepted and most reasonable rule of law applicable to actions in which the defence is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in *Davies* v. *Mann*, 10 M. & W. 546,) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551, 558, and cases cited; *Donohue* v. *St. Louis &c. Railroad*, 91 Missouri, 357;

Vicksburg &c. Railroad v. *Patton*, 31 Mississippi, 156; *Deans* v. *Wilmington &c. Railroad*, 107 N. C. 686; 2 Thompson on Negligence, 1157; Cooley on Torts, (1st Ed.,) 675; 4 Am. & Eng. Enc. Law, Tit. "Contributory Negligence," 30, and authorities cited in note 1.

With respect to the question of the alleged contributory negligence of the deceased, the court charged the jury as follows:

"Turning now to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit.

"So if you find that he was familiar with this crossing and its dangers, one and all of them; that he frequently used it and knew how to act in using it to protect himself; and that under the special circumstances which you find he failed to act as a prudent and cautious man should have acted from beginning to end, or that he omitted some precaution that a prudent man ought to have taken, whereby he lost his life, the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully; should look and listen and do everything that a reasonably prudent man would do before he attempted to make the crossing. Scrutinize his actings and doings under the light of the then situation; the nature and character of the crossing; the fact of the difficulty of observation; the time of day and the probability of danger from passing trains; the fact that there were other railroads side by side; that another train on one of these was actually approaching and passing; the noise and confusion; possibly the noise and confusion of signals; and every fact and circumstance bearing on the case to influence his conduct then and there, under those circumstances and not any other circumstances; and say upon your fair and impartial judgment whether he acted as

a reasonable and prudent man should have acted and with the due care and caution demanded by the exigencies of the occasion.

"If he did so act, and the railroad company was negligent, his administrator is entitled to your verdict. If he did not so act, the railroad company is entitled to your verdict, whether it was negligent or not. If it was not negligent, it is entitled to your verdict, no matter how Smith acted."

These instructions are so full and complete, and are in such entire accord with the rules of law applicable to cases of this character, that no fault whatever can be found with them. They embody, substantially, the entire law of the case, on the questions under consideration, and were applicable to every feature of it. Indeed, if they are open to any criticism at all it is that they were more favorable to the defendant than it had the right to demand, under the rules above stated, since they enabled the defendant to be relieved from any liability in the case, if the deceased had been guilty of contributory negligence, even though it might, by the exercise of ordinary care and prudence, have averted the results of such negligence. Mr. Pierce, in his work on railroads, p. 343, after a review of the authorities on the subject, lays down, substantially, the same general rule as to the care required of travellers at railway crossings, in the following terms: "A traveller upon a highway, when approaching a railroad crossing, ought to make a vigilant use of his senses of sight and hearing, in order to avoid a collision. This precaution is dictated by common prudence. He should listen for signals, and look in the different directions from which a train may come. If by neglect of this duty he suffers injury from a passing train, he cannot recover of the company, although it may itself be chargeable with negligence, or have failed to give the signals required by statute, or be running at the time at a speed exceeding the legal rate." See also, generally, upon this question, 4 Am. & Eng. Enc. Law, 68–78, and authorities cited in the notes.

The recent case of *Sullivan* v. *New York &c. Railroad Co.*, from Massachusetts, which, in advance of the official

reports, is published in 28 N. E. Rep. 911, is so similar to the one at bar on this question that it deserves more than a passing notice. The substance of the case is stated in the syllabus by the reporter as follows:

"Plaintiff, a woman about 65 years of age, of ordinary intelligence, and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the sidewalk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train, and hurried to get across. Plaintiff testified that she looked before going upon the track, but did not see the train or hear the whistle; that the only warning she had was the noise of its approach, after she was on the first track; and that she did not then look to see where it was, or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled and fell between the rails. The signals required by the statutes were not given: *Held*, that it did not appear as matter of law that plaintiff was guilty of gross or wilful negligence, and that it was proper to submit the question to the jury."

See also *Evans* v. *Lake Shore & Mich. South. Railway*, (Mich.) 50 N. W. Rep. 386; *Ellis* v. *Lake Shore & Mich. South. Railway*, 138 Penn. St. 506; *Brown* v. *Tex. & Pac. Railway*, 42 La. Ann. 350; *Heddles* v. *Chicago &c. Railway*, 77 Wisconsin, 228; *Parsons* v. *New York &c. Railroad*, 113 N. Y. 355; *Cooper* v. *Lake Shore & Mich. South. Railway*, 66 Michigan, 261.

Nothing was said by this court in *Railroad Company* v. *Houston*, 95 U. S. 697, or in *Schofield* v. *Chicago & St. Paul Railway*, 114 U. S. 615, which are relied upon by the defendant, that in anywise conflicts with the instructions of the court

below in this case, or lays down any different doctrine with respect to contributory negligence. *Delaware Railroad* v. *Converse*, 139 U. S. 469. Nor do the Michigan authorities, which are relied upon, when read in the light of the particular facts and circumstances of each separate case, enunciate a different doctrine; but, so far as applicable, they tend to sustain the instructions objected to.

It is also insisted that the court erred in refusing the following request of the defendant for instructions:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City train, that had already passed, and with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The reason given by the court for refusing this request was that "it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated without notice of others that they may think important." This reason is a sound one. In determining whether the deceased was guilty of contributory negligence the jury were bound to consider *all* the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others. *Cooper* v. *Lake Shore & Mich. South. Railway Co.*, *supra*; *Baltimore etc. Railroad* v. *Kane*, 69 Maryland, 11. Moreover, the substance of the request, so far as it was correct, had already been given, in general terms, by the court in that part of the charge referring to the degree of care and caution required of the deceased in approaching the railroad crossing, in order to free him from the charge of contributory negligence; and the refusal of the court to give it again, in different language, was not error. *Erie Railroad Co.* v. *Winter*, 143 U. S. 60, 75.

There are no other questions in the case that call for special consideration. We have endeavored to consider and pass upon all of the material ones that have been discussed by counsel both in their brief and in oral argument at the bar. We do not think that it has been shown that any error was committed in the trial below which was prejudicial to the rights of the defendant.

Judgment affirmed.

KEATOR LUMBER COMPANY *v.* THOMPSON.

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

No. 242. Argued and submitted March 25, 1892. — Decided April 4, 1892.

An objection that replications were not filed to the defendant's pleas when the trial commenced, nor before judgment, with leave of court, comes too late if made after entry of judgment.

When a defendant is compelled to proceed with a trial in Illinois in a case in which the issues are not made up by the filing of replications to the pleas, and makes no objection on that ground, the failure to do so is equivalent to consenting that the trial may proceed.

In Illinois the filing by the plaintiff under the statute of that State (2 Starr & Curtis' Stats. 1801) of an affidavit "showing the nature of his demand and the amount due him from the defendant" does not prevent the recovery of a larger sum if a larger sum is claimed by the pleadings and shown to be due by the evidence.

THE case was stated by the court as follows:

Benjamin F. Thompson and Homer Root brought this action of assumpsit against the J. S. Keator Lumber Company for a balance alleged to be due them for cutting and hauling saw-logs, etc. The two main grounds of dispute were: (1) Whether the price for the work was limited by the contract in question to $3 per thousand feet of saw-logs cut and delivered into the boom limits of the Black River, Wisconsin, without extra charge, or whether the plaintiffs, in addition to the above price, were entitled to be paid for the driving or delivery of the logs into said boom limits; (2) whether the plaintiffs had

not overcharged the defendant in the scaling and measurement of the logs.

With the declaration was filed an affidavit by plaintiffs under the statute of Illinois, providing that "if the plaintiff in any suit upon a contract expressed or implied for the payment of money, shall file with his declaration an affidavit, showing the nature of his demand and the amount due him from the defendant, after allowing to the defendant all his just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant, or his agent or attorney if the defendant is a resident of the county in which the suit is brought, shall file with his plea an affidavit stating that he verily believes he has a good defence to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount (according to the best of his knowledge and belief)," etc. 2 Starr & Curtis' Stat. Ill. p. 1801, ¶ 37, § 36.

The defendant filed a plea in abatement, and, subsequently, pleas of non-assumpsit and set-off; the latter being for an amount exceeding that sued for by the plaintiff. With these pleas the defendant filed an affidavit of merits in conformity with the above statute.

The parties, by written stipulation, waived a jury and agreed that the case be set for trial any day not earlier than March 28, 1888. Under this stipulation the plaintiffs had it set for trial on the day just named. The defendant, on that day, requested a postponement of the trial until the arrival of its Wisconsin counsel, who had had sole charge of the preparation of the defence, and also because of the absence of its principal witness. The court ruled that unless the defendant showed legal grounds for a continuance, the trial should proceed forthwith. The defendant then entered a motion for continuance based upon affidavit as to what the absent witness would state. The plaintiffs offering to admit upon the trial that the witness, if present, would testify as set forth in the affidavit, the court overruled the motion for continuance, and held that the trial must proceed forthwith. To this action of the court the defendant excepted. Thereupon, the trial was commenced

on the 28th of March, 1888, in the absence of the defendant's Wisconsin counsel, who, however, arrived before the conclusion of the trial, which continued during the 29th and 30th of March. On the last-named day, but before the trial was concluded, the plaintiffs, without notice to the defendant or its attorney, and without obtaining leave from the court, filed with the clerk replications to the defendant's pleas.

On March 31st, 1888, the court made a general finding of the issues for the plaintiffs, and assessed their damages at $15,568.99, for which amount judgment was entered against the defendant. To this judgment the defendant excepted on the ground that it was excessive in amount.

Mr. James K. Edsall for plaintiff in error submitted on his brief.

Mr. James O'Neill for defendant in error. *Mr. John S. Miller* was with him on the brief.

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

The principal assignments of error have nothing of substance in them. When the plaintiffs agreed to admit upon the trial that the defendant's absent witness would testify as stated in the affidavit filed for a continuance of the case, and the court thereupon ruled that the trial should proceed, attention was not called to the fact that replications had not been filed to the first and third pleas, and judgment was not asked upon those pleas for want of such replications. Nor did the defendant, before judgment, move for a new trial upon the ground that its first and third pleas were unanswered at the time the trial began. The filing of replications to those pleas, during the progress of the trial, and without leave of the court, was, of course, improper and irregular. But it must be presumed that the fact of their having been so filed was known to the defendant before the trial was concluded, or before the judgment was entered. Besides, the judgment was under the control of the court during the term; and if it had been made to

appear that the defendant was unaware, prior to the entry of judgment, that replications to its first and third pleas were put on file during the progress of the trial, it may be that the court would have set aside the judgment. It appears only that the replications were not on file when the trial commenced, not that their being filed during its progress was unknown to the defendant before the trial was concluded. The defendant was bound to know, when the court ordered the parties to proceed with the trial, that replications had not been filed to its first and third pleas. It should then have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced. The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, came too late after judgment was entered. In *Kelsey* v. *Lamb*, 21 Illinois, 559, the Supreme Court of Illinois said : "If the defendant has filed his plea, and the other party fails to reply within the time required by the rules of the court, he has a right to judgment by default against the plaintiff, but until he obtains such default, the pleas cannot be considered as confessed by the plaintiff. It is the default which gives the right to consider and act upon the pleas as true. In this case no such default was taken. When the parties submitted the case to trial by the court, without a jury by consent, it had the effect of submitting the case to trial on the pleadings, as if there were proper issues formed, and the court will hear evidence under all the pleas presenting a legal defence, precisely as if the allegations of such pleas had been formally traversed. This is the fair and reasonable construction to be given to such agreements. But it is otherwise, where the party is compelled to proceed to trial, without the issues being formed in the case. There the act is not voluntary, and no such intendment can be made." The defendant here was compelled to proceed with the trial, but no objection was made by it to a trial because the issues were not fully made up. See also *Bunker* v. *Green*, 48 Illinois, 243 ; *Beesley* v. *Hamilton*, 50 Illinois, 88 ; *Barnett* v. *Graff*, 52 Illinois, 170.

It is objected that the damages awarded to the plaintiffs are excessive in that their affidavit, filed with the declaration, shows the amount claimed, as of August 16, 1887, when the action was commenced, was only $13,943.23, whereas the judgment was for $15,568.99. Allowing interest upon the first-named sum up to the date of the judgment, the damages given exceed the amount claimed in the plaintiffs' affidavit by more than one thousand dollars. But the *ad damnum* was twenty thousand dollars, and the bill of exceptions states that "the plaintiffs also introduced evidence tending to show that the amount now [then] due and owing from the defendant to the plaintiffs for the matters and causes of action aforesaid is $15,568.99." It does not state what this evidence was, nor does it appear that the defendant objected to evidence showing an indebtedness on its part in excess of the sum claimed in the plaintiffs' affidavit. Besides, the affidavit, though no part of the declaration itself, was a statutory pleading, which might have been amended upon such a suggestion. *Healey* v. *Charnley*, 79 Illinois, 592; *McKenzie* v. *Penfield*, 87 Illinois, 38. The only purpose of the affidavit is to entitle a plaintiff to judgment as in case of default unless defendant shall file an affidavit of merits with his pleas, and in case of such default the plaintiff's affidavit may be taken as *prima facie* evidence of the amount due; but even this is discretionary with the court. *Kern* v. *Strasberger*, 71 Illinois, 303. No point was directly made in the court below, either before or after judgment, that the plaintiffs were limited in their recovery to the sum named in their affidavit. An objection of that character, made for the first time in this court, ought not to be entertained.

No other questions presented by the record are of sufficient importance to be considered.

Judgment affirmed.

HARTFORD LIFE ANNUITY INSURANCE COMPANY *v.* UNSELL.

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

No. 224. Submitted March 23, 1892. — Decided April 4, 1892.

In an action to recover on a policy of life insurance, error in admitting evidence as to the mental and physical condition of the assured in his last days, when an overdue premium was paid and received, is held to be cured by the charge of the court that the only question was whether there had been a waiver by the insurer, and that it was immaterial whether the assured was or was not ill at that time.

As an action could not have been maintained against the insurer without offer to pay overdue premiums, evidence of such offer was properly admitted.

When the charge contains all that need be submitted to the jury on the issues, it is no error to refuse further requests to charge.

A life insurance company whose policy provides for the payment of premiums at stated times and further that the holder "agrees and accepts the same upon the express condition that if either the monthly dues," etc., "are not paid to said company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force" may nevertheless by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due without inquiry as to his health, and such a course of dealing may amount to a waiver of the conditions of forfeiture.

Courts do not favor forfeitures; but will nevertheless enforce them when the party by whose default they are incurred cannot show good ground in the conduct of the other party on which to base a reasonable excuse for the default.

If, in a case where the evidence warranted a request for a peremptory instruction to find for the defendant, no request for such instruction was made, it cannot be made a ground of reversal that the issues of fact were submitted to the jury.

THE court stated the case as follows:

This action was brought upon five certificates of membership, in the nature of policies of life insurance, issued by the

plaintiff in error to E. J. Unsell, the deceased husband of the defendant in error, who was the plaintiff below, numbered 24981 to 24985, inclusive, dated September 27, 1881, and each for the sum of $1000; also, upon a similar certificate, numbered 52143, for the sum of $5000, dated July 10, 1882. The charge of the court at the first trial will be found in 32 Fed. Rep. 443.

The petition alleged that the assured died December 31, 1885, having performed all the conditions of the policies on his part to be kept and performed. The answer denied that the assured died December 31, 1885, and alleged that his death occurred on January 31, 1886. It also alleged that none of the certificates were in force at the latter date by reason of the fact that the dues payable by the assured on the first day of January, 1886, were not paid at any time prior to his death; consequently the certificates of insurance ceased to be of any force or effect.

To the answer setting up this defence the plaintiff replied: "She admits that her husband, Elias J. Unsell, died January 31, 1886, and not December 31, 1885, as through clerical error was averred in the petition. Further replying, she denies that the said Elias J. Unsell failed to pay the monthly dues for the month of January, 1886, as averred in the answer, but avers the same were paid. And for further reply this plaintiff says that for several months before his death the said Elias J. Unsell was in such agony and pain of body as to seriously affect his mind and render him unfit for attention to any business; that in consequence thereof, said Unsell lost his memory and the knowledge of all his business affairs, but was fully conscious that he was about to die. That in December, 1885, and while he was so under disability and possessed of a consciousness of his approaching death, he informed plaintiff and his friends that he had paid up all that was due by him to the defendant; that plaintiff supposed and yet believes such to be the fact; that during the whole of the month of December, 1885, said Elias J. Unsell was at home confined to his bed; that he never received any notice, or had any knowledge that anything was due on any of said certificates, nor

had this plaintiff, or any of his friends, such knowledge until on or about January 26, 1886, when a notice was received through the mail from defendant that dues from January 1, 1886, were in arrears. That she at once, for said Elias J. Unsell, forwarded to defendant the sum of $5, to pay dues for the months of January and February, 1886, which sum was duly received by defendant and was kept by it and not returned until after defendant had learned of the death of said Elias J. Unsell.

"And for further reply, plaintiff says that defendant is and ought of right to be estopped from now setting up the alleged failure to pay said dues in advance as any defence, for she avers that during the whole time said Unsell has been the owner of certificates, in the defendant company, said defendant has without objection received from him the monthly dues long after the date on which by the terms of the contract they were payable, and had thereby led said Unsell to believe that the payment in advance was not essential and had waived the payment thereof in advance."

The material conditions of insurance under the several certificates were as follows:

"*Of payments.* The person to whom this certificate is issued agrees to pay to said company three dollars per annum, for expenses, on the first day of the month after date of issue, and at every anniversary thereafter, so long as this certificate shall remain in force; or by monthly or other *pro rata* installments of the same in advance for periods of less than one year.

"*Conditions of acceptance.* The holder of this certificate further agrees and accepts the same upon the express condition that if either the monthly dues, assessments or the payment of the ten dollars toward the safety fund, as hereinbefore required, are not paid to said company on the day due, then this certificate shall be null and void and of no effect, and no person shall be entitled to damages or the recovery of any moneys paid for protection while the certificate was in force, either from said company or the trustee of the safety fund."

Statement of the Case.

It appeared in evidence that the company mailed at Hartford, January 21, 1886, a postal card as follows: "Hartford Life and Annuity Insurance Company. Reinstatement account. Elias J. Unsell, 308 North Commercial Street, St. Louis, Missouri. Certificates numbers 24981 to 24986 and 52143. Payments are in arrears for assessments ———, dues from January to May, $5. *Memorandum:* This should be returned when remittance is made; also accompanying health certificate signed by the member. Reinstatement cannot be made without proper warrant that the member is alive and in good health." This card had on it the following blank form of health certificate: "I hereby warrant and declare that since the date of such certificate I have sustained no personal injury, nor been afflicted with any disease of a serious nature. That my habits are temperate now, and I am in a sound condition and good health, and I hereby apply to be reinstated in consideration thereof. Dated —— this —— day of ——— 188—."

The plaintiff testified that she received the above postal card on the 28th of January, 1886, and, on that day, addressed and mailed to the defendant's secretary at Hartford a letter as follows: "Enclosed please find $5, dues on my husband's policy 24981 to 24985, and 52143, from January 1, 1886." This letter was received by the defendant February 1, 1886.

On the 3d day of February, 1886, the plaintiff received from the defendant this postal card: "Hartford Life and Annuity Insurance Company. Reinstatement account. Elias J. Unsell, 308 North Commercial Street, St. Louis, Missouri. Certificate 24981. Payments in arrears, nothing. Assessment No. ———, installment on deposit ———, dues from January 1 to March 1, 1886, $7.50. Total payable at this date, $7.50. Assessment No. 30, for $45, will be due and payable March 1, 1886, if reinstatement is made. *Memorandum:* This should be returned when remittance is made, also accompanying health certificate signed by member. Reinstatement cannot be made without proof that the person is living and in good health." This notice was mailed February 1, 1886, and had upon it a blank health certificate like the one on the previous postal card.

Statement of the Case.

Under date of February 8, 1886, the plaintiff wrote to the company as follows: "My husband, Elias J. Unsell, insured in your company under policy 24981 to 52143, died on Sunday, January 31. Please send me blank proofs of loss that I may have the same properly executed." The defendant, before receiving this letter, wrote to the plaintiff, under date of February 9, as follows: "We have just received information from our St. Louis agent, that the decease of your husband, Mr. E. J. Unsell, has taken place, and it being impossible in consequence that the membership issued by this company upon his life be reinstated by the furnishing of health certificate, for which we asked on February 1st inst., such health certificate being asked for because of the lapse of membership on January 1st last, we have to return you herewith $5.00, the same being the tender of your arrears made to us under date of January 28th, and which was unacceptable as notified to you, until our conditions have been complied with."

Evidence was introduced to show the course of business between the assured and the company during the whole period covered by the certificates, in respect to the payment of dues after the date fixed in the contracts of insurance.

The defendant asked the court to instruct the jury as follows:

"The court charges the jury that if they believe from the evidence that it was not because of a supposition that prompt payment of dues, payable January, 1886, would not be required, that such payment was not made, but because of the sickness or mental disability of the assured, then they will find for the defendant.

"The court charges the jury that the defendant was not required, by the terms of the certificates sued upon, to give the assured notice of the time when his dues were payable. He was bound to know when such dues were payable and make his payments according to the terms and requirements of the certificates.

"The court charges the jury that they cannot find, from mere isolated instances of indulgence to the assured, that the defendant pursued such a course of business with him as led

him to believe that the defendant would not insist upon payment of dues, stipulated for and required in the policies, or certificates of membership.

"The course of business, in regard to time of payment, must have been general and uniform and such as would enable the jury to say that it was the settled practice in this regard, adopted by the defendant as to the assured."

The court refused to so charge the jury, and the defendant "duly excepted."

The jury having been charged by the court returned a verdict in favor of the plaintiff for the amount sued for, and judgment was entered against the company for $10,851.66. A motion for new trial was overruled.

Mr. Chester H. Krum for plaintiff in error.

I. Under a policy of life insurance, which requires payment of a premium on a day certain and specified, it is immaterial what was the mental or physical condition of the assured on such day. That he was sick will not excuse non-payment. *N. Y. Life Ins. Co.* v. *Statham*, 93 U. S. 24; *Klein* v. *Insurance Co.*, 104 U. S. 88; *Thompson* v. *Insurance Co.*, 104 U. S. 252, 257. Hence the trial court erred in admitting evidence, against the objection of the defendant, in regard to the mental and physical condition of the assured during the last month of his life.

II. Having erroneously permitted inquiry as to the mental and physical condition of the assured, at the time when his premium fell due and he failed to pay, it was the manifest duty of the trial court to leave it to the jury to determine: (*a*), Whether the failure to pay the premium resulted from the mental or physical incapacity of the assured at the time which would be no excuse for non-payment, or, (*b*), Whether such failure to pay the premium resulted from a reliance in a supposed waiver by the company of the condition requiring payment upon the day when due or within four days thereafter — which reliance, on the theory of the court, might be an excuse for such non-payment.

Argument for Plaintiff in Error.

Hence the propriety of the instruction asked by the defendant in regard to this phase of the case. For, if the assured did not pay, merely because he was sick, the jury ought to have been told to return a verdict for the defendant. If he did not pay because he supposed the condition had been waived, and the course of conduct of the defendant had been such as to legally justify such conclusion, then the plaintiff was entitled to a verdict. But the defendant was entitled to have the question of fact so left with the jury as to afford an opportunity for them to say, upon what circumstances depended the failure to pay the premium within the time stipulated for its payment.

III. The defendant was entitled to the instruction refused by the court below, which declared that it was not required, by the terms of the certificate sued upon, to give the assured notice of the time when his dues or premiums were payable. *Thompson* v. *Insurance Co.*, 104 U. S. 252, 258; *Insurance Co.* v. *Mowry*, 96 U. S. 544.

IV. There was no evidence which justified submission to the jury of the question of waiver. The defendant in error was permitted to try her case upon the theory that by its course of conduct, with reference to payment of dues, the plaintiff in error had waived the requirement of prompt payment. It is true, that a party always has the option to waive a condition or stipulation made in his favor. Equally true, that forfeitures are not favored in the law. But to create a waiver of conditions on which forfeiture may be claimed, there must have been some agreement, some declaration, some course of action evidencing an abandonment or withdrawal of such conditions. *Thompson* v. *Insurance Co.*, 104 U. S. 252, 259.

The condition of insurance in the present certificate is: "The holder of this certificate further agrees and accepts the same upon the express condition that if either the monthly dues, assessments or the payment toward the safety fund, as hereinbefore required, are not paid to said company on the day when due, then this certificate shall be null and void." To grant indulgence as to such payment upon one occasion, or

upon a series of occasions, does not prohibit the company from insisting upon the condition on subsequent occasions. *Mut. Ben. Life Assn.* v. *Ruse*, 8 Georgia, 534; *Winnesheik Ins. Co.* v. *Holzgrafe*, 53 Illinois, 516; *Wood* v. *Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Baker* v. *Union Mut. Life Ins. Co.*, 43 N. Y. 283; *Mowry* v. *Home Ins. Co.*, 9 R. I. 346; *Thompson* v. *Insurance Co.*, 104 U. S. 252.

In fact the whole theory upon which the plaintiff was permitted to try her case was repudiated by this court in *Thompson* v. *Insurance Co.*, *ubi sup.*

V. The verdict was wholly against the evidence, and the trial court ought to have set it aside on that ground. *Improvement Co.* v. *Munson*, 14 Wall. 442; *Pleasants* v. *Fant*, 22 Wall. 116; *Herbert* v. *Butler*, 97 U. S. 319; *Bowditch* v. *Boston*, 101 U. S. 16; *Griggs* v. *Houston*, 104 U. S. 553; *Randall* v. *Balt. & Ohio Railroad*, 109 U. S. 478; *Baylis* v. *Travellers' Ins. Co.*, 113 U. S. 316; *Conn. Mut. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612. These cases hold that when a verdict would be set aside as being against the evidence, the court ought to direct a verdict. *A fortiori* is it the duty of a trial court to set aside a verdict, where it is wholly against the evidence.

Mr. George D. Reynolds for defendant in error.

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

1. The court, against the objections of the defendant, permitted the plaintiff, testifying as a witness in her own behalf, to answer the following questions: "How long before his death had your husband been confined to his house?" "What was his condition; what was the state of his health, so far as enabling him to continue in business; what effect had it on his attention to business the month preceding his death?" "In what condition, mentally and physically, was Mr. Unsell at the receipt of that notice?" The notice referred to in the last question was the one from the company, mailed at Hart-

ford, January 21, 1886, and which stated that payments were in arrears for dues from January to May, $5. The admission as evidence of the answers to these questions is the foundation of some of the assignments of error in this court. It is sufficient to say that whatever error may have been committed by admitting this evidence was cured by the charge of the court to the jury; for they were instructed that there was but one question in the case, namely, as to the alleged waiver by the company of the terms of the contract in respect to the payment of premiums or dues at the times stipulated, and that it was immaterial whether the contract was a stringent one or not, or whether the assured was sick the last of December or in the first part of January.

2. There was no error in admitting as evidence the plaintiff's letter of January 28, 1886, transmitting five dollars for dues from January 1, 1886, on her husband's policies. That letter was written in reply to defendant's notice by postal card mailed January 21, 1886. It was competent as showing that the payment of the amount due January 1, 1886, was, in fact, made or tendered, though not at the precise time specified in the contract. If the plaintiff had sued on the policies or certificates without having paid or tendered the amount due to the company — the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited — that fact would have been fatal to a right to recover, in any view of the case. *Thompson* v. *Insurance Co.*, 104 U. S. 252.

3. The refusal of the court to give the instructions asked by the defendant is also assigned as error. But such refusal constitutes no ground for reversal, for the reason that the charge of the court contained everything that need have been said to the jury upon the single question submitted to them, namely, whether, under all the circumstances, the defendant waived a strict compliance with the stipulation in the contract as to the payment, at the times specified, of the premiums or dues on the certificates of insurance.

The court, among other things, said to the jury: "Nobody is bound to enter into any contract. It is perfectly voluntary

on the part of either side; but when they once enter in, the terms of the contract, as expressed in the writing, control. The plaintiff comes in, however, and says: 'Conceding that this contract reads in this way, the company by its conduct waived the necessity of a strict compliance.' She does not say the company so said to her, or to her husband, 'We do not insist upon this; we waive this;' but she says that the company so acted, so conducted itself in its dealings with her husband that he, as a prudent, reasonable man, did believe, and had the right to believe, that payment on the very day specified would not be insisted upon. Of course we speak by our actions, just as much as we do by our words; and although there may be no spoken word, no written word, declaring a waiver, yet it may be that a man by his conduct, his course of dealing, justly and fairly leads the other party to believe that he does not care about a strict compliance. That is what this plaintiff says was the case here; that while the contract reads 'payment must be made on specified days,' yet the company did not insist on such payment. It did, when her husband was alive and well, take the dues from him after the time specified and permit the policy to continue in force, and that it did so until he had a right, as a reasonable man, to believe, and did in fact believe, that that was to be the rule in the future. I do not think that any particular number of instances, one or more, can be said as a matter of law to make or not make a waiver. It is a question for you, as reasonable men, to consider what did the company intend; what would its conduct make a reasonable man believe in reference to it. . . . So far as the matter of notices is concerned, and the receipt of notice, it is a matter that need not concern you. The company did not contract to give notice; the policy specifies when the payments are due."

But the part, and the only part, of the charge to the jury to which the defendant excepted was in these words: "But the plaintiff says, that beyond these receipts of money after the day specified, there were instances in which money was received without any such notice. Now the question comes up in respect to that, was there such a continuance of business,

was the whole course of business, from the commencement to the close, such that from this and that, and from all the receipts and all the transactions, he had a right to believe and did believe that the question of health even would not be considered, and that it would be willing to take his money shortly after it had become due without inquiry as to his health? If so, that makes a waiver. If the company, by its conduct, led him, as a reasonable and prudent business man, to believe that he could make payments a few days after, sick or well, it cannot turn around now and say, 'You did not pay at the time.' I cannot say to you, as a matter of law, that one receipt, after the time specified, would make a waiver, or that fifty would. It is not in the numbers. The question is for you to consider and determine from all of them and from the whole course of business, whether, as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health, then there was no waiver applicable to the case at bar. It must have been such a course of conduct as would lead a reasonably prudent man to believe that the company was willing to take payment, sick or well."

The law applicable to the case was stated to the jury with substantial accuracy. It is a mistake to suppose that the charge was inconsistent with the principles announced in *Thompson* v. *Insurance Company*, or in any other case decided by this court. In the case of *Insurance Company* v. *Eggleston*, 96 U. S. 572, 577, Mr. Justice Bradley, speaking for the court, said: "We have recently, in the case of *Insurance Co.* v. *Norton*, 96 U. S. 234, shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company

from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

These principles were not modified in *Thompson* v. *Insurance Company*. Alluding to the claim, in that case, that the company had, by its conduct, waived the requirement as to the punctual payment of premiums, Mr. Justice Bradley, again speaking for the court, said: "The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions." After observing that a fatal objection to the entire case was, that payment of the premium note there in question had never been made or tendered at any time; that there might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence; and that "a valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all," the court proceeded: "Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. . . . We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the insured has a right to rely."

The principles of the above cases were reaffirmed in *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 34, *et seq.*

The charge was in entire consonance with the settled doctrines of this court as established in the cases to which we

have adverted. The only ground for serious doubt in respect to the case is, whether the evidence was sufficient in any view of it to sustain the theory that the defendant had by its course of business with the assured led him to believe, and that he, in good faith, believed, that the company waived, as to him, a strict performance of the conditions as to the payment of dues or premiums, and whether if the court had given a peremptory instruction to find for the defendant, the verdict and judgment would have been disturbed. But we need not consider the case in those aspects; for the defendant assumed that it would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury. As no error of law was committed to the prejudice of the defendant, the judgment must be

Affirmed.

DODGE *v.* TULLEYS.

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

No. 222. Argued and submitted March 22, 23, 1892. — Decided April 11, 1892.

Interest at the rate of 8¾ per cent in Nebraska is not usurious.

The *cestui que trust* is not a necessary party to a bill by a trustee to foreclose a mortgage.

A loan was made February 1, and the mortgage and notes were dated on and bore interest from that day; but as there were sundry incumbrances part of the money was retained; one sum applied to a payment March 4; another sum March 11; a large proportion of the whole debt was not remitted to the borrower until June 8; and on the 8th of October a final sum of $3000 was sent to the borrower's agent to pay a judgment of $2466, which was paid, the agents retaining the balance. On a suit to enforce the lien of the mortgage a decree was entered for the plaintiff with an allowance of $1000 as an attorney's fee. *Held,*

(1) That no rebate of interest should be allowed on the payments made March 4, March 11 and October 8;

(2) That a rebate should be allowed on the remittance of June 8;

(3) That the attorney's fee should be reduced to $500.

Statement of the Case.

THE court stated the case as follows:

On February 17, 1886, the appellants, residents of Hall County, Nebraska, executed and delivered two instruments, each dated February 1, 1886, and together given for a loan of $10,000. Both instruments conveyed the same lands. The first was in form a trust deed, executed to L. W. Tulleys, trustee, to secure payment of a bond of $10,000, given to Clarence K. Hesse, due in five years, with interest at 6½ per cent, payable semi-annually. The second was in form a mortgage to Burnham, Tulleys & Co., to secure ten notes of $112.50, due respectively at the times the semi-annual interest became due on the $10,000 bond. Burnham, Tulleys & Co. were loan brokers doing business at Council Bluffs, Iowa, and took these notes and this mortgage as payment of their commissions, the notes, with the interest named in the $10,000 bond, making the loan in fact, as was intended, at 8¾ per cent. Clarence K. Hesse, the obligee in the bond, was in the employ of Burnham, Tulleys & Co. as examiner of lands. He was not the lender of the money, and was named as obligee simply for convenience in transferring title. Default having been made in the payment of interest, a suit of foreclosure was commenced in the name of L. W. Tulleys, trustee, to which suit the present appellants were the sole defendants. The bill described complainant as "trustee for Cornell University, and for Burnham, Tulleys & Company," and set out two separate causes of action, the first on the trust deed, and the second on the mortgage. In respect to the first, after alleging the execution of the bond and the trust deed, it averred that Cornell University was the present holder of the bond. With reference to the second, the bill contained this allegation as to complainant's title: "And your orator further shows the court that he is trustee for Burnham, Tulleys & Co., the owners of said promissory notes and the mortgage deed securing the same, by virtue of the purchase of the same before maturity." It is also alleged that Tulleys was a citizen of Iowa, and the defendants citizens of Nebraska. To this bill a demurrer was filed by defendants, on the ground,

first, of a want of equity; second, that Cornell University and Burnham, Tulleys & Co. were not made parties; and, third, that a cause of action in favor of Cornell University had been improperly joined with one in favor of Burnham, Tulleys & Co. This demurrer was overruled, and leave given to answer. Subsequently the court held that Cornell University ought to be made a party to the suit, and leave was given to amend the bill by making new parties plaintiff; and thereafter Cornell University and Burnham, Tulleys & Co. appeared and filed what was called an amendment to the bill, but which simply reaffirmed in their behalf the allegations of the original bill. The answer, admitting the execution of the papers, alleged that Hesse, the obligee, was a mere nominal party, the real lender being Burnham, Tulleys & Co.; and that $534 of the $10,000 loaned had never been paid to the defendants; and also pleaded, generally, usury. Proofs were taken, and a decree entered in favor of the complainants for the full amount claimed, with a thousand dollars allowance for attorney's fees. The defendants appealed to this court.

Mr. Albert Swartzlander, (with whom was *Mr. C. S. Montgomery* on the brief,) for appellants.

Mr. Smith McPherson for appellees, submitted on his brief.

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

Appellants allege several matters as grounds for reversal. They claim that the commission notes represent unlawful interest, or that in any event they should be credited with rebates. Adding the commission notes to the interest named in the bond aggregates only 8¾ per cent on the money actually loaned, and ten per cent is allowable under the laws of Nebraska. (Comp. Stats. of Nebraska, p. 483, c. 44, sec. 1.)

The claim of a credit for rebates springs from these facts. The title to the land at the time the loan was contracted for and the securities given was only partly in the defendants.

One tract of it was school and another railroad land, in respect to which they had only a contract of purchase, and upon which balances were still due to the State and to the railroad company. These were paid by the lender out of the loan, and deeds perfecting title obtained. Then a portion of the loan was handed over to the defendants. Three thousand dollars was by agreement retained on account of a judgment against the defendant, F. C. Dodge, which was a lien upon the land, but which had been appealed by him to the Supreme Court. After this judgment had been affirmed by that court, it was paid out of the moneys thus retained. Dates and amounts are as follows: The securities are dated February 1, 1886, and call for interest from that time. They were not in fact executed until February 17. The amount due the State was $1417.25, and was paid March 4. That due the railroad company, $1388, and paid March 11. On June 8, $4194.75 was sent to defendants; and the judgment, $2466, was paid October 8. On the face of the papers, interest was due from February 1. There was no agreement between the lenders and the borrowers with respect to a different date for its commencement. The borrower knew the condition of his title, and the fact of a judgment lien. The moneys due the State and the railroad company were paid within a reasonable time, and as soon as title could be obtained from the vendors. In the absence of an express agreement to the contrary it must be assumed that the borrower, knowing that there would be some short delay in making payments and perfecting title, intended and agreed that such delay should work no change as to the time at which interest was to commence to run. The same is true of the $3000 retained by express agreement for the judgment. It cannot be that the lenders were to hold that money without interest, waiting his pleasure in respect to the judgment. The delay was for his accommodation, and at his instance. But with respect to the moneys given to him on June 8, we think equity requires a rebate of interest on account of the long delay in the matter. When a loan is negotiated, the understanding is that the money is to be paid promptly after the execution of the papers. As the

parties lived in different cities, of course a little time for transfer would be expected, and the perfecting of the title is implied; but there is no excuse for such a long delay as this. The judgment, which was a lien upon the property, justified the lenders in retaining enough money to satisfy it. It was only $2000 in the first instance, and by agreement $3000 was retained in order to cover interest and costs; but the balance of the loan should have been promptly forwarded to the borrower. Because it was not so forwarded, we think the defendants are entitled to a rebate on the amount due to Burnham, Tulleys & Co., for the interest on the sum withheld during the time it was so withheld, a period of about three months. Eighty-five dollars would be a fair amount to thus credit.

Another claim of appellants is that they had in fact paid all of the interest due at the time the suit was commenced. It appears that the $3000 retained for the judgment was sent in a single draft to West & Schlodtfelt, real estate men at Grand Island, through whom the application of defendants had come to Burnham, Tulleys & Co. Out of that they paid the judgment, $2466. The balance, $534, they retained. Why it was retained is not fully disclosed by the testimony. It would seem that they had rendered some services to the borrowers, and an inference is possible that there was a dispute as to the matter of compensation. Be that as it may, and although West & Schlodtfelt wrongfully retained the money, the burden of this wrong must be borne by the defendants, and is not chargeable to Burnham, Tulleys & Co., for they sent the money to West & Schlodtfelt upon the written direction of the borrowers; and there is no evidence that West & Schlodtfelt ever paid the interest, as the defendant, Freeman Dodge, testifies they promised to do.

Another defect claimed is that the citizenship of Hesse, the obligee in the bond, is not alleged; but this is unnecessary. The suit is in the name of Tulleys, trustee, to whom the legal title was conveyed in trust, and who was, therefore, the proper party in whose name to bring suit for foreclosure. It happens in this case that there was but one party beneficiary under

the trust deed; but it often is the case, as in railroad trust deeds, that the beneficiaries are many. But whether one or many, the trustee represents them all, and in his name the litigation is generally and properly carried on. The fact that the beneficiary in a trust deed may be a citizen of the same State as the grantor, would not, if the trustee is a citizen of a different State, defeat the jurisdiction of the Federal court. In any event, the bond being negotiable, the citizenship of the obligee becomes immaterial after transfer of title from him. *Mersman* v. *Werges*, 112 U. S. 139; *School District* v. *Hall*, 113 U. S. 135. Hesse had, by the allegations of the bill, parted with his interest in the bond, and it was unnecessary to either make him a party or allege his citizenship. It may be that the allegation of the transfer of the mortgage from Burnham, Tulleys & Co. to Tulleys is defective, and perhaps it would have been more correct to have made them parties defendant, and permitted them to set up their mortgage by cross-bill; but they were by permission of the court made parties, and with the Cornell University, the present holder of the bond, appeared in the case and asserted their rights and interest in the property. While the proceedings may have been somewhat irregular, yet no objection seems to have been taken to the manner in which this was done. As all the parties in interest were parties to the record, and all the facts fully disclosed by the testimony, it would be sacrificing substance to form to set aside the decree because of a mere irregularity in the arrangement of the parties, or the frame of the pleadings. So far as Cornell University is concerned, its citizenship, if it were necessary, is sufficiently disclosed by the allegation that it is a corporation duly organized under the laws of the State of New York.

The remaining proposition of appellants, is that the court erred in allowing a solicitor's fee of $1000. There is a stipulation in the trust deed for the payment of an attorney's fee of $1000, in case of foreclosure, but such stipulations have been held by the Supreme Court of Nebraska to be unauthorized. *Dow* v. *Updike*, 11 Nebraska, 95; *Hardy* v. *Miller*, 11 Nebraska, 395. It seems that in 1873 an act passed the legis-

lature of Nebraska, expressly authorizing in any written instrument for the payment of money a stipulation for not exceeding ten per cent as an attorney's fee in case of suit. Neb. Gen. Stats. 98. This act was repealed in 1879. Laws of Neb. 1879, p. 78. In the cases cited, the Supreme Court of the State held that by the repeal of the statute the contract right to recover attorney's fees was taken away. So, as this court follows the decisions of the highest court of the State in such matters, (*Bendey* v. *Townsend*, 109 U. S. 665,) the provision in the trust deed for the payment of $1000 as attorney's fees cannot be regarded as of binding force. But while contract rights are settled by the law of the State, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. Those courts acquire their jurisdiction and powers from another source than the State. There is no statute of Nebraska in respect to the matter. Even if there were one expressly prohibiting courts of equity from making allowances to trustees or their counsel, such prohibition would not control the proceedings in Federal equity courts. They proceed according to the general rules of equity, except so far as such rules are changed by the legislation of Congress, and while they may enforce special equitable rights of parties given by state statutes, (*Holland* v. *Challen*, 110 U. S. 15,) yet their general powers as courts of equity are not determined and cannot be cut off by any state legislation. It is the general rule of equity, that a trustee called upon to discharge any duties in the administering of his trust is entitled to compensation therefor, and included therein is a reasonable allowance for counsel fees. This is constantly enforced in the Federal courts in the various railroad foreclosures that have been and are proceeding therein; and this, irrespective of any state legislation. The subject was exhaustively considered by Mr. Justice Bradley, in the case of *Trustees* v. *Greenough*, 105 U. S. 527. The English and American authorities were fully reviewed, and the power and duty of the court to make reasonable allowances (including counsel fees) to trustees or others acting in that capacity

was affirmed. See, also, *Central Railroad* v. *Pettus*, 113 U. S. 116. It is unnecessary to more than refer to these decisions.

In the case before us, a trustee comes into a court of equity and asks its aid in enabling him to discharge the duties of his trust; and, according to the settled law of this court, he is entitled to an allowance for reasonable counsel fees. But we think $1000 is too much. Indeed, in the bill of complainant, the trustee alleges that $500 is a reasonable attorney's fee for the foreclosure of the trust deed; and we think that under the circumstances no more should be allowed.

The decree will, therefore, be modified by reducing the amount found due Burnham, Tulleys & Company to $1094.16, and the attorney's fee from $1000 to $500. In other respects the decree will be affirmed. The appellants will recover their costs in this court. *Affirmed as modified.*

NORTHERN PACIFIC RAILROAD COMPANY *v.* ELLIS.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 1495. Submitted March 28, 1892. — Decided April 11, 1892.

A decision by the highest court of a State that a former judgment of the same court in the same case, between the same parties, upon a demurrer, was *res judicata* in that action as to the rights of the parties, presents no Federal question for the consideration of this court, and is broad enough to maintain the judgment; and this court is therefore without jurisdiction.

THE court stated the case as follows:

Ellis brought his action in the Circuit Court for Douglas County, Wisconsin, against the Northern Pacific Railroad Company, E. L. Johnson, W. H. Sage and Henry W. Bradford, July 1, 1889, to quiet title to seven lots in the city of Superior, deraigned through one Roberts, to whom the county

of Douglas, which held under certain tax deeds, had conveyed, and then averred that the Northern Pacific Railroad Company asserted title to the lots under a certain deed, a copy of which was given. This deed recited that by resolution of the county board of supervisors, passed on the 7th day of September, 1880, and duly entered in their record of proceedings, the county of Douglas offered and agreed to transfer, by good and sufficient deed or deeds, to the Northern Pacific Railroad Company, all the alienable lots or lands belonging to the said county of Douglas, which had been acquired by deed, and to which said county had held undisputed title during two years then last past, upon condition that the said Northern Pacific Railroad Company should, within the year 1881, construct, complete and equip a railroad from the Northern Pacific junction, entering the State of Wisconsin, and running therein between the St. Louis and the Nemadji Rivers to the Bay of Superior, at or near the mouth of the Nemadji River, and thence to Connor's Point, along or near the westerly side of said bay, with a depot, and convenient connections with docks or piers; that the railroad company by resolution of its board of directors duly accepted the offer and terms of the agreement, and constructed, completed and equipped a railroad as required; and, therefore, the county "hereby quit claims to the Northern Pacific Railroad, grantee, in consideration of the premises, and for the sum of one dollar in hand paid by said grantee," etc., the lots in question and others, the deed being duly executed by the county clerk and sealed with the county seal, with proper witnesses and acknowledgment.

It was further alleged that prior to the issuing of the deed the county board of Douglas County, on or about the 16th day of December, 1880, entered into a contract with the railroad company, substantially as appeared by the recitals in the deed, with the exception of an extension of time for one year in which to complete the road; that the contract was without authority upon the part of the county, and its acts were *ultra vires* and void; that the railroad company neither paid to the county or for its use, nor contracted to pay, any valuable consideration, nor to issue, nor did it issue, any stock in the com-

pany to the county, or for its use, nor did the county ever subscribe for or agree to take any stock in the company; and that the only consideration for the conveyance was the bonus or inducement to the company to locate its road in Superior.

That the defendants Sage, Johnson and Bradford, respectively, claimed, as owners of the original title, some interest in some of these lots; and abstracts, showing the chain of title, were affixed as exhibits.

That the value of all the lots was $1400; and that by reason of the premises the plaintiff was embarrassed and injured in his title, etc.

The prayer was for a decree that the plaintiff be adjudged the owner of the lots in fee simple, free from any lien, claim, title or right made or exercised or attempted to be made or exercised by the defendants, or any of them, by virtue of their several claims of ownership; and that the deed from the county of Douglas to the railroad company be adjudged illegal, null and void, and the plaintiff quieted in his title and possession, etc.

The railroad company filed its demurrer to the complaint on July 23, 1889, assigning as grounds multifariousness and insufficiency of facts stated to constitute a cause of action.

August 22, 1889, the Douglas County Circuit Court entered an order overruling the demurrer, from which order the railroad company prosecuted an appeal to the Supreme Court of Wisconsin.

The Supreme Court held that "a conveyance of its lands by a county as a donation to a railroad company is void; and the legislature, having no power to authorize such donation in the first instance, cannot by a subsequent statute validate the conveyance;" and that the deed in question was, therefore, void; and it gave judgment May 20, 1890, affirming the order of the court below, and remanding the cause for further proceedings. *Ellis* v. *Northern Pacific Railroad*, 77 Wisconsin, 114.

The opinion and order were filed in the Douglas County Circuit Court July 23, 1890, and on August 15, 1890, the company filed its answer reasserting, among other things, its claim under the deed of the county.

March 11, 1891, the company applied for leave to file a supplemental answer, which was denied, and on March 30 the court made its findings upon which judgment was rendered April 13, 1891, establishing the title of the plaintiff, and adjudging the invalidity of the railroad company's claim.

A bill of exceptions was duly signed, and contained the supplemental answer, which the railroad company had asked leave to file, and the motion for such leave and the order thereon denying it. This supplemental answer averred that on December 13, 1889, the railroad company filed its bill of complaint in the Circuit Court of the United States for the Western District of Wisconsin against Roberts, Johnson and Ellis, (the plaintiff in this case,) setting forth the passage of resolutions by the board of supervisors of Douglas County, the acceptance by the company of the proposition therein made, and its compliance therewith by the construction of the line of railroad required to be built, and the conveyance to the company in accordance with another resolution of the board, whereby, it was alleged, the company became owner in fee simple of the real estate mentioned therein, of which all but the seven lots embraced in this action was claimed in the complaint; that the identical question involved in this suit was involved in the case in the Circuit Court of the United States, which was heard, upon bill and answer, November 18, 1890, and taken under advisement, and on February 11, 1891, that court directed a decree in favor of the company and against the defendants, which decree was afterwards, on March 7, 1891, duly entered, it being thereby ordered, adjudged and decreed that the company was the full, legal and beneficial owner of all the lands described in the bill of complaint in said cause, and that the deeds of conveyance by the county to Roberts and by Roberts to Ellis were and are invalid and of no force and effect as against the complainant; and the railroad company insisted upon this decree as an absolute bar to the relief prayed in this action.

The bill of exceptions also showed the evidence offered on the trial in the state court, including the resolutions of the supervisors of Douglas County and of the railroad company,

and the record of the suit in the United States court, which was offered in evidence but excluded, exceptions being taken by the railroad company. From the judgment of the Circuit Court for Douglas County the railroad company appealed to the Supreme Court of the State, which, on November 17, 1891, affirmed it.

The opinion of the Supreme Court by Winslow, J., will be found reported in advance of the official series in 50 N. W. Rep. 397. The court, after stating the case, said:

"The Circuit Court held, in its rulings upon the proposed answer and in its judgment, in effect, that the decision of this court upon the former appeal was *res adjudicata* in this action. If this view was correct, then the judgment below must be sustained, because upon that appeal the question was fairly raised whether the county could lawfully donate the land in question to the railroad company, and it was decided by this court that it could not. It is vigorously contended by appellant's counsel that the rule of law is that a decision can only become *res adjudicata* when it is contained in a final judgment in the cause, and that the decision upon the demurrer being confessedly not a final judgment, but granting leave to plead over, it cannot be considered as *res adjudicata*, and authorities are cited which undoubtedly tend to support that contention. We shall not attempt to review the authorities nor reconcile conflicting decisions. It is sufficient to say that by repeated decisions it has become the settled law in this State that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved, and is *res adjudicata* in that case. *Noonan* v. *Orton*, 27 Wisconsin, 300; *Lathrop* v. *Knapp*, 37 Wisconsin, 307; *Fire Dept.* v. *Tuttle*, 50 Wisconsin, 552. It is true that this court has decided that an order of the Circuit Court upon a demurrer is not *res adjudicata*. This doctrine, however, is based upon the ground that such an order is reviewable by statute upon appeal from the judgment. *Hackett* v. *Carter*, 38 Wisconsin, 394. But the decision of this court upon a demurrer upon the questions properly involved cannot be reviewed by the Circuit Court, nor, indeed, by this court, save upon motion for rehearing. Such questions

are finally decided and settled for that case, and, as between the parties to that litigation, for all time. This view of the law decides this case. The complaint charged the appellant's alleged title to be just what the proofs now before us show it to be, and this court, prior to the judgment in the United States court, finally decided that such alleged title was worthless. The question was no longer an open one, and the Circuit Court was right in ruling out the record of the action in the United States court, and rendering judgment for the plaintiff."

A writ of error was thereupon sued out from this court, which the defendant in error moved to dismiss.

Mr. William F. Vilas for the motion.

Mr. A. H. Garland and *Mr. H. J. May* opposing.

If this court has not jurisdiction of this case, and shall dismiss the writ of error herein, we shall find ourselves confronted with the anomalous position of having two judgments — one of the Federal, the other of the state courts — between the same parties and upon the same question, both final, but antagonistic to each other, simply because the state courts have disregarded, and, in so far as they could do so, nullified a valid decree or judgment of a Federal court without any other reason than it was within the *discretion* of the judge of the Douglas Circuit Court to deny the supplemental answer setting up the final decree of the Federal court. It seems to us that this important question, which was passed upon by the Supreme Court of Wisconsin, is reviewable here, inasmuch as it brings up for consideration and decision the validity and effect of decrees and judgments of the Federal courts under the laws of the United States. In other words, the railroad claims a right adjudged it by a Circuit Court of the United States — by a Federal court; and if this is not a Federal question we must despair of ever falling upon one; it brings up a right under the authority of the United States. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Crescent Stock Co.* v. *Butchers' Union*, 120 U. S. 141.

The equity jurisdiction of the Federal courts, fixed by the

Constitution and Statutes of the United States, is not safe in its enforcement in the States, if the state courts may in their discretion disregard the decrees of those United States courts, and this court could not review the action of the state courts. *Payne* v. *Hook*, 7 Wall. 425; *Railway Co.* v. *Whitton*, 13 Wall. 270, 285, *et seq.*

The answer of the plaintiff in error admits its incorporation under the laws of the United States, and alleges its authority under the act of Congress of July 2, 1864, to build a railroad in the State of Wisconsin, and to acquire and hold real estate therein, and to accept any grant, donation, etc., which might be conferred upon it. This is, therefore, an action against a corporation of the United States, and an action arising under the laws of the United States of which this court has jurisdiction. *Pacific Railroad Removal Cases*, 115 U. S. 1.

The very right to hold this land under the grant to the railroad is brought in question and the Federal question is patent.

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

The motion to dismiss the writ of error must be sustained. The decision of the Supreme Court of Wisconsin rested upon an independent ground not involving a Federal question and broad enough to maintain the judgment. *Hammond* v. *Johnston*, 142 U. S. 73.

The Supreme Court held that by reason of its decision of May 20, 1890, when the case was presented to the court on the appeal of the railroad company from the order of the lower court upon demurrer, the rights of the parties were *res adjudicata*, and that it was itself, as the parties were, bound by its own former judgment. Its conclusion had been announced and its mandate had gone down, and it had no power upon a second appeal to review that judgment. This is the settled rule in Wisconsin; *Lathrop* v. *Knapp*, 37 Wisconsin, 307; *Oshkosh Fire Department* v. *Tuttle*, 50 Wisconsin, 552; and in this court; *Clark* v. *Keith*, 106 U. S. 464; *Chaffin* v. *Taylor*, 116 U. S. 567; *Peck* v. *Sanderson*, 18 How. 42; *Hick-*

man v. *Fort Scott*, 141 U. S. 415. Under these circumstances the judgment of the Supreme Court is not subject to review here.

The suit in the state court involving certain lots was commenced before the institution of the action in respect to other real estate in the Circuit Court of the United States, and the judgment of the Supreme Court of the State had become *res adjudicata* between the parties, before the decree was entered by the Circuit Court. The judgment before us was rendered in accordance with well-settled principles of general law, not involving any Federal question, and did not deny to the decree of the Circuit Court the effect which would be accorded under similar circumstances to the judgments and decrees of the state court.

The writ of error is *Dismissed.*

NORTHERN PACIFIC RAILROAD COMPANY *v.* AMATO.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1508. Submitted February 29, 1892. — Decided April 11, 1892.

A suit was brought in the Supreme Court of New York against a railroad corporation created by an act of Congress, to recover damages for personal injuries sustained by the plaintiff, who was a laborer on the road, from the negligence of the defendant. The suit was removed by the defendant into a Circuit Court of the United States, on the ground that it arose under the act of Congress. It was tried before a jury, and resulted in a verdict and judgment for the plaintiff for $4000. The defendant took a writ of error from the Circuit Court of Appeals, which affirmed the judgment. On a writ of error taken by the defendant from this court to the Circuit Court of Appeals, a motion was made, by the plaintiff, to dismiss or affirm: *Held*,

(1) Under § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, the writ would lie, because the jurisdiction of the Circuit Court was not dependent entirely on the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other

Statement of the Case.

a citizen of a different State, but was dependent on the fact that, the corporation being created by an act of Congress, the suit arose under a law of the United States, without reference to the citizenship of the plaintiff;

(2) The decision of the Circuit Court of Appeals was not final, nor in effect made final by the act of 1891, as in *Lau Ow Bew* v. *United States*, 144 U. S. 47;

(3) As it did not appear by the record, that, on the trial in the Circuit Court, the defendant made any objection to the jurisdiction of that court, and the petition for removal recognized the jurisdiction, it could not be said, as a ground for the motion to dismiss, that the defendant might have taken a writ of error from this court to the Circuit Court, under § 5 of the said act of 1891, and had, by failing to do so, waived its right to a review by this court;

(4) There was color for the motion to dismiss, and the judgment must be affirmed on the ground that the writ was taken for delay only;

(5) The main defence was contributory negligence on the part of the plaintiff, and the court charged the jury that they had the right to take into consideration the fact that the foreman of the defendant told the plaintiff it was safe for him to cross, at the time, the bridge where the accident took place, through the plaintiff's being struck by a locomotive engine while he was crossing the bridge on foot. The question was fairly put to the jury, as to the alleged contributory negligence. The case was one for the jury.

On February 11, 1890, Dominick Amato brought an action in the Supreme Court of the State of New York, in the county of New York, against the Northern Pacific Railroad Company, a corporation created by an act of Congress, approved March 2, 1864, c. 217, 13 Stat. 365. The summons in the action was duly served on the defendant, and it appeared by attorney.

The complaint stated that the plaintiff was a resident of the city and county and State of New York; that on or about November 6, 1888, in or near the county of Burleigh, in the then Territory of Dakota, now State of North Dakota, through the negligence of the defendant and without negligence on his part, he was run over by an engine owned and operated by the defendant, from which he sustained injuries which caused him the loss of his leg; that on account of said injuries he was confined in a hospital for 7½ months, and had sustained permanent injuries which made him unable to work, and had

been damaged thereby in the sum of $25,000; and that he demanded judgment against the defendant for that sum.

On the 13th of March, 1890, the defendant filed, in the Supreme Court of the State of New York, a petition in due form, setting forth that the action was a suit of a civil nature, arising under said act of Congress, accompanied this with a proper bond, and prayed that the suit be removed into the Circuit Court of the United States for the Southern District of New York. The Supreme Court of the State made an order, on the 21st of March, 1890, approving the bond and removing the cause into the said Circuit Court, and staying all further proceedings therein in the state court.

A certified copy of the record being filed in the Circuit Court, the defendant put in its answer in that court, setting forth, that on or about November 5, 1888, at or near the east end of its bridge which extends across the Missouri River, from Burleigh County to Morton County, in North Dakota, the plaintiff, who at the time was a laborer on its road, attempted, without any right or authority to do so, to get or jump upon the footboard at the front end of a locomotive engine, the property of the defendant, while the same was in motion; that he slipped and fell, and one of his legs was run over by one of the wheels of the engine; that the defendant, its agents and servants, were using due care and diligence in running said locomotive at the time of the accident, which was not due to any negligence on the part of the defendant, its agents or servants, but was owing to the negligence and fault of the plaintiff himself; and that that was the matter referred to in the complaint; and the answer denies each and every allegation in the complaint contained, not thereinbefore specifically admitted.

The case was tried by a jury, in April, 1891, before Judge Coxe, and resulted in a verdict for the plaintiff, for $4000. On May 28, 1891, a judgment was entered for the plaintiff for the $4000, with $26.66 interest and $33.10 costs, amounting in all to $4059.76. A motion was afterwards made before Judge Coxe to set aside the verdict as contrary to law and against the weight of evidence, and because the damages were

excessive. On the 24th of June, 1891, Judge Coxe filed an opinion, (46 Fed. Rep. 561,) denying the motion. A bill of exceptions was duly made and signed, July 16, 1891, and filed July 22, 1891.

A writ of error to review the judgment, returnable August 20, 1891, was duly sued out by the defendant from the Circuit Court of Appeals for the Second Circuit. The plaintiff moved in that court to dismiss the writ of error for want of jurisdiction. On the 25th of January, 1892, an order was entered in that court denying the motion to dismiss, and affirming the judgment of the Circuit Court, and ordering that a mandate issue to the latter court directing it to proceed in accordance with the decision and order of the Circuit Court of Appeals. An opinion, on the affirmance by the Circuit Court of Appeals, was delivered by Judge Lacombe, and is set forth in the record. 1 U. S. App. 113.

On the 20th of February, 1892, the defendant sued out a writ of error from this court, which was allowed by an Associate Justice of this court, to review the judgment of the Circuit Court of Appeals, and the transcript of the record has been duly filed in this court. The plaintiff now moves to dismiss the writ of error and to affirm the judgment.

Mr. Roger Foster in support of the motion to dismiss.

I. The court will not construe the act creating Courts of Appeals literally and technically, but will give it a broad and liberal interpretation, consistent with its object, the relief of the Supreme Court, *ut res magis valeat quam pereat.*

Taken literally, section 5, which gives jurisdiction to the Supreme Court, amongst other cases, to "any case in which the jurisdiction of the court is in issue," and section 6, which gives the Circuit Courts of Appeals jurisdiction only in "cases other than those provided for by the preceding section of this act unless otherwise provided by law," would have excluded from the Circuit Courts of Appeals all cases in which the jurisdiction was put in issue by a denial of a difference of citizenship in the pleadings or otherwise. This court, however, gave

the act a construction, founded upon its intent rather than upon its literal language, in *McLish* v. *Roff*, 141 U. S. 661, 668.

II. This case is one in which the decision of the Circuit Court of Appeals is final. Section 6 decides that its jurisdiction "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the controversy." Here the jurisdiction depends upon the fact that the plaintiff is an alien and the defendant a corporation chartered by Congress, a citizen of the United States.

III. The final paragraph of section 6 of the act does not authorize a review by the Supreme Court of an order of a Circuit Court of Appeals.

The intention of that paragraph was to afford an *omnium gatherum* for any cases which had not been previously mentioned in section 5 or section 6, and to provide that in such cases, if any there were, there should be a review of the judgments or decrees of the District or Circuit Courts, not of the Circuit Courts of Appeals, by the Supreme Court, where the matter in controversy exceeded one thousand dollars.

IV. The plaintiff in error has lost its right to a review of this judgment by the Supreme Court.

It appears by his fifth assignment of error in the Circuit Court of Appeals that "a question of jurisdiction is in issue."

By failing to take a writ of error to the judgment of the Circuit Court from the Supreme Court immediately upon the entry of such judgment, and by electing to have a review of the whole case by the Circuit Court of Appeals, which has failed to certify any question to this court, the plaintiff in error has waived his right to a review here. *McLish* v. *Roff*, *ubi supra*.

V. If this court has jurisdiction of any writ of error in this case, the writ must run to the judgment of affirmance entered by the Circuit Court upon the mandate of the Circuit Court of Appeals, not to the order of the Circuit Court of Appeals that a mandate issue, after the mandate has issued and is filed in the Circuit Court.

Mr. A. H. Garland and *Mr. H. J. May* opposing.

Argument against the Motion.

The motion to affirm should be denied, because the writ of error was not taken for delay, and the question upon which the jurisdiction depends is not frivolous.

The statement of the boss to Amato that no train would come over the bridge until a certain hour did not warrant Amato in walking over the bridge in the manner he did.

Under all the circumstances that statement was more of a warning than an assurance of safety. He said no train would come over *until* about 7 or 7.30 P.M. That was a notice that a train *would* come over about that time. The statement was that a train would come over *about* 7 or 7.30; that was a notice to Amato to be on the lookout before 7 P.M. Amato says he started to walk over the bridge at *about* 5.30 or 6 P.M.; he probably put it quite as early as it was. Suppose he started at 6 P.M. He was lame and had to walk very slowly. The bridge measurements on the photograph show the bridge to be nearly half a mile long. Thus a man, who, in consequence of lameness, walks very slowly, is about to start at 6 P.M. to walk over a railroad bridge about half a mile long. He is told that a train will come over *about* 7 P.M. That statement was a warning to be on his guard, and not an assurance of safety excusing him from the obligation to watch and listen and warranting him in walking at his ease without thinking of anything.

Under the circumstances it was Amato's duty to listen and to look, and not to walk carelessly into danger. Having omitted to use his senses and having walked thoughtlessly upon the track he was guilty of culpable negligence, that so far contributed to his injuries as to deprive him of any right to complain of the railroad company. *Railroad Company* v. *Houston*, 95 U. S. 697; *Schofield* v. *Chicago, Milwaukee &c. Railway*, 114 U. S. 615; *Finlayson* v. *Chicago, Burlington &c. Railway*, 1 Dillon, 579–584.

It having been shown by undisputed testimony that Amato's culpable negligence brought about the accident, and it not having been shown that the railroad company was guilty of any negligence, or failed to exercise such reasonable care and prudence as would, if exercised, have avoided the conse-

quences of Amato's negligence, Amato was not entitled to recover, and the question was one of law to be decided by the court, and not of fact to be submitted to the jury. *Railroad Company* v. *Houston*, 95 U. S. 697; *Schofield* v. *Chicago &c. Railway*, 114 U. S. 615; *Inland &c. Coasting Co.* v. *Tolson*, 139 U. S. 551, 557.

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

The first ground urged for the motion to dismiss is that, under the act of March 3, 1891, c. 517, (26 Stat. 826,) the writ of error will not lie. That act provides, in § 6, that the Circuit Courts of Appeals established by it shall exercise appellate jurisdiction to review, by appeal or by writ of error, "final decision" in the existing Circuit Courts in all cases other than those provided for in § 5 of the act, unless otherwise provided by law, and that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different States."

The present case is not one provided for in § 5 of the act, and the judgment of the Circuit Court was not directly reviewable by this court under § 5; nor was the judgment of the Circuit Court of Appeals final in this case, because the jurisdiction of the Circuit Court was not dependent entirely upon the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other a citizen of a different State. The jurisdiction of the Circuit Court in this case depended upon the fact that, the defendant being a corporation created by an act of Congress, the suit arose under a law of the United States, without reference to the citizenship of the plaintiff. His citizenship is not mentioned in the complaint, or in the petition for removal; and that petition states that the action arises under the act of Congress. Nor was the decision of the Circuit Court of Appeals in effect made final, as in *Lau Ow Bew* v. *United States*, 143 U. S. 47.

Section 6 of the act of 1891 provides that in all cases not thereinbefore, in that section, made final, "there shall be of right an appeal, or writ of error, or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars besides costs." Under that provision, as the judgment of the Circuit Court of Appeals in the present case was not made final by § 6, and as the matter in controversy exceeds $1000 besides costs, the defendant had a right to a writ of error from this court.

We do not think there is anything inconsistent with this view in what was said by this court in *McLish* v. *Roff*, 141 U. S. 661, or in *Chicago, St. Paul & Omaha Railway* v. *Roberts*, 141 U. S. 690.

In the Circuit Court of Appeals, the defendant, by its fifth assignment of error, took the point that the Circuit Court had no jurisdiction of its person or of the subject matter of the action; and on the present writ of error from this court, the first assignment of error, filed in the Circuit Court of Appeals and sent up as part of the record, assigns as error the several errors set out in the assignment of errors before the Circuit Court of Appeals. The plaintiff, therefore, contends on this motion, that as, under § 5 of the act of 1891, the jurisdiction of the Circuit Court was in issue, the case might have been brought by a writ of error directly from the Circuit Court to this court. But it does not appear by the record that on the trial, the defendant made any objection to the jurisdiction of the Circuit Court. On the contrary, its petition for removal states that the action had been brought against it, and that the complaint had been duly served on it, and that the defendant had duly appeared. And, even if a writ of error from this court to the Circuit Court could have been taken, yet, as the defendant did not take such a writ of error, but took one from the Circuit Court of Appeals to the Circuit Court, the plaintiff cannot be heard to assert, as the ground of this motion, the fact that the defendant might have taken a writ of error from this court to the Circuit Court. Equally it cannot be said, as a ground for this motion, that the case is one which involved in the Circuit Court the con-

struction or application of the Constitution of the United States, on the ground that the question arose whether the act of Congress incorporating the defendant was constitutional. Nor can it be objected, as a ground for this motion, that the defendant has waived its right to a review by this court, because it failed to take a writ of error from this court to the Circuit Court, to review the judgment of the latter court.

But, although this court has jurisdiction of this writ of error, we are of opinion that, under clause 5 of Rule 6 of this court, the judgment of the Circuit Court of Appeals must be affirmed, on the ground that there was color for the motion to dismiss, and that the writ was taken for delay only.

The bill of exceptions in the Circuit Court shows that the plaintiff was sworn as a witness, and that, after he had given his testimony, he rested, and then the defendant's counsel moved to dismiss the complaint on the ground that the plaintiff, upon his testimony, was shown to be guilty of contributory negligence. The motion was denied, and the defendant excepted. The defendant then called several witnesses, who were in its employ, and who testified that the plaintiff was injured at a point 110 feet east of the east end of the bridge, while attempting to jump on the front footboard of a moving locomotive, and that this occurred on the evening of November 5, 1888. The testimony of all but one of those witnesses for the defendant was taken by deposition in Dakota, and, except that one, they were not cross-examined.

The testimony of the plaintiff was that the accident happened while he was crossing a railroad bridge near Bismarck, in North Dakota, on November 6, 1888; that he was a laborer on the defendant's railroad, and was at work fixing up the track near the west end of the bridge; that he lived near the east end of the bridge; that the custom of the company was to take the men home from their work on a car drawn by a locomotive over the bridge from the west to the east end, at about half-past 5 o'clock in the afternoon; that he had never crossed the bridge before; that on the afternoon of the 6th of November, "the English boss" told the laborers, about 56 in number, of whom the plaintiff was one, that there would be

no train to take them across the bridge that night, and that they would have to walk across; that the boss said that no train or engine would come over the bridge until about 7 or half-past 7; that the plaintiff started to walk across the bridge with the other laborers at about half-past 5 or 6 o'clock P.M., but in consequence of a pain in his side, the result of a fall a week previous, he was not able to keep up with the others, and fell behind and walked over the bridge by himself; that there was but one track on the bridge, and he was walking on that track; that he could not walk at the side of the track without crawling from one trestle to another; that the engine came on the bridge from the east, meeting him about its middle; that there was room on the bridge to allow him to step aside and let the engine pass, if he had seen it coming; that it was coming in front of him, right around the turn, but he could not see it; that he did not see it until it was on top of him; that he then tried to get out of the way, but slipped on the track, which was slightly frozen, and fell and caught his leg under the wheel, and the engine passed over it and his leg was cut off; that he remained in the hospital 7½ months, and had not been able to work since; and that before the accident he earned $1.50 a day.

On cross-examination, he testified that if he had seen the locomotive coming he would have stepped to one side, out of the way, but he did not see it because it was coming around the curve; and that he never thought of the locomotive, because the boss told him there was nothing to come across, and he was walking at his ease, without thinking of anything. He further testified that he did not attempt to jump on a moving locomotive at the east end of the bridge.

At the close of the testimony on both sides, the defendant moved that the court direct a verdict for it, on the ground that the plaintiff had been guilty of contributory negligence in walking across the bridge in the manner he did, and also upon the ground that he was a trespasser on the bridge, and it was necessary for him to prove gross negligence on the part of the defendant. The motion was denied, and the defendant excepted.

The court, in its charge, put the question fairly before the

jury, and among other things told them that on the question whether it was a prudent thing for the plaintiff to walk across the bridge in the manner he did, and not see the engine approaching until it was directly upon him, they had the right to take into consideration the statement which he said was made to him by the boss, that it was safe for him to cross at that time, and that no engine would cross the bridge until about half-past 7 o'clock. To that portion of the charge the defendant excepted, but not to any other portion.

We concur with the view of Judge Coxe, in his opinion on the motion to set aside the verdict, that the question of the plaintiff's negligence was one of fact, and was submitted to the jury under instructions as favorable to the defendant as it could expect; and that the testimony of the plaintiff that the boss or foreman of the defendant had told him that no train or engine would come over the bridge until about 7 or half-past 7 o'clock, was properly to be taken into consideration by the jury in determining the question whether the plaintiff was negligent in not seeing the engine.

We concur also with the view of the Circuit Court of Appeals, in the opinion of that court, given by Judge Lacombe, that it was fairly a question for the jury to determine, whether or not it was negligence on the part of the plaintiff not to keep a lookout for a coming engine, in view of the assurance of the boss that there was none to come; and that the case is quite within the decisions in *Bradley* v. *New York Central Railroad*, 62 N. Y. 99, and *Oldenburg* v. *New York Central Railroad*, 124 N. Y. 414.

The judgment is affirmed, and the cause remanded to the Circuit Court of the United States for the Southern District of New York, for further proceedings, as required by § 10 of the act of March 3, 1891, 26 Stat. 829.

Mr. Justice Brewer and Mr. Justice Brown dissented on the ground that the Circuit Court should have directed a verdict for the defendant because the plaintiff had been guilty of contributory negligence.

CHATEAUGAY ORE AND IRON COMPANY *v.* BLAKE.

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

No. 189. Argued March 4, 7, 1892. — Decided April 11, 1892.

B. contracted with C. to construct and put up for him a crushing plant, with a guaranteed capacity of 600 tons daily, and C. agreed to pay therefor $25,000, one-half on presentation of the bills of lading and the remainder when the machinery should be successfully running. The machine was completed and put in operation October 1. The agreed payment of $12,500 was made on delivery, and $7500 in three payments in the course of a month. B. sent a man to superintend the putting up of the machine and to watch its working. Under his directions a book was kept in which were recorded either by himself or under his directions by C.'s foreman, the daily workings of the machine between October 18 and November 7, which account was copied by B.'s man and sent to B. The working from November 7 to the following March was also kept in the same way. In an action by B. against C. to recover the remainder of the contract price; *Held*,

(1) That B.'s man could use these books in his examination in chief to assist him in testifying as to the actual working of the machines from October 18 to November 7;

(2) That the defendant not having introduced the books, (which were in his possession,) in his evidence in reply to the plaintiff's evidence in chief, could not, in rebuttal, ask a witness to examine them and state the results as to the working of the machine in the months of November, December and January, which subjects had not been inquired about by the plaintiff.

Evidence of a local custom is not admissible unless it is shown to be known to both parties; and this court may infer, from the general course of the inquiries and proceedings at the trial, that a custom inquired of at the trial and so excluded, was regarded by the court and by both parties as a local custom, and not as a general custom, although the record may contain nothing positive on that point.

An exception that the court did not charge either of eighteen enumerated requests for special instructions except as it had charged is an insufficient exception.

THE court stated the case as follows:

Statement of the Case.

The defendant in error, plaintiff below, is a manufacturer, engaged in the manufacture and sale of a crushing machine known as the "Blake" crusher. Plaintiff in error, defendant below, owns and operates a large mine of iron ore in Clinton County, New York. In 1881 and 1882 plaintiff built for defendant a crushing mill of 200 tons capacity per day, which was accepted by the defendant and satisfactorily used for years. The operation of this crusher and its adaptability to the business necessities of the defendant were thus fully disclosed to the latter by its experience of these years. With this experience and knowledge, the following contract was entered into between the parties:

"Memorandum of agreement made and entered into this 26th day of March, 1886, between Theodore A. Blake, of New Haven, Conn., and the Chateaugay Ore & Iron Co., of Plattsburg, New York.

"Theodore A. Blake, party of the first part, in consideration of one dollar to him in hand paid and of other considerations, covenants and agrees to furnish the Chateaugay Ore & Iron Co. with a crushing plant, guaranteeing capacity of six hundred tons daily, crushed — to pass through a round hole $\frac{4}{16}$ths of an inch in diameter, consisting of the necessary crushers, screens, elevators, shafting, hangers, pulleys, couplings, collars and belts, in accordance with the specifications hereunto annexed and drawings already submitted, delivered free on board cars at places of manufacture, together with full detailed plans of building for said crushing plant and arrangement of crushing machinery therein, and that he will send a competent man to superintend the placing and erection of the machinery without extra charge, except for board and travelling expenses, and an experienced man to put on all belts, on same terms, for the sum of twenty-five thousand five hundred dollars.

"And the said Chateaugay Ore & Iron Co., party of the second part, in consideration of the premises and other considerations, agrees to pay the said Theodore A. Blake or his order one-half the amount, viz., twelve thousand seven hun-

dred and fifty dollars, on presentation of the bills of lading for the sixteen crushers at the said company's office and the remainder when the machinery is successfully running.

"THEODORE A. BLAKE,
"CHATEAUGAY ORE & IRON CO.,
"By A. L. INMAN, *Gen'l M'g'r.*"

The first half of the purchase price was paid at the stipulated time. The crushing plant was completed and put in operation about the first of October, 1886. On October 7, defendant paid plaintiff $2500; on October 27, $2500; and about the 9th of November, $2500 in addition; making $7500 paid after the completion of the plant and the commencement of its operation, and leaving a balance under the contract of $5250, for which suit was brought. Another suit was also commenced for extras and the expenses of the superintendent. The two were consolidated by order of the court and proceeded to trial as one. Verdict and judgment were in favor of the plaintiff for $9574.53; to reverse which judgment the defendant, plaintiff in error, sued out this writ of error.

The assignments of error, so far as noticed by the court in its opinion, were:

First. In allowing the witness, Charles S. Brown, (the agent of Blake,) to testify on behalf of the plaintiff from certain memorandum books produced by the said plaintiff;

Second. In refusing to permit defendant to offer testimony in rebuttal based upon the same books which it had ruled were admissible against it as set forth in the preceding assignment of error;

Third. In refusing to allow the witness Inman, the general manager of defendant and sworn on its behalf, to answer the question, "What in your judgment is the daily capacity of that mill?" the only objection being that the witness had not been shown competent to answer;

Fourth. In refusing to allow defendant to prove a general usage or custom in the business of mining iron ore whereby a day's work consists of two shifts of ten hours each;

Fifth, etc. In refusing requests for charges.

Argument for Plaintiff in Error.

Mr. Edmund Wetmore and *Mr. Frank E. Smith* for plaintiff in error.

I. The memorandum books from which Brown was allowed to testify were not competent evidence against the company. They were not books or records of the company, and Brown was Blake's representative at the mine. He caused these books to be kept, and the greater part of the entries are in his handwriting.

In February, 1887, after the keeping of the books was ended, a copy was sent by Brown to Mr. Inman, the general manager of the Iron Company. These circumstances plainly characterize the books as those of Mr. Blake and not of the defendant. As such they could only be used in his favor after the correctness of the entries had been established by some witness having knowledge of the facts recorded. *The Mayor* v. *Second Avenue Railroad*, 102 N. Y. 572, 579; *Chaffee* v. *United States*, 18 Wall. 516.

The books were not competent as admissions or declarations made by agents of the Iron Company. Admissions or declarations made by an agent as evidence against the principal stand upon an entirely different foundation from the admissions of the party himself. The unsworn statement of the agent to be received against the principal must not only relate to an act which the agent is authorized to do, but must also be made while the act itself is still pending. In other words, the statement of the agent is received only when it constitutes a part of the *res gestæ*. Greenl. Ev., sec. 113. This rule is strictly adhered to by this court. *Packet Co.* v. *Clough*, 20 Wall. 528; *Vicksburg & Meridian Railroad Co.* v. *O'Brien*, 119 U. S. 99.

The foremen of the mill were not the agents or servants of the Iron Company, but of Blake as regards the books in question. The books were kept in the interest of Blake. The object of keeping them was to enable him to have a record of the work done by the mill. Whatever was done by any agent or servant of the defendant with reference to them was done at the request of Blake's agent and for his convenience. Manifestly it was impossible for Brown to be at the mill con-

stantly day and night. It was necessary that some one should assist him if he was to obtain a record which should cover the entire time. He selects for that purpose the men at work in the mill. These men could do his work only with the consent of their employer, the Iron Company, which consent was given and the men instructed to do what Brown desired done in this behalf. The men therefore in preserving the data on which the books were made were doing his work, and not the work of the defendant, which had, in the reports of its weigh-master an independent record of the ore crushed at the mill.

Even assuming that the foremen of the mill were in all respects the servants of the Iron Company, it was not within the scope of their authority to make admissions which should be evidence against their employer. *First Unitarian Society* v. *Faulkner*, 91 U. S. 415.

II. The refusal of the court to allow defendant to avail itself of the memorandum books, after plaintiff had used them against it was error. The testimony offered was strictly in rebuttal. We of course concede the rule that a party must exhaust his case in chief before he rests, and that testimony in rebuttal, as matter of strict right, must be confined to matter which denies or qualifies facts first proved by the other side. *Marshall* v. *Davies*, 78 N. Y. 414.

The actual working of the mill upon isolated days, or during particular parts of October or November, being facts first brought out by the plaintiff, after defendant's case was closed, it was strictly in rebuttal to show that the actual working upon other days at substantially the same time, was very different, and so qualify or limit the effect of the fact first proved by plaintiff. The right of a party after he has closed his case in chief, to offer evidence tending to deny, limit or qualify a fact first brought into the case by his adversary, or to contradict a statement made by one of his witnesses, is a strict legal right, and one which it is error to deny. *French* v. *Hall*, 119 U. S. 152; *Winchell* v. *Winchell*, 100 N. Y. 159; *Ankersmit* v. *Tuch*, 114 N. Y. 51; *Asay* v. *Hay*, 89 Penn. St. 77; *Hayward* v. *Draper*, 3 Allen, 551; *Kent* v. *Town of Lincoln*, 32 Vermont, 591.

Argument for Plaintiff in Error.

The testimony should have been received on the ground that it was an omitted part of an admission made by defendant, the other part of which had been used against it. The books themselves cannot be made competent evidence against defendant except on the theory that they were admissions made by an agent.

The party seeking to use an admission made by his adversary cannot pick out that part which is in his favor and omit what qualifies or limits it. He must take the whole or none. *Insurance Co.* v. *Newton*, 22 Wall. 32. *Grattan* v. *Metropolitan Life Ins. Co.*, 92 N. Y. 274, 284.

III. It was error to reject the testimony of Mr. Inman, defendant's general manager, as to the daily capacity of the mill.

The general manager of defendant was asked what, in his judgment, was the daily capacity of the mill? No objection was made that the capacity of the mill was not a proper subject for expert evidence, and indeed the plaintiff had made out his *prima facie* case in that way. The only objection was that the witness had not been shown competent to answer. It had been made to appear that he was familiar with the business and knew what the mill had done, as well as what a similar mill, built by plaintiff for defendant, some years previous, had done. It is submitted that the testimony showed the witness to possess such qualifications and knowledge as to make his testimony admissible, and that it was error to exclude it. *Stillwell & Bierce M'f'g Co.* v. *Phelps*, 130 U. S. 520.

IV. The court erred in refusing to permit defendant to show that the words "daily capacity" in the contract meant a day of twenty working hours.

The customs and usages of the business to which a written contract relates may be proved in aid of its interpretation, and the general usages of such a business are presumptively known to persons making contracts with reference to it. *Hostetter* v. *Park*, 137 U. S. 30, 40; *McMasters* v. *Pennsylvania Railroad*, 69 Penn. St. 374; *Walls* v. *Bailey*, 49 N. Y. 464.

It was competent to prove by parol evidence that the word "day" or "daily" used in the written contract had a peculiar

or technical meaning in the business to which the contract related.

The use of parol evidence to attach a special meaning to common words when used with reference to a particular trade or business is one of the settled exceptions to the rule excluding parol evidence as to a contract reduced to writing.

And for the purpose of showing the peculiar meaning of an everyday word, and thereby converting it into a word of art, it is common and established practice to receive proof of the usage of the trade with reference to it. *Hinton* v. *Locke*, 5 Hill, 437; *Newhall* v. *Appleton*, 114 N. Y. 140; *Smith* v. *Clews*, 114 N. Y. 190; *Grant* v. *Maddox*, 15 M. & W. 737; *Robinson* v. *United States*, 13 Wall. 363; *Bradley* v. *Steam Packet Co.*, 13 Pet. 89; *Myers* v. *Sarl*, 3 El. & El. 306; *Lowe* v. *Lehman*, 15 Ohio St. 179; *Cochran* v. *Retberg*, 3 Esp. 121.

V. The court erred in refusing certain requests to charge, duly submitted.

Mr. R. D. Mussey and *Mr. L. E. Chittenden* for defendant in error.

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

The question in this case is whether or not the plaintiff fully performed his contract of March 26, 1886. The contract stipulated for payment of one-half of the price before, and of the other half when the machinery was completed and successfully running. Now, in addition to the full payment of the one-half, substantially three-fifths of the other was paid in three successive payments; the first within one and the last not until six weeks after the commencement of actual operations. There is significance in these latter payments. While not conclusive on the company, they indicate that in its judgment, for a while at least, the plant fully satisfied all the conditions of the contract, and are properly to be considered in determining the merits of the defence made to this action.

That defence is, that the plant was improperly and unskilfully constructed, of weak and defective parts, of material not adapted to the work which it was designed to perform, and that its actual working capacity did not exceed 350 tons a day. The answer, besides its defensive allegations, contained a counter-claim.

The first matter we notice is the alleged error in the testimony of Charles S. Brown, who, from certain account books which he presented, was permitted to testify as to the actual working of the plant between October 18 and November 7, giving in that testimony the actual hours the plant was working, the number of tons crushed, the hours of delay, and the causes therefor. This witness was sent by Mr. Blake to superintend the erection of the plant, to watch its workings when completed, and to make any needed repairs, improvements or changes. At his suggestion, after the plant commenced work, the defendant's superintendent directed the foremen of the mill to keep these books. The foremen, of whom there were four, generally made the entries on the books, though sometimes Brown did the writing at their dictation. The entries were made daily; at least, that was the intention and the general practice. The amount of ore crushed, as disclosed by these books, corresponded within a few tons with the amount testified to by the officers of the defendant company. Brown, himself, was present at the mill most of the time during the day, and had a general knowledge of the accuracy of these entries, so far as respects the work during that time. We think the testimony was competent. The books were kept by the direction of the defendant's superintendent, and the entries made by its foremen. They were intended to be, and in fact generally were, contemporaneous with the matters stated; and their substantial accuracy is corroborated by the personal knowledge of the witness, and the near coincidence of the general result with that vouched for by the defendant. They may not have been account books of the defendant, in the technical sense of the term, such as are generally admissible against a party, but they were memoranda made under the direction of the defendant for the purpose of preserving a

record of certain facts, and made under such circumstances as to be worthy of a measure of credence as against it.

A second matter is this: The general manager of the defendant was asked what, in his judgment, was the daily capacity of the mill. This question was objected to on the ground that the witness was not shown to be competent to testify as an expert, which objection was sustained. How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous. *Stillwell & Bierce Mfg. Co.* v. *Phelps*, 130 U. S. 520; *Montana Railway Company* v. *Warren*, 137 U. S. 348; *Inland & Seaboard Coasting Co.* v. *Tolson*, 139 U. S. 551. This witness testified that he had been general manager of the defendant company for six years; and that he was at the mill as often as twice a month, and usually went there once a week. He does not appear to have been a practical machinist, or to have had any special knowledge of mining or crushing machinery. He was not superintendent of the workings of the mine or of the machinery, and does not claim to have been there regularly, or, indeed, oftener than once a week, and, as general manager, was apparently more employed in the financial and outside business affairs of the company than in the details of the mining or the practical workings of the machinery. We think the ruling of the trial court in excluding his opinion was right; at any rate, it cannot be adjudged clearly erroneous.

Another matter is also complained of, and to a clear understanding of this question the course of the trial must be stated. The plaintiff opened by proving the construction of the mill, and, in a general way, that it had the capacity of 600 tons daily, and also the payments by the defendant. He then rested, and the defendant introduced testimony to show that the mill was not of the stipulated capacity, and explaining the circumstances of the subsequent payments. This included evidence of the actual workings of the mill from the 1st of October, 1886, to the 1st of January, 1888, the difficulties

that were encountered in its workings, the stoppages, what was done on such occasions, and the efforts to remedy supposed defects, as also the opinions of competent witnesses as to its capacity. In other words, it went fully into the matter of the actual workings of the mill, and its alleged incapacity to do the stipulated amount of crushing. In rebuttal, plaintiff called the witness Brown, who gave the testimony heretofore referred to from the memorandum books. It appeared from his testimony that the books had been kept from October 18 till he left, in March following. He had made out from them a statement of the facts respecting the workings of the mill from October 18 to the 7th of November, which he had forwarded to the plaintiff, and the details of that statement, as verified by the books, was the sum and substance of his testimony. After he had finished, and the plaintiff had rested in his rebuttal, the defendant called a witness named Hall, who testified that he had examined the books, and he was then asked what the average run per hour was for the months of November, December and January, separately, as shown by those books. This testimony was objected to and ruled out, and of this defendant now complains. We think the ruling of the court was right. If the defendant had a right after the plaintiff had closed his case in rebuttal to introduce any testimony at all, such right was limited to the new matters brought out in the rebuttal; and while the fact of the existence of these books, and that they were kept for several months was then disclosed for the first time, the only matters therefrom presented to the consideration of the jury were those transpiring between October 18 and November 7. As to those matters, the witness Hall was given full liberty of testifying, and that certainly was as far as the defendant's rights extended. These books were its own books; at least, made by its own employés under the direction of its superintendent. It did not offer them when it was making its defence, and the fact that certain portions of them are brought to the attention of the jury on plaintiff's rebuttal did not entitle it thereafter, and after the plaintiff had finally closed his testimony, to present the whole matter of these books in evidence.

Still another matter is this: Defendant called as a witness Smith M. Weed, who testified that he was a lawyer, but not in actual practice, and had not been for eight or ten years; that he was one of the defendant's directors; that he was interested in mining iron ore; and that that had been his principal business and taken most of his time for the past twenty years. He was then asked this question: "What is understood by a day in the iron mining business?" the defendant's counsel saying that he offered to prove the independent fact that a day means two shifts of ten hours each in iron mining. This testimony was offered for the purpose of interpreting the stipulation in the contract guaranteeing a capacity of 600 tons daily. In other words, the defendant sought to prove by this that the contract was for a mill capable of crushing 600 tons in twenty hours, instead of twenty-four hours. This testimony was objected to, and the ruling of the court was stated in these words: "I do not think that it is admissible unless you propose to show that that local custom was known to both contracting parties." Evidently the court understood that a local and not a general custom was sought to be proved. It is true the question is general in its terms; but for some reason, not altogether apparent — perhaps from the course of the testimony of this witness — the court understood the question to be directed to a merely local usage, to wit, that obtaining in the mine of which the witness had been speaking. If it was such local usage, the court was right in holding that it could not affect the meaning of the terms used in the contract unless known to both parties. Of a custom prevailing generally there may be a presumption of knowledge; and the testimony might have been competent without anything directly bringing home knowledge of it to the plaintiff. If the court misunderstood the scope of the question, counsel should have corrected the misunderstanding at the time; but, simply noting an exception, they passed on to a further and different examination. They were notified that the court was ruling on an offer to prove a local custom. If that was not what they sought to prove, they should then have stated the fact. Saying nothing, it must be held that

the court properly interpreted the scope of the offer, and it will not do now to say that the language of the question is broad and comprehensive, and that the court ruled out evidence of a general custom and understanding in the mining business as to the meaning of a common word. When the general manager of the company was thereafter on the stand a substantially similar question was put to him by counsel, and an objection was sustained without any comments by the court. Of course, if that ruling stood by itself its correctness might have to be determined by all implied in the question; but in view of that which had previously passed we think it fair to hold that the court was simply continuing the ruling which it previously made, and not that it was passing upon a new and independent question.

We have been not a little embarrassed by this matter, and the question is not free from difficulty; but we think the interpretation we have given is the correct one; at all events, if not the only, it is a fair interpretation of the proceedings, and error is not to be presumed. The rulings of the trial judge are to be taken as stated by him, and not to be carried beyond his own statement unless clearly demanded by the circumstances of the case. It is worthy of note in this connection that, according to the testimony, defendant's mill during certain months worked twenty-two hours a day. And, further, that in a letter written by the general manager of the company to plaintiff, in 1881, preliminary to the contract under which the first crusher was furnished by plaintiff, the writer says: "What we want is appliances that will crush (without roasting) 200 tons of crude chunk ore in 24 hours, and stand the racket month in and month out without breakdowns and stoppages. . . . Now, if we can do the work we speak of (200 tons daily) and dispense with rolls it is a great desideratum." Evidently "daily" at that time was used in the ordinary significance of the term, and it would require very satisfactory testimony to show that in this later contract it was used in a different sense. We think it must be held that the court did not err in its rulings in this respect.

The final matter is concerning the instructions: To the

general charge no exceptions were taken. Eighteen special instructions were asked, and in respect to them the bill of exceptions states: "The court did not charge either of said requests except as he had charged. For the refusal of the court to charge in the specific language of said hereinbefore-recited requests, the defendant's counsel then and there duly excepted." In this way only is any exception taken to the matter of the instructions. But this wholesale exception is not sufficient. *Connecticut Mutual Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250; *Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474.

These are the only matters presented for our consideration. The judgment will be

Affirmed.

BELFORD *v.* SCRIBNER.

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

No. 226. Submitted March 24, 1892. — Decided April 11, 1892.

In an equity suit for the infringement of a copyright, where the defendant appeals from the final decree, if exceptions were taken to the report of a master in favor of the plaintiff, it is the duty of the appellant to bring the exceptions into this court, as part of the record; and, if he took no exceptions, the report stands without exception.

Where the authoress of a book was a married woman, the copyright of which was taken by her assignee as proprietor, it was held, that, inasmuch as she settled, from time to time, with the proprietor, for her royalties, the court would presume that her legal title as author was duly vested in such proprietor, and that long acquiescence, by all parties, in such claim of proprietorship, was enough to answer the suggestion of the husband's possible marital interest in the wife's earnings.

If the husband was entitled to any part of the wife's earnings, that was a matter to be settled between the husband and the proprietor, and could not be interposed as a defence to a trespass on the rights of the proprietor of the copyright.

The proof showed that the title to the book was vested in the plaintiff, and that the copyright was secured by him in accordance with law.

Under § 4956 of the Revised Statutes, it is sufficient if the two printed

Statement of the Case.

copies of the book are deposited with the Librarian of Congress the day before its publication.

A certificate of the Librarian of Congress as to the day of the receipt by him of the two copies is competent evidence, though not under seal.

The finding by the Circuit Court that a certified copy of copyright had been theretofore filed as proof and lost, is sufficient evidence of that fact to sustain an order granting leave to file a new certified copy in its place, there being nothing in the record to control such finding.

As two of the defendants printed the infringing books by contract with the third defendant, who published and sold them, and as, under § 4964 of the Revised Statutes, both the printer and the publisher are equally liable to the owner of the copyright for an infringement, and as the sum decreed was found to be the profit shown to have been made by the defendants from the defendants' infringement, the two defendants who did the printing were held to be sharers in the profits so realized from the sales, and to be properly chargeable with such profits.

The matter and language in the infringing books being the same as the plaintiff's in every substantial sense, but so distributed through such books as to make it almost impossible to separate the one from the other, the entire profits realized by the defendants must be given to the plaintiff.

THE court stated the case as follows:

This is a suit in equity, brought on the 18th of January, 1884, in the Circuit Court of the United States for the Northern District of Illinois, by Charles Scribner, a citizen of New York, against Belford, Clarke & Co., an Illinois corporation, and Michael A. Donohue and William P. Henneberry, citizens of Illinois.

The bill alleges that the plaintiff is a publisher and bookseller, doing business under the name of Charles Scribner's Sons, in the city of New York; that from a time previous to April 1, 1871, and ever since then, one M. Virginia Terhune, the wife of Edward P. Terhune, a citizen of Massachusetts, has been and now is an authoress, who has written and published various works under the name of "Marion Harland;" that about April 1, 1871, she, being then and ever since a citizen of the United States, became the authoress and compiler of a work or manuscript entitled "Common Sense in the Household; A Manual of Practical Housewifery, by Marion Harland;" that said work was made up and composed of

receipts for cooking foods and fruits, preserving meats, vegetables, and fruits, and preparing drinks, and many other receipts for the sick-room and nursery, and contained much other instructive and valuable matter and information for household and family purposes; that all such receipts, information, instruction and material were selected and arranged with great care and labor, and embodied and written in the style, words and language of said lady, and she was the original inventor and author of most of the written matter contained in said work, and with great labor and care had selected and compiled the remainder thereof, and was the original compiler and author of all of said work and of the arrangement of the topics and index thereof; that prior to the publication of said work, and on or about April 1, 1871, Charles Scribner, since deceased, and three other persons, named Armstrong, Seymour and Peabody, all being citizens of the United States, and publishers and booksellers residing and doing business in the city of New York, under the firm name of Charles Scribner & Co., by an agreement with the said lady, undertook and became interested in, and assumed the risk and responsibility of, the publication of said work; that such agreement was duly entered into in the city of New York, and was to be performed in the State of New York by the parties thereto, and by the laws of that State the said lady, being a married woman, was authorized and empowered to enter into and execute the said contract in the same manner and to the same extent as if she had been a *feme sole;* that thereafter and prior to the publication of the work, and in or about May, 1871, the said copartners, under the firm name of Charles Scribner & Co., secured, according to the laws of the United States, a copyright of said work, as proprietors thereof; that thereafter, said firm printed, published and sold the work under the aforesaid name, at reasonable prices, until the death of said Charles Scribner and the formation of the firm of Scribner, Armstrong & Co., and the transfer of all their interests in the said copyright and agreement with said lady to the latter firm; that on or about February 10, 1872, John Blair Scribner, a son of Charles Scribner, deceased, and the said Armstrong

and Seymour, all being citizens of the United States and residing in New York, and publishers and booksellers doing business in the city of New York under the firm name of Scribner, Armstrong & Co., succeeded to the business and became the owners of the property, good-will and trade of the firm of Charles Scribner & Co., including the said copyright and the agreement between said firm and the said lady, and by virtue thereof became interested in and assumed the risk and responsibility of the publication and sale of said work, and continued to supply the public with copies of the same at reasonable prices, until the dissolution of the firm, in 1878, and the formation of the firm of Charles Scribner's Sons, and the transfer to the latter firm of all interest in said copyright and agreement; that on or about June 11, 1878, John Blair Scribner and the plaintiff, sons of said Charles Scribner, deceased, citizens of the United States, and publishers and booksellers, doing business in the city of New York, under the firm name of Charles Scribner's Sons, succeeded to and became the owners of the property, business, good-will and trade of the firm of Scribner, Armstrong & Co., including the said copyright and the agreement with said lady, and by virtue thereof became interested in and assumed the risk and responsibility of the publication and sale of the said work, and continued to supply the public with copies of the same at reasonable prices, until the death of John Blair Scribner, in 1879, and the transfer to the plaintiff of all the property, business, good-will and trade of the firm, including said copyright and agreement; that on the death of John Blair Scribner, in 1879, the plaintiff, under the firm name of Charles Scribner's Sons, succeeded to and became the owner of the property, business, good-will and trade of the firm, including said copyright and agreement, and assumed the risk and responsibility of the publication and sale of said work, and continued to supply the public with copies of the same at reasonable prices, until the publication and sale, hereinafter mentioned, of the new and revised edition of said work were made; that, under the statutes of the State of New York, the plaintiff, upon the death of John Blair Scribner, was entitled

to the continued use of the copartnership name of Charles Scribner's Sons, and has carried on the business under that firm name; that by reason of the publication of nearly 100,000 volumes of said work, the stereotype plates had become worn and the impressions therefrom sometimes faint and illegible; that the authoress, in or about 1880, prepared a revised edition of her work, making many corrections and additions; that prior to the taking out of a copyright therefor, and on or about September 8, 1880, the plaintiff, by an agreement with said authoress, became interested in and assumed the risk and responsibility of the publication of the new, revised and enlarged work; and that, on or about September 18, 1880, under the firm name of Charles Scribner's Sons, he secured, according to law, a copyright of said new work as proprietor thereof, under the same title, and published said new work, and supplied the public with copies of the same at reasonable prices.

The bill then alleges that the defendant Belford, Clarke & Co., printers, publishers and booksellers doing business at Chicago, Illinois, and the defendants Donohue and Henneberry, printers and bookbinders doing business at said Chicago under the firm name of Donohue & Henneberry, well knowing the plaintiff's rights, and intending to infringe said copyrights, at Chicago and elsewhere, without the allowance and consent of the plaintiff, published and sold a work in one volume, issued by them under various titles and with different title-pages, and purporting to be edited by different persons and to be written and compiled by different authors, (the body of said work and all the matter contained therein, excepting the title-pages and matters relating thereto, being the same,) said work, consisting of 351 pages, being a compilation of receipts for cooking, treating of the same subjects and covering the same topics, and adapted and intended for the same portion of the public, as the plaintiff's said book, and being a copy from and an infringement and piracy of the plaintiff's said work; that more than 170 receipts contained in said piratical work were copied *verbatim et literatim* from the said copyrighted work of the plaintiff, said receipts comprising a part or the whole of over 150 pages of said piratical work; that

many other parts of that work, besides said 170 receipts, are infringements upon the copyrights of the plaintiff, and many of the remaining receipts are in fact copied from the plaintiff's book, with certain changes in the phraseology thereof; and that the subjects in the piratical work and the index thereto are arranged in the same order, and with almost the same headings, as in the plaintiff's work, and were copied and imitated therefrom. The bill then sets forth the particulars of the piratical work and of the various title-pages and covers thereof.

The bill prays for an injunction to restrain the defendants from printing, publishing, binding, selling or exposing for sale any copies of said piratical work, and for an account and payment of the profits of sales of it.

The defendants were duly served with process and appeared, and the plaintiff moving for a preliminary injunction, the court, on January 21, 1884, entered an order, on notice, referring the bill, affidavits and other proofs to a master in chancery, to examine and report whether the bill and affidavits made a case entitling the plaintiff to an injunction, and meantime issuing a restraining order against the defendants, and ordering them to keep an account of all books sold by them at retail.

The master, after hearing the parties, made the following report, on February 27, 1884: "Upon hearing the arguments of counsel, and an examination of the testimony and exhibits submitted to me upon this reference, I find and report that the defendants have violated the rights of the complainant in printing, publishing and selling all of the certain books described in said bill of complaint as having been published by the defendants. That said works, though purporting to be edited and compiled by different persons, whose names appear therein, in one instance the title being partially changed, and in others entirely so, are largely compilations of the recipes of the complainant, and that the matter and language of said books is the same as the complainant's in every substantial sense, but so distributed through said books of defendants as to become incorporated into those works, making it almost impossible to

separate the one from the other. I find, also, that the defendants have been guilty of an appropriation of the topics in use in complainant's book as well as the index, with slight and occasional changes, and that as to the balance of said publications of defendants there constantly occurs the use of complainant's language, with occasional change of phraseology, with the general arrangement and headings preserved. In all of the alleged illegal publications the defendants are shown to have used the material of the complainant instead of 'resorting to original sources of information.' The case, therefore, in my estimation, comes within the rule laid down by the court in *Myers* v. *Callaghan*, 10 Bissell, 139. I am, therefore, of the opinion that the defendants have infringed the rights of complainant, as charged in the bill, and recommend that an injunction issue as prayed."

On notice, the court, on March 14, 1884, entered an order confirming the master's report, and enjoining the defendants from printing, publishing, binding, selling or exposing for sale, or being in any way concerned in exposing for sale or disposing of any copies of their book described in the bill, or infringing upon the copyright of the plaintiff in his book described in the bill.

On the 4th of April, 1884, the defendants put in a demurrer to the bill, on the ground that it did not allege that, before the publication of the plaintiff's book, a printed copy of its title was delivered at the office of the Librarian of Congress, or deposited in the mail addressed to him at Washington; that it did not allege that within ten days after publication two copies of the book were delivered at the office of the Librarian of Congress or deposited in the mail addressed to him at Washington; and that it did not show that a notice of such copyright had been inserted, in the form prescribed by law, in the several copies of each edition of the book which had been published.

On the 12th of May, 1884, the court entered an order sustaining said demurrer, giving leave to the plaintiff to amend his bill, and ordering that the defendants plead, answer or demur to the bill as amended.

Statement of the Case.

On the 24th of June, 1884, Donohue and Henneberry filed a separate answer to the bill, and on the same day the corporation defendant filed its separate answer. Each answer took issue on all the material allegations of the bill. The answer of Donohue and Henneberry alleged that they were employed by the corporation defendant to manufacture the books complained of in the bill; and that the plaintiff was not entitled to a discovery from them, as asked in the bill, as to the number of copies of the piratical book they had on hand, because such discovery would subject or tend to subject them to a penalty or forfeiture. The answer of the corporation took issue on the material allegations of the bill, and alleged that the corporation employed the firm of Donohue & Henneberry to print and manufacture the alleged infringing book, admitted its alleged sale thereof, and averred that it had sold about 9500 copies of the principal book and about 44,000 copies of a cheap edition, but averred that the plaintiff was not entitled to any discovery from it of the number of books it had on hand, because such discovery would subject or tend to subject it to a penalty and forfeiture.

On the 3d of September, 1884, the plaintiff filed replications to the two answers, and on the 17th of October, 1884, the court referred the case to a master in chancery, "to take proof and state an account herein." It appears by the record that in November and December, 1884, and January, 1885, the testimony on behalf of the plaintiff was taken in the city of New York before a United States commissioner, and was filed in the court on the 28th of February, 1885. The testimony on the part of the defendants was taken before the master in Chicago, in May, July and November, 1885, and was filed in the court on the 27th of April, 1886.

On the 17th of November, 1886, an order was entered stating that, on motion of the plaintiff and with the consent of the defendants, leave was given to the plaintiff to file an amendment to his bill in place of the original amendment, which had been removed from the files; and on the same day amendments to the bill were filed, setting forth that the firm of Charles Scribner & Co., on the 26th of May, 1871, delivered

at the office of the Librarian of Congress at Washington, a printed copy of the title-page of the book, which title-page is set forth in the amendments; that on the same day said librarian recorded the name of such book; that on the same day, within ten days from the publication of the book, the firm delivered at the office of said librarian two printed copies of the book, which were complete copies thereof, and of the best edition thereof published; that prior to the publication of the book, said firm caused to be printed, on the page immediately following the title-page of each copy published, words giving notice of the copyright; that such words and notice are printed in each copy of said book published; and that said firm did everything required by law for the securing of the copyright. The amendments also set forth that the plaintiff, under the firm name of Charles Scribner's Sons, on the 18th of September, 1880, delivered at the office of the Librarian of Congress, at Washington, a printed copy of the title-page of the new edition of said book, containing the printed words of the title, and on the same day the librarian recorded the name of such book; that on the 15th of November, 1880, and within ten days from the publication thereof, the plaintiff delivered at the office of said librarian two printed copies of the book, of the best edition thereof published; that prior to the publication of the book he caused to be printed, on the page immediately following the title-page of each copy published, words giving notice of the copyright; that such words and notice are printed in each copy of said book published; and that he did everything required by law for the securing of his copyright in said book.

The record shows that on the 30th of November, 1887, an entry was made in the record of proceedings in the cause, setting forth that the case on that day came on to be heard on pleadings, proofs "and master's report and exceptions." There are not in the record any exceptions to a master's report.

There is an entry in the record of the proceedings in the cause, made February 23, 1888, setting forth an order which states that, on motion of the plaintiff's solicitors, he was allowed "to file a certified copy of copyright in place of such

proof heretofore filed and lost." The record shows that on the 24th of February, 1888, there were filed in the court the certified copies of papers from the office of the Librarian of Congress, which are set forth in the margin.[1]

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[1] LIBRARY OF CONGRESS,
No. 4933 B. COPYRIGHT OFFICE, WASHINGTON.

To wit:

Be it remembered that on the 26th day of May, anno Domini 1871, Charles Scribner & Co., of New York, has deposited in this office the title of a book, the title or description of which is in the following words, to wit:

Common Sense in the Household;
A Manual of Practical Housewifery.
By Marion Harland.
New York:
Charles Scribner & Co., 1871.

the right whereof they claim as proprietors in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD, *Librarian of Congress.*

Two copies of the above publication deposited May 26, 1871.

I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress. In witness whereof I have hereto set my hand and affixed the seal of my office this 12th day of November, 1883.

[SEAL.] A. R. SPOFFORD, *Librarian of Congress.*

Librarian of Congress,
Copyright office.
United States of America.

LIBRARY OF CONGRESS,
No. 14239 L. COPYRIGHT OFFICE, WASHINGTON.

To wit:

Be it remembered that on the 18th day of September, anno Domini, 1880, Charles Scribner's Sons, of New York, have deposited in this office the title of a book, the title or description of which is in the following words, to wit:

Common Sense in the Household;
A Manual of Practical Housewifery.
By Marion Harland.
(New edition.)
New York:
Charles Scribner's Sons, 1881.

the right whereof they claim as proprietors in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD, *Librarian of Congress.*

Statement of the Case.

On the 6th of April, 1888, the defendants filed in the clerk's office a motion to strike from the record, as evidence in the cause, the certificates of the Librarian of Congress so filed, because (1) neither of them was in proper form or properly authenticated; (2) neither of them was in compliance with the order of February 23, 1888, "because no other certificates having the like purport or effect had been ever offered in evidence nor lost from the files in said cause;" and (3) they were incompetent and irrelevant.

On the 7th of April, 1888, the court entered an order overruling the motion to strike from the files "the certificates by the Librarian of Congress, filed as testimony in this cause."

The cause was heard by Judge Blodgett, who filed an opinion on April 9, 1888, a copy of which is contained in the record, and on the same day the court entered a decree which stated that the case was heard upon the bill, answers and replications, and proof taken in the cause, documentary, oral and written, "and upon the master's report herein, with exceptions thereto." The decree granted a perpetual injunction restraining the defendants and each of them, their officers and agents, from printing, publishing, binding, selling or exposing for sale, or causing or being in any way concerned in selling or exposing for sale, or otherwise disposing of any copy of the book described in the bill as having been published by the defendants under various titles, (which titles are set forth,) and any copy of said book under any title whatsoever. The decree adjudged that the defendants' book was an infringement upon the rights of the plaintiff as owner of the copyright of his book, the title of which is given in the decree, and that he was entitled to damages for such infringement; and upon the proof the court fixed the amount of such damages at $1092, "being the amount of the profits shown by the proof

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I, A. R. Spofford, Librarian of Congress, hereby certify that the foregoing is a true copy of the original record of copyright in the Library of Congress. In witness whereof I have hereto set my hand and affixed the seal of my office this 25th day of October, 1884.

[SEAL.] A. R. SPOFFORD, *Librarian of Congress.*

to have been made by defendants from the defendants' infringement," and that the plaintiff recover that sum from the defendants and each of them, with costs. The defendants took an appeal to this court.

Mr. Newton A. Partridge for appellants.

I. The first assignment of error relates to the recital in the decree that the final hearing was upon the master's report and exceptions. While this error is clearly established upon the face of the record, counsel for the appellants do not desire to discuss it at length, and deem it immaterial, unless some advantage bearing upon the extent and nature of the evidence before the court to sustain its findings of fact and its decree upon the final hearing, should be attempted by appellee. In that event, the recital complained of might become material, and it is for that reason alone that the necessary space has been taken to clearly raise the point.

II. It is further contended that the complainant was not the owner of the two copyrights in said book entitled, "Common Sense in the Household," in question in this case, and that he was not entitled to file and maintain his bill herein. The bill of complaint states that M. Virginia Terhune, the wife of Edward P. Terhune, was the author of said book, and her evidence shows that at the time when said book was written, she resided in Newark, New Jersey, with her said husband, and she stated that she was married in 1856. The agreement stated the name of the author as Mrs. E. P. Terhune (Marion Harland) of the city of Newark, State of New Jersey. At common law a married woman has no interest in personal property acquired by or through her during marriage, but it belongs absolutely to her husband.

No proof was introduced of the provisions of the laws of New York or of New Jersey or of Massachusetts, where it was stated said M. Virginia Terhune resided at the time said bill was filed and no proof was submitted to show that the laws of either of said States differed from the common law; and the presumption is that the common law is in force in the

different States unless the contrary is pleaded and proved. *Crouch* v. *Hall*, 15 Illinois, 263. But in case of personal property acquired after marriage by her means, such property belongs absolutely to the husband; so that, if a legacy should be given to the wife during coverture, and the husband should die before it is paid or due, it would not belong to the wife, but to the husband's executor.

III. No valid copyright was obtained in the first or 1871 edition of the said book, "Common Sense in the Household," because the statute was not complied with. The statute required delivery at the office of the Librarian of Congress or deposit in the mail addressed to the said librarian, of two copies of such copyright book "within ten days from the publication thereof." The uniform construction which has been placed upon this provision of the law is the same as if it read ten days from and after publication, and such is the ordinary, well-determined meaning of the words employed. In discussing the same phraseology under the act of February 3, 1831, although the period of time was different, the court used the following language: "Undoubtedly the three conditions prescribed by the statute, viz.: . . . and the depositing of the copies of the book within three months after the publication, are conditions precedent to the perfecting of the copyright." *Callaghan* v. *Myers*, 128 U. S. 617, 652.

IV. The copyright in the new or 1880 edition of said book, "Common Sense in the Household," was claimed to be invalid because the proof is not sufficient to show that the two copies of said book were duly deposited to complete said copyright.

V. It is claimed that said Circuit Court committed error in granting the motion of the complainants to file a certified copy of copyright in place of such proof alleged theretofore to have been filed and lost, and in refusing to grant the motion on behalf of the defendants to strike from the record in said cause the certified copies which were filed February 24, 1888.

VI. The decree ought to have been entered for the amount of $1092, against said defendant corporation, Belford, Clarke

& Co., alone, and it was error to decree Michael A. Donohue and William P. Henneberry, and each of them, to pay any part of said amount. The present case comes clearly within the rule announced in *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126, where an identical question was discussed and the true rule laid down, which is, that unless all of the defendants realize a profit from the infringement, a joint decree for the payment of such profit should not be entered against them. It was there held to be error to enter a decree against the defendants who did not participate in the profits shown to have been thus realized for the payment of such profits.

VII. The decree ought to have been entered for only the proportion of the profits realized by said corporation, Belford, Clarke & Co., from the sale of the said books complained of, which was derived from the use of the matter copied from said book entitled "Common Sense in the Household." This is the case of a cook-book. Its matter consists of short receipts classified together under appropriate heads. Many of these vary but little from some others contained under the same heading. The book is not constructed upon the plan of the reports considered in *Callaghan* v. *Myers*, where it was stated that the value of the book consisted in its integrity as a whole. Had the books complained of contained other matter so incorporated with the copyright matter that the same could not be separated, and so that the lawful matter would be useless without the use of the matter unlawfully obtained, a different principle would apply. But here the evidence shows that all the receipts contained in the books complained of which were wholly or partly identical with the matter contained in said book, "Common Sense in the Household," could be separated without difficulty from the other receipts.

Mr. Walter C. Larned for appellee.

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

The assignments of error filed by the defendants in this

court allege that the final decree of the Circuit Court is erroneous (1) because it recites that the hearing was upon the master's report, with exceptions thereto, when there was no report nor any exceptions thereto before the court at the final hearing; (2) because it finds that the plaintiff is entitled to damages, when the only remedy in equity is by injunction and an account of profits; (3) because it finds that copyright in the book, the title of which is set forth in the bill, was vested in the plaintiff as proprietor thereof, when the proofs show that he never was its proprietor, and therefore could not procure a valid copyright therein; (4) because the proofs did not show that any valid copyright had been procured at any time in said book or in either edition thereof; (5) because the decree goes for the entire amount of profits realized by the corporation defendant, which was the proprietor of the book which is alleged to infringe the rights of the plaintiff, instead of such part of the profits as was realized by reason of such infringement; (6) because it orders the defendants Donohue and Henneberry to pay the amount of said profits, when the pleadings and proofs fail to show that any part of such profits was realized by them or either of them; (7) because the court granted the motion of the plaintiff, after the hearing of the cause, to file proofs therein, and denied the motion of the defendants to have such proofs stricken from the record; and (8) because the findings and decrees of the court were against the law and the evidence.

(1) It is true that the record shows that, on the 17th of October, 1884, the court made an order referring the cause to a master in chancery "to take proof and state an account herein." No report afterwards made is found in the record. The only special report found therein is one of the master, hereinbefore set forth, filed February 27, 1884, on the question of the issuing of a preliminary injunction. To that report no exceptions appear to have been filed. Not only does the final decree, of April 9, 1888, state that the cause was heard upon bill, answers, replications and proof, "and upon the master's report herein, with exceptions thereto," but the opinion of Judge Blodgett says: "The case was referred to one of the

masters of the court, to take proofs and report findings upon the question of infringement, and he has reported that the defendants, by the publication and sale of two books set out and described in the bill of complaint, one under the title of 'How to Cook,' and the other under the title of 'Economy Cook Book,' have infringed upon the complainant's copyright by incorporating into their said publication something over fifty pages of the matter of complainant's book, as well as substantially following the arrangement of subjects and headings. *Myers* v. *Callaghan*, 10 Bissell, 139. I have carefully examined the proof upon which the master bases his findings, and am satisfied that the finding was fully justified by the testimony. The case is now before me on defendants' exceptions to the master's findings, and on complainant's motion for a decree in pursuance of the master's report."

The report thus referred to in the decree and in the opinion is manifestly the report filed February 27, 1884, and there must have been exceptions thereto taken by the defendants. The testimony on which that report was based is not found in the record. The only other master's report in the record is one made by him reporting the testimony which he had taken in the cause in Chicago in May, 1885, and subsequently, and which report is dated April 20, 1886, and was filed April 27, 1886. If exceptions were taken by the defendants to either or both of those reports, it was their duty as appellants to have them brought into this court as part of the record; and if they took no exceptions, the reports stand without exception. The first assignment of error is of no avail to the defendants.

(2) It is also contended that the plaintiff is not the owner of the two copyrights in question, because the authoress of the book was a married woman, residing with her husband in New Jersey, when the agreement between her and Charles Scribner & Co. was made, on April 1, 1871; that at common law a married woman has no interest in personal property acquired by her during marriage, but it belongs absolutely to her husband; that no proof was introduced of the provisions of the laws of New York, or those of New Jersey, or

those of Massachusetts, in which latter State the bill averred that the authoress resided, at the time the bill was filed, and no proof was offered to show that the laws of any of those States differed from the common law, and the presumption was that the common law was in force in those different States; that it does not appear that the authoress had any right to sell her husband's property or to make contracts in regard to it; that this suit ought to have been brought in his name as plaintiff; and that if, by ratification, he had confirmed her right to hold and deal with the property in question, then the suit ought to have been brought in her name, as owner in fact of the copyright.

On this point the Circuit Court said, in its opinion, that, as the proof showed that the authoress from time to time settled with the owners of the copyright for her royalties, the court would presume that her legal title as the author of the books was in some due and proper manner conveyed to and vested in the persons who secured the copyright thereof; and that acquiescence for so many years, by all the parties, in that claim of proprietorship in the copyright, was enough to answer the suggestion of the husband's possible marital interest in his wife's earnings. This is, we think, a sound view.

The opinion of the Circuit Court further correctly said: "It is certain that, if there is any ownership in this work by copyright at all, it is in the complainant, in whose name the copyright was taken and now stands, so far as is shown by the proof in this case. If the law of the domicil of Mrs. Terhune entitles her husband to any part of her earnings, that is a matter to be settled between her husband and the complainant, and which the defendants cannot interpose as a defence to a trespass upon the complainant's property rights in this copyrighted book."

(3) It is also contended for the defendants that the two contracts in the case, one dated April 1, 1871, between the authoress and Charles Scribner & Co., and the other dated November 6, 1884, between her and Charles Scribner's Sons, did not vest the title of the book in the plaintiff or in those through whom he claims title; and that those agreements did

not show that she parted with the title to the book of which she was the authoress. But we are of opinion that the proofs are to the contrary, and that the copyright was secured in accordance with law, in both editions of the book, by the proprietor, and that the plaintiff owns such copyright.

(4) Objection is also made that it is stated in the amendments to the bill that a printed copy of the title-page of the book first published was delivered at the office of the Librarian of Congress at Washington, May 26, 1871; that on the same day Charles Scribner & Co., within ten days from the publication of the book, delivered two printed copies of it at the office of the Librarian of Congress; that § 4956 of the Revised Statutes required that the two copies should be delivered at the office of said librarian or deposited in the mail addressed to him "within ten days from the publication" of the book; that the testimony shows that the book was published May 27, 1871; and that, therefore, the two printed copies of it were deposited one day before the publication, and the law was not complied with.

But we are of opinion that the statute was substantially complied with. The two copies were deposited before the expiration of ten days after the publication, and that was all that was necessary. Ten days were allowed after the publication within which the two copies were required to be deposited, and, within the meaning of the statute, they were so deposited, although the deposit took place one day before the publication. The case is analogous to the ruling of this court as to the protest or notice of dissatisfaction to be given to the collector in a customs case, where the statute required it to be given within ten days after the liquidation of the duties, and it was given after the collector's decision and before the final liquidation, and it was held that, as the notice was given before ten days after the final liquidation had expired, it was a sufficient notice. *Davies* v. *Miller*, 130 U. S. 284.

(5) It is also contended that the copyright of 1880 was invalid, because no sufficient proof appeared that two copies of that book were duly deposited. We are of opinion that the certificate of the Librarian of Congress, set forth in the

margin, as printed in the record,[1] that two copies of the new edition of the plaintiff's copyrighted book were received by him November 15, 1880, which was within ten days after the publication, was competent evidence, although the certificate was not under seal.

(6) It is also contended that the Circuit Court erred in granting, on February 23, 1888, the motion of the plaintiff "to file a certified copy of copyright in place of such proof heretofore filed and lost," and in refusing, on April 6, 1888, to grant the motion of the defendants to strike from the record the certificates of the Librarian of Congress which had been filed in pursuance of the order of February 23, 1888. The ground of making the order of February 23, 1888, was stated in it to be that proof by a certified copy of copyright had been theretofore filed and lost, and that the new certified copy was to be in place of such proof; and in the motion made by the defendants to strike the new certificates from the record, it was stated that "no other certificate having the like purport or effect had been ever offered in evidence nor lost from the files in said cause." But the court, by overruling such motion, must necessarily have found that the fact was otherwise, and that such former certificates had been filed as proof and had been lost. There is nothing in the record to control this finding of fact.

(7) It is urged that the decree ought to have been entered for the sum of $1092 against the defendant corporation alone, and that it was error to decree the other two defendants to pay any part of that amount; that those two defendants manufactured the books complained of, and did not sell them

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[1] NEW YORK, *Nov. 15th*, 1880.

Mr. A. R. Spofford, the Librarian of Congress, Washington, D.C.

DEAR SIR: We send you to-day by mail (2) two copies of Marion Harland's "Common Sense in the Household," new edition, to complete the copyright for that book.

The certificate for title entry is numbered 14239 L.

Please acknowledge their receipt.

Yours truly, CHARLES SCRIBNER'S SONS.

2 copies of the above received Nov. 15, 1880.

A. R. SPOFFORD, *Librarian of Congress.*

or offer them for sale; that the corporation defendant published and sold the books and was the only defendant which received any part of the profits arising from their sale; and that it was from the books of account of the corporation defendant that the account of profits was stated on which the decree for damages in the case was based. To support this view, the case of *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126, 139, 140, is cited to show that unless all of the defendants realize a profit from the infringement, a joint decree for the payment of such profits ought not to be entered against them; and that the defendants who did not participate in the profits realized ought not to be charged with any part of those profits. It is contended that while the defendants Donohue and Henneberry might have been called upon to account for the profits realized by them from manufacturing, or printing and binding the books complained of, no proof of such profits was offered, and, therefore, no decree for the payment of any profits could lawfully be entered against them. The decree sets forth that the $1092 is the amount of the profit shown by the proof to have been made by the defendants from the defendants' infringement.

To this view it is replied by the plaintiff that, as the defendants Donohue and Henneberry printed the books by contract with the corporation defendant, and as, under the copyright law, Rev. Stat. § 4964, both the printer and the publisher are equally liable to the owner of the copyright for an infringement, and as it is to be inferred that Donohue and Henneberry made a profit from printing the piratical books, they were, therefore, sharers in the profits realized from the sale of the books, and were *participes criminis* with the defendant corporation in the infringement; that the two sets of defendants together printed and published the books, and were practically partners in doing it, the corporation doing one part, and the other defendants the other part of the printing and publishing; and that all the parties concerned ought to be held to an account to the owner of the copyright in respect to the profits derived from the printing, publishing and selling, without all of which combined there

could have been no infringement. We think these views are sound.

(8) It is contended by the defendants that the decree ought to have been only for that proportion of the profits realized from the sale of the books, which was derived from the use of the matter which had been copied from the copyrighted books. But the report of the master, filed February 27, 1884, speaking of the books printed and published by the defendants, said that he found "that said works, though purporting to be edited and compiled by different persons, whose names appear therein, in one instance the title being partially changed and in others entirely so, are largely compilations of the recipes of the complainant, and that the matter and language of said books is the same as the complainant's in every substantial sense, but so distributed through said books of defendants as to become incorporated into those works, making it almost impossible to separate the one from the other."

The rule is well settled, that, although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan* v. *Myers*, 128 U. S. 617, 665, following *Mawman* v. *Tegg*, 2 Russell, 385, 391, and *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126, 139.

We have thus reviewed the points urged in the brief of the appellant, and do not deem it necessary to consider any others.

Decree affirmed.

SMITH *v.* GALE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

No. 225. Argued March 23, 24, 1892. — Decided April 11, 1892.

The right to intervene in a cause, conferred by secs. 89, 90 of the Dakota Code of Civil Procedure upon a person interested in the subject of a litigation, relates to an immediate and direct interest by which the intervenor may either gain or lose by the direct legal operation and effect of the judgment, and can only be exercised by leave of the court, in the exercise of its discretion ; and if the request to intervene is made for the first time in a case which had been pending for two years, and just as it is about to be tried, it is a reasonable exercise of that discretion to refuse the request.

Since the enactment of the act of January 6, 1873, (Laws of Dakota Territory, 1872–73, pp. 63, 64,) a deed of land within Dakota executed and acknowledged without the State before a notary public having an official seal, and certified by him under his hand and official seal, is sufficient to admit the deed to record and in evidence, without further proof ; and the fact that the recording officer in making the record of the deed fails to place upon the record a note of the official seal, does not affect the admissibility of the original.

When the defendant in his answer admits the execution of an instrument set up by the plaintiff in his declaration, and claims that it is invalid by reason of matters set forth in the answer, that instrument is admissible in evidence.

The finding, in a suit to quiet title, that the plaintiff and her grantees had been in continued possession of the premises from a given day is the finding of an ultimate fact, and the sufficiency of the evidence to support it cannot be considered on appeal.

Possession and cultivation of a portion of a tract under claim of ownership of all, is a constructive possession of all, if the remainder is not in adverse possession of another.

In Dakota a person purchasing real estate in litigation from the party in possession, in good faith and without knowledge or notice of the pendency of the litigation, may acquire a good title as against the other party if no *lis pendens* has been filed.

THIS was an action originally brought by Gale in the District Court of Minnehaha County, against the widow and heirs of Daniel G. Shillock, Samuel A. Bentley and Byron

Statement of the Case.

M. Smith, to quiet the title of the plaintiff to certain lands of which it was averred the defendants unjustly claimed to have title in fee.

The following facts are abstracted from the finding of the court:

Both parties claimed title from Margaret Frazier, who, on the 1st day of July, 1864, became grantee of the land in fee by a patent of the United States of that date.

Plaintiff's chain of title was as follows:

1. Power of attorney, Margaret Frazier to William H. Grant, executed December 9, 1868, authorizing him to sell and convey all her real estate in the Territory of Dakota, etc., and to execute a warranty deed of conveyance in her name.

2. Warranty deed, Margaret Frazier by William H. Grant her attorney-in-fact, to Louisa E. Gale, wife of the plaintiff Artemas Gale, executed October 12, 1870, for a consideration of $160. Under this deed the court found that Mrs. Gale entered into possession; caused the property to be surveyed and the boundaries to be marked; and thence to the time of her decease, continued in open, continuous and uninterrupted possession, which possession was continued by Artemas Gale, her husband, and his grantees hereinafter mentioned, who have been, and at the time of the trial, were in actual possession of said premises.

3. Will of Louisa E. Gale, who died June 27, 1880, devising this property to her husband Artemas Gale, the plaintiff. This will was probated July 29, 1880, and filed for record July 5, 1883.

This suit was begun September 27, 1882. During its pendency, and on August 1, 1883, plaintiff Gale conveyed the lands in question to Helen G. McKennan by warranty deed for a valuable consideration, and on August 14, 1883, Helen G. McKennan conveyed an undivided half of the same to Melvin Grigsby.

The defendant's chain of title was as follows:

1. Warranty deed, Margaret Frazier to Oscar Hodgdon, dated May 29, 1872, for a consideration of $500. This deed

was executed eighteen months after the deed to Louisa E. Gale. The court found that there was no other evidence offered or submitted, tending to prove that any consideration was paid for such transfer, or that the grantee Hodgdon did not then have actual notice or knowledge of the prior conveyance of Frazier to Gale, or that at the time Hodgdon was an innocent purchaser of the said property for a valuable consideration, without notice of the outstanding title in Louisa E. Gale.

2. Quit-claim deed by Oscar Hodgdon to defendant Byron M. Smith, executed June 20, 1874, the property being then in the actual and open possession of Louisa E. Gale.

3. Warranty deed, Margaret Frazier to Daniel G. Shillock and to Samuel A. Bentley, executed May 14, 1873. Subsequent to this conveyance Shillock died, leaving a widow and heirs, who, with Smith and Bentley, were made defendants.

It was claimed by defendants that the power of attorney from Frazier to Grant was obtained for the purpose of enabling the latter to locate land scrip owned by Frazier, and selling the land so located; that it was not intended to be used in conveying the land in question; that such use of it was fraudulent; and that Gale and his wife, well knowing these facts, procured Grant to make a deed, under and by virtue of said power of attorney, to Louisa E. Gale. In this connection, however, the court found that Mrs. Gale was an innocent purchaser for a valuable consideration of the property in controversy; that if said power of attorney was procured from Margaret Frazier by fraud, and if the conveyance by Grant to Gale was fraudulently made, the said Louisa E. Gale and Artemas Gale were neither of them cognizant of such facts, and had no knowledge or notice whatever of such alleged fraud; and that Helen G. McKennan was also an innocent purchaser for valuable consideration of said property, and, at the time of the conveyance from Artemas Gale to her, had no notice or knowledge whatever of the pendency of this action, or of the ground upon which Smith claimed an interest in the property.

Upon the day before the case was tried, Margaret Frazier

filed a complaint, denying Gale's possession of the lands, averring the title to be in Smith, or in herself for the benefit of Smith, and asked leave of the court to intervene and be made a defendant. This was refused, and the court found as conclusions of law, from the facts above stated, that Artemas Gale, the plaintiff, was, at the time of the commencement of the action, the owner in fee; that McKennan and Grigsby were, at the time of the trial, the owners each of an undivided half in fee simple; and that the warranty deed from Frazier to Hodgdon, and the quit-claim deed from Hodgdon to Smith, and the warranty deed of Frazier to Shillock and Bentley, were all of them void, and conveyed no title, right, interest or estate in the said property; and upon these conclusions a decree was entered, confirming the title in McKennan and Grigsby. From this decree of the District Court both Smith and Frazier appealed to the Supreme Court of the Territory, by which it was affirmed, (30 N. W. Rep. 138; 29 N. W. Rep. 661,) and Smith thereupon appealed to this court. Smith having died subsequent to the appeal, the case is now prosecuted by his executrix.

Mr. Enoch Totten and *Mr. Franklin H. Mackey* for appellant.

I. In Dakota the right to have a party brought in in order that there may be a *complete determination of the controversy* is not a discretionary matter with the court. The court "*must* cause them to be brought in," and the denial of this right is error, whether the error takes the form of sustaining a demurrer to the complaint of intervention, or in striking the complaint from the files, or in refusing leave to file the complaint. *Coburn* v. *Smart*, 53 California, 742; *Coffey* v. *Greenfield*, 55 California, 382. Mrs. Frazier should have been allowed to intervene, as she is the grantor with warranty for a valuable consideration, of a deed which is attacked as null and void, and without her there can be no complete determination of the controversy. *Camp* v. *McGillicuddy*, 10 Iowa, 201.

The New York Code is similar in this respect to that of

Dakota, and in that State it is held that whenever it appears that a complete determination of the controversy cannot be had without the presence of other parties, the code makes it the *imperative* duty of the court to cause the proper parties to be brought in. *Shaver* v. *Brainard*, 29 Barb. 25. Abundant authority will be found to support this proposition in cases decided under the rule of equity, that in suits by third parties to set aside deeds as void for fraud as against plaintiffs the grantors in the deeds to be declared void must be made parties. *Lawrence* v. *Bank of the Republic*, 35 N. Y. 320; *Beardsley Scythe Co.* v. *Foster*, 36 N. Y. 561; *Lovejoy* v. *Irelan*, 17 Maryland, 525; *S. C.* 79 Am. Dec. 667.

Even in States where the provisions concerning new parties are not so liberal, the courts will allow another party to be brought into the case when his presence is necessary to enable the defendant to set up an equitable defence. *Hiner* v. *Newton*, 30 Wisconsin, 640.

II. The third and fourth assignments of error go to the ruling of the court in admitting in evidence the power of attorney from Margaret Frazier to Wm. H. Grant and the deed of Grant executed in pursuance of said power, without proof of their execution, on the ground that their execution was admitted by the defendant's pleadings.

In the ninth paragraph the defendant sets up a separate and independent defence to the plaintiffs' cause of action, and there we must look for the admissions, if there are any, of the execution of these instruments.

But that defence, being distinct from and independent of all others in the action, and entire in itself, any admission of the power of attorney or of the deed which might find its way into this defence, would not obviate the necessity of proving execution of the deeds when they are denied and put in issue by another defence. *Miller* v. *Chandler*, 59 California, 540; *Nudd* v. *Thompson*, 34 California, 39; *Troy & Rutland Railroad* v. *Kerr*, 17 Barb. 581. The averments of this separate defence are not admissions of anything stated in the complaint; they are the averments of new matter. If, notwithstanding the authorities just above cited, they are to be taken

as admissions at all, then they are to be taken as an entirety. *Mutual Ins. Co.* v. *Newton*, 22 Wall. 32; *Insurance Co.* v. *Higginbotham*, 95 U. S. 380; *Craig* v. *Tappin*, 2 Sandf. Ch. 78.

III. The ninth assignment of error is to the court's finding that the power of attorney from Frazier to Grant was duly recorded. As the consideration of this assignment involves the same question which must be considered with regard to the eleventh assignment of error, which is to the finding of the court that the deed of Grant to Gale was duly recorded, we will consider them together. If defendant has not admitted the execution of these instruments and they are not *duly recorded*, then they were improperly admitted in evidence without proof of execution, and plaintiffs' whole case fails. Or if they were not duly recorded, and the instruments constituting defendant's chain of title were duly recorded, and defendant was a *bona fide* purchaser for value, then also plaintiffs' case fails.

The Dakota Code of Civil Procedure, sec. 493, provides that "every instrument in writing which is acknowledged or proved, and *duly* recorded, is admissible in evidence without further proof." Plaintiffs introduced in evidence, over defendant's objection, certificates of register of deeds on the back of the instruments, purporting to certify that they had been duly recorded. These were not admissible. No statute of this Territory, prior to the present revised codes (1877), requires registers of deeds to make any endorsement whatever on *instruments* recorded by them; therefore, the certificate not having been made in the *performance of a duty* enjoined by law upon the officer, is not evidence of the facts recited in it. *Board of Water Commissioners* v. *Lansing*, 45 N. Y. 19; *Puryear* v. *Beard*, 14 Alabama, 121.

Neither the instruments themselves nor the record of them disclose the certificate of magistracy and authenticity required at the time of their execution and attempted record by section 518 of the Civil Code of 1865–66; and the record does not show that the certificate of acknowledgment attached to either instrument was under the official seal of the officer whose name is subscribed to it. The record of a deed is not con-

structive notice of its existence or contents, unless all the prerequisites prescribed by law in respect to its registration are observed. *Pringle* v. *Dunn*, 37 Wisconsin, 449; *Buell* v. *Irwin*, 24 Michigan, 145.

It is the deed "*as spread upon the record*" which imports constructive notice, and subsequent purchasers are chargeable with notice *only* of what the *record* shows, and if a deed be properly executed, but defectively recorded, as to subsequent purchasers the *defective record is not notice and cannot be aided* by the production of the original instrument. *Girardin* v. *Lampe*, 58 Wisconsin, 267; *Taylor* v. *Harrison*, 47 Texas, 454; *Wood* v. *Cochrane*, 39 Vermont, 544; *Potter* v. *Dooley*, 55 Vermont, 512; *Frost* v. *Beekman*, 1 Johns. Ch. 288; *Beekman* v. *Frost*, 18 Johns. 544; *S. C.* 9 Am. Dec. 246; *Pringle* v. *Dunn*, 37 Wisconsin, 449; *Chamberlain* v. *Bell*, 7 California, 294; *S. C.* 68 Am. Dec. 260; *Terrell* v. *Andrew County*, 44 Missouri, 309; *Parret* v. *Shawbhut*, 5 Minnesota, 323; *S. C.* 80 Am. Dec. 424.

The certificate made by statute a prerequisite to recording was not attached either to Gale's deed or to the power of attorney. Hence there was no authority for the record of these instruments at the time they were spread upon the record. Nor was this defect cured by the curative act of January 6, 1873, inasmuch as it does not appear *of record* that the official seals of the notaries public who took the acknowledgments were impressed upon the instruments. From and after that date an acknowledgment certified by a notary *under his seal* entitled a deed to record without additional certificate, and a record showing a deed acknowledged before a notary and certified by him *under his official* seal was cured and made effective from that date though it lacked the additional certificate; but if the notary's seal was wanting from the instrument to be recorded in the one case, or from the record to be cured in the other, the additional certificate was as necessary after that act as before. Gale's deed and power of attorney became entitled to record at the time of the passage of this act. He might at that time have caused these instruments to be duly recorded, but he did not. The former attempted

record, however, was not cured, because it did not appear of record that the instruments bore notarial seals, and the same act which cured certain defective certificates limited that cure to cases when the notary's seal appeared.

IV. The 13th and 14th assignments of error go to the question whether Louisa E. Gale was in actual, open, continuous and uninterrupted possession of the property at the time of the making of the deeds of Frazier to Hodgdon and of Hodgdon to Smith.

There was no such possession by Gale as would have been constructive notice to Hodgdon. To affect him with such notice, there must have been an actual, open, notorious and exclusive *occupancy* of the land.

This occupancy and possession must have been unequivocal, not ambiguous or liable to be misunderstood. *McMechan* v. *Griffing*, 3 Pick. 149; *S. C.* 15 Am. Dec. 198; *Brown* v. *Volkening*, 64 N. Y. 76; *Page* v. *Waring*, 76 N. Y. 463; *Thompson* v. *Burhous*, 79 N. Y. 93.

The possession must be such as to arrest attention before it will even put purchasers on inquiry. *Loughridge* v. *Bowland*, 52 Mississippi, 546.

V. The 15th assignment is to the finding that Louisa E. Gale was an innocent purchaser for a valuable consideration. We submit that this finding is not sustained by the evidence.

VI. The last assignment of error is to the finding that Helen G. McKennan and her grantor, Melvin Grigsby, were innocent purchasers without notice of the pending of this action.

Mrs. McKennan was not a purchaser in good faith. She had notice of facts sufficient to put a prudent person upon inquiry. When a person is put upon inquiry he must examine the records or question the grantor or third persons, and if he refrains he is chargeable with whatever he might have learned from such examination and inquiry. *Sergeant* v. *Ingersoll*, 7 Penn. St. 340. Inadequacy of price puts one upon inquiry. Wade on Notice, 13. The relationship of the parties is also to be considered. 2 Pom. Eq. Jur. 29; Wade on Notice, 14.

Mr. C. K. Davis for appellees. *Mr. Melvin Grigsby* was with him on the brief.

Opinion of the Court.

MR. JUSTICE BROWN delivered the opinion of the court.

This case was tried in the court of original jurisdiction without a jury, upon the amended and supplemental answers of Byron M. Smith and the replies thereto of Gale, Grigsby and McKennan, and was appealed to the Supreme Court of the Territory, and thence to this court, upon exceptions of the defendant Smith to certain proceedings upon said trial.

(1) Error is alleged in the refusal of the court to permit Margaret Frazier to file an intervening complaint, and be joined with defendant Smith as a necessary party to the complete determination of the controversy. By sec. 89 of the Dakota Code of Civil Procedure, respecting parties to civil actions, "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when *a complete determination of the controversy* cannot be had without the presence of other parties, the court must cause them to be brought in." And by sec. 90: "Any person may, before the trial, intervene in any action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed *by leave of the court*," *etc.* This complaint set forth, in substance, the issue of the patent to the complainant in 1864, and the conveyance to Hodgdon May 29, 1872, and averred that Hodgdon had no knowledge or notice that any person was then in possession of the lands; denied that any person was in possession thereof; further alleged the execution of the deed from Hodgdon to Smith of June 20, 1874; and averred that plaintiff had falsely claimed that he or his wife were in possession of the land, and that by reason thereof the deeds

to Hodgdon and Smith were void. And "this complainant avers that, in case said Smith does not now have the legal title to said land, the legal title to the whole thereof is now in this complainant, and that she now holds the same for the use and benefit of said Smith, his heirs and assigns, and for no one else."

These provisions of the Dakota code above cited are found in the codes of several of the States, and appear to have been originally adopted from Louisiana, wherein it is held by the Supreme Court, interpreting a similar section, that the interest which entitles a party to intervene must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties. *Gasquet* v. *Johnson*, 1 La. 425, 431. In *Horn* v. *Volcano Water Co.*, 13 California, 62, 69, the Supreme Court of California had occasion to construe a similar provision of the code of that State, and held, speaking through Mr. Justice Field, now a member of this court, that "the interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. . . . To authorize an intervention, therefore, the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation." In *Lewis* v. *Harwood*, 28 Minnesota, 428, the cases from Louisiana and California were cited with approval. In that case the persons who sought to intervene held attachments upon some property subsequent to those of the plaintiff in the suit. The suit was upon certain promissory notes executed to the plaintiff by the defendants, and the intervenors claimed that the notes were without consideration and fraudulent; that the plaintiff's attachments were fraudulent; and that the suit and attachments were in execution of a collusive scheme between the plaintiff and defendant to defraud the intervenors, who were *bona fide* creditors of the defendant. It was held that the complaint of the intervenors did not dis-

close such an interest in the subject matter of the suit as to entitle them to intervene, and that the plaintiff's motion to dismiss the same should be granted. The decision was put upon the ground that when the judgment was entered against the defendants, the whole subject matter of the suit was disposed of; and that the writ of attachment was a part of the remedy and had nothing to do with the cause of action. "If property is seized by virtue of the writ to which another has a better right, the vindication of such right involves another and independent judicial inquiry."

The intervention must be not only to protect the direct and immediate interest of the intervenor in a suit, but she is bound to make that interest appear by proper allegations in her petition. *Coffey* v. *Greenfield*, 62 California, 602. In this case the petition not only fails to show any title in the intervenor, and no beneficial claim to or lien upon the property in suit, but it shows conclusively that such interest as she once had has been conveyed away to Hodgdon, and that the only actual interest she could possibly have in the result of the litigation was the contingency of being held upon the covenants of warranty in the deed to Hodgdon. This, however, is not the direct and immediate interest which, under the construction given to this statute by the courts of Louisiana, California and Minnesota — a construction which we do not hesitate to adopt — is necessary in order to entitle a person to intervene. Her liability to Smith would depend upon the scope of her covenants, and could properly be determined in a separate action. But it is needless to consider her claim further, since she has not appealed from the decision of the court denying her right to intervene, and the appeal of Smith brings up that question only so far as the ruling of the court was injurious to *his* interests.

Appellant Smith's argument in this connection is that, under section 681 of the Dakota Civil Code, "every grant of real property, other than one made by the Territory, or under a judicial sale, is void, if at the time of the delivery thereof such real property is in the actual possession of a person claiming under a title adverse to that of the grantor;" that, as the

Gales were in adverse possession of this land under a claim of title, when the deed to Hodgdon was delivered, such deed, under the provisions of this section, was void, and conveyed no title to Hodgdon, nor did Hodgdon's deed to himself, and hence that he did not stand in a position to resist the claim of Gale, and that his rights could only be determined in a suit to which Margaret Frazier was a party, since she was in a position to claim that the deed to Mrs. Gale was void by reason of her fraudulent connivance with Grant. For these reasons he claims that the title to these lands is, as against the Gales, still in Margaret Frazier, and that, if she succeeded in showing that her deed to the Gales was void by reason of fraud, her title would enure to his use and benefit, under the deed to Hodgdon and that from Hodgdon to himself. In this connection he calls the attention of the court to a number of cases holding that a deed of land held in adverse possession is good as against the grantor and his heirs, and against strangers, though void as against the party in possession; and that, it being void as against the latter, an action would lie against him in the name of the grantor, notwithstanding such deed, but not in the name of the grantee. A recovery therein, however, will enure to the benefit of the grantee. *Hamilton* v. *Wright*, 37 N. Y. 502; *Hasbrouck* v. *Bunce*, 62 N. Y. 475, 482; *Chamberlain* v. *Taylor*, 92 N. Y. 348; *Farnum* v. *Peterson*, 111 Mass. 148, 151; *McMahan* v. *Bowe*, 114 Mass. 140.

There is great plausibility in this position, and we are not disposed to hold that the court might not have permitted this complaint in intervention to be filed. But by section 90 of the code, above cited, such complaint must be filed *by leave of the court*, a limitation upon the right to intervene which presupposes a certain amount of discretion in the court. Such right ought to be claimed within a reasonable time, and may be properly refused in a case like the present one, where the action had been pending two years, and was about to be tried. *Hocker* v. *Kelley*, 14 California, 164.

There were other circumstances in this case which doubtless had their influence in determining the court not to permit this complaint to be filed. The Gales had been in adverse

possession of the land for nearly twelve years under a claim of title, and, according to the facts found by the court, had broken and cultivated about twenty acres. Hodgdon had received his deed eighteen months after the deed to Gale, and Smith had received his deed from Hodgdon in 1874, nearly eight years before this suit was begun by Gale to quiet his title. Although these parties were chargeable with notice of the fact that the Gales were in open and notorious possession of this land, yet, during all this time, they made no movement looking toward an assertion of their own title to it. While, under the cases from New York and Massachusetts above cited, they might not have been able to institute a suit in their own name against Gale, they might have instituted an action against him in the name of their grantor, Frazier, and a recovery thereunder would have enured to their benefit. Instead of that they lay by for eighteen months after the suit was begun, and then, upon the eve of the trial, after Smith had filed an original, an amended and a supplemental answer, he asked that Frazier be permitted to intervene and set up her title as against Gale. Under this state of facts the court might not unreasonably hold that the application came too late; and that if Smith desired to assert any rights in the name of Frazier he should take the initiative and file a bill in her name to annul the deed to Gale upon the ground of fraud.

(2) Several assignments of error relate to the ruling of the court admitting in evidence the power of attorney from Frazier to Grant, and the deed executed in pursuance of such power. These instruments were executed in Minnesota; were acknowledged before a notary public of Ramsey County in that State, who certified to the same under his official seal, and to this acknowledgment was appended a certificate of the Secretary of State of Minnesota, to the effect that the notary taking the acknowledgment had been duly appointed and qualified, etc.; that full faith and credit were due to his official acts; and that his signature was genuine, and the instrument executed and acknowledged in accordance with the laws of the State. Endorsed upon these instruments was the certificate of the register of deeds of Minnehaha County, Dakota,

that they had been filed for record in August, 1871. Objection was made to the admission of these conveyances upon the ground that, having been executed without the State, the certificate of the officer taking the acknowledgment ought to have been "accompanied by a certificate under the name and official seal of the clerk, register, recorder or prothonotary of the county in which such officer resides . . . specifying that such officer was at the time of taking the proof or acknowledgment duly authorized," etc., as required by section 528 of the Civil Code of 1865–66. Under this statute, the certificate of the secretary of State was insufficient and immaterial.

In January, 1873, after these instruments were executed, an act was passed by the legislature of Dakota providing "that the proof or acknowledgment of any deed, mortgage or other instrument may be made either within or without this Territory and within the United States, before any public officer *having an official seal*, including notaries public," etc. "Sec. 2. Whenever the proof or acknowledgment of any deed, mortgage or other instrument is certified by a public officer having an official seal, *under his hand and seal*, it shall be a sufficient authentication of such instrument to entitle it to record," etc. By sec. 5: "All *records* of instruments *heretofore* made in any of the counties of the Territory, the acknowledgment and certificate of which instruments are taken and certified by the officers, and in the manner herein provided, shall, from and after the taking effect of this act, have the same force and effect as though such certificates of acknowledgment were accompanied by the additional certificates heretofore required by law."

This curative act did away with the necessity of any certificate additional to that of the notary public, provided the latter certified to the acknowledgment under his hand and seal. The certificates upon the original instruments were attested by an official seal. It seems, however, that in putting these instruments upon record in the register's office in the county of Minnehaha, the scrivener omitted to make a similitude on the record of the notarial seal, or a scroll or symbol to indi-

cate it, and the defendant introduced the record books in which these instruments had been recorded to show this fact. It was claimed at this point that the deeds did not prove themselves, as they had not been duly recorded. By section 493 of the Dakota Code of Civil Procedure it is enacted that "every instrument in writing, which is acknowledged or proved, and *duly recorded*, is admissible in evidence without further proof."

These instruments, however, under the curative act of 1873, were perfect upon their face, the certificate of the secretary of State being mere surplusage, and that of the notary being accompanied by his official seal. Now, while section 5 of this act makes the *records* of instruments heretofore made evidence, notwithstanding the want of a certificate of authorization, it ought not to be held that the original instrument, which is perfect upon its face, is made inadmissible by the fact that the record of such instrument has omitted the official seal of the notary. The record of the instrument is really but secondary evidence, although by statute it is made primary; and it would be sticking in the bark to hold that the original instrument, having the official seal of the notary to the acknowledgment, should be defeated by the fact that in recording such instrument the seal was accidentally omitted. The record of such instrument might thereby become inadmissible as a substitute for the original, but so slight an omission as this in the record ought not to defeat the original instrument as evidence. *Starkweather* v. *Martin*, 28 Michigan, 472. It would be a singular perversion of the principles of natural justice if, with a perfect deed before the court and a record which lacked only a scrawl or other symbol of a seal, neither could be admitted in evidence by reason of the fact that they did not exactly correspond, or, to speak more accurately, were not exactly identical, especially when the record could be amended on the spot by adding the representation of a seal. The court should not permit such a plain defeat of justice as this would be, by an obstinate adherence to a statutory requirement.

But, if there were any doubts regarding the admissibility of these documents, we think they are resolved by the allegations

of the amended answer of Smith, wherein, after denying in general terms that Frazier by her warranty deed, or in any other way, sold or conveyed to Gale the land in question, he proceeds to allege that Grant on December 9, 1868, offered to take her scrip and locate the same upon such of the public lands as he might select, if she would execute to him a power authorizing him to convey the same to whomsoever he should elect; that she assented to this, and thereupon he presented her a power of attorney in writing, bearing the above date, which he had himself drawn up, representing to her that he would only use it to sell the lands located by the scrip; that thereupon she executed the same; and that subsequently the Gales, knowing all these facts, fraudulently procured Grant on the 12th day of October, 1870, to execute and deliver to Louisa E. Gale a deed of the lands in question; and that Frazier never received any consideration for the same. Taking all these allegations together, they constitute a clear admission that a power of attorney and deed corresponding in description to those offered in evidence were executed upon the days these respectively bear date, but that the same were made use of for the fraudulent purpose of conveying other lands than those intended by Frazier when she executed the power of attorney. The allegations, however, were broad enough to admit the instruments without further proof of their execution or delivery, subject to any attack which the defendant might choose to make upon the manner in which they had been procured, and the use which had been made of them. It is true that when a general denial is pleaded in connection with a special defence of new matter, or two inconsistent defences are set up, the admissions in the one cannot be used to destroy the effect of the other. *Glenn* v. *Sumner*, 132 U. S. 152, 157. In this case, however, there are no inconsistent defences; the general denial itself is qualified by a denial of each and every allegation of the complaint "not expressly admitted;" the defence is, in reality, a single one, namely, that Frazier did not sell or convey to Gale the land in question, although she did execute a power of attorney, on its face authorizing Grant to convey according to its terms; and that he did in pursuance

of such power assume to execute and deliver to Mrs. Gale a deed of this property. The admission of the actual execution and delivery of these instruments, as they appear upon their face, is as clear and distinct as the denial of their legal effect. *Cook* v. *Barr*, 44 N. Y. 156; *Shafter* v. *Richards*, 14 California, 125; *Philadelphia &c. Railroad* v. *Howard*, 13 How. 307; *Hartwell* v. *Page*, 14 Wisconsin, 49; *Derby* v. *Gallup*, 5 Minnesota, 119; *Barnum* v. *Kennedy*, 21 Kansas, 181.

(3) The thirteenth and fourteenth assignments of error relate to the sufficiency and notoriety of Mrs. Gale's possession to charge Hodgdon and Smith with notice of her claim to the land, in case the record of her deed was not of itself sufficient notice.

In this connection the court below found as a fact that on or about the 15th day of June, 1871, the said Louisa E. Gale took actual possession of such real property; "that among other acts of possession and ownership she then caused said real property to be surveyed, and the boundaries thereof to be marked by mounds and stakes; she caused to be broken and cultivated a portion thereof along the north side, consisting of about ten acres; that subsequently, during the year 1874, she caused to be broken and cultivated about ten acres more of said land, and that, continuously from and after the spring of 1871 to the time of her decease and devise to this plaintiff, Artemas Gale, she continued to openly use, occupy and possess said real property, and that such possession and occupation were actual, open, continuous and uninterrupted, and that such occupation and possession of said premises have been continuous by her devisee, said Artemas Gale, and his grantees, the said Helen G. McKennan and the said Melvin Grigsby," etc. This finding of possession is, under the case of *Mining Co.* v. *Taylor*, 100 U. S. 37, the finding of an ultimate fact and has the same legal effect as the finding of a jury in a special verdict, and the sufficiency of the evidence to support the finding cannot be considered upon this appeal. *Idaho &c. Land Co.* v. *Bradbury*, 132 U. S. 509, 514.

While their actual occupancy and cultivation of the property did not apparently extend to the entire tract, we think it

was sufficient, under the case of *Ellicott* v. *Pearl*, 10 Pet. 412, to give the Gales a constructive possession of the whole tract, the remainder not being in the adverse possession of anybody. In that case it was held that where there has been an entry on land under color of title by deed, the possession is deemed to extend to the bounds of that deed, although the actual settlement and improvements are on a small parcel only of the tract. In such case, where there is no adverse possession, the law construes the entry to be coextensive with the grant to the party, upon the ground that it is his clear intention to assert such possession. So also *Ewing* v. *Burnet*, 11 Pet. 41, 52; *Brobst* v. *Brock*, 10 Wall. 519, 532; *Hunnicutt* v. *Peyton*, 102 U. S. 333.

We think there is nothing in section 46 of the Dakota Code of Civil Procedure which, fairly construed, conflicts with this view. Certainly, if there were any doubt in this matter, the finding of possession by the court below would be sufficient to turn the scale in the plaintiff's favor.

(4) There is also an assignment of error to the finding that Helen G. McKennan and her grantee Grigsby were innocent purchasers without notice of the pendency of the action. The defendant Smith, by his supplemental answer, alleged that they were not purchasers in good faith, nor for a valuable consideration, and that they purchased with notice. To this McKennan and Grigsby made denial.

In order to charge purchasers of property with notice of the pendency of a suit, it is necessary, under the statutes of Dakota, to file a *lis pendens* with the register of deeds of the county in which the land is situated, containing the names of the parties, the object of the action, and a description of the property. There appears to have been no *lis pendens* filed in this case, and hence no constructive notice of the suit. As the court finds that Mrs. McKennan was an innocent purchaser of the property for a valuable consideration, and had no notice or knowledge of the pendency of the action, or of the ground upon which defendant Smith claimed an interest in the property, and as there is no evidence to contradict this, we know of no reason why she or Grigsby should not be held

to have acquired a good title to the property, although purchased during the pendency of this litigation, and although the title which Mrs. Gale acquired might have been impeachable for fraud. It is true that Mrs. McKennan was a sister of Gale, living in Rochester, N. Y., and bought the property while on a visit to her brother; but she swears that she paid $8000 for it, and there is nothing above the dignity of a suspicion to contradict her.

Several other errors in the action of the court below are set up in the assignment, but they are either immaterial or have been already disposed of in the assignments passed upon.

The judgment of the court below will, therefore, be

Affirmed, and the mandate will issue to the Supreme Court of South Dakota.

TORRENCE *v.* SHEDD.

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

No. 244. Argued March 25, 1892. — Decided April 11, 1892.

A suit in a state court for partition of land cannot be removed into the Circuit Court of the United States under the act of March 3, 1875, c. 137, § 2, by reason of a controversy between the plaintiff and a citizen of another State, intervening and claiming whatever may be set off to the plaintiff.

When, on appeal from a decree of the Circuit Court of the United States upon the merits, it appears that the case had been wrongfully removed from a state court on petition of the appellant, the decree should be reversed for want of jurisdiction, and the case remanded to the Circuit Court, with directions to remand it to the state court, and with costs against him in this court and in the Circuit Court.

This was a bill in equity, filed August 29, 1881, in the superior court of Cook County in the State of Illinois, by Joseph T. Torrence against Susan M. Shedd, John B. Brown and ninety others, for partition of a tract of land in that county, to an undivided third of which the plaintiff claimed title under a deed from Edward Sorin. Brown and twenty

others were not served with process. Most of the other defendants appeared and answered, denying the plaintiff's title, and claiming title in themselves to the whole in separate shares.

A decree of the superior court dismissing the bill was reversed, on appeal, by the Supreme Court of Illinois, and the case remanded to the superior court for further proceedings. 112 Illinois, 466.

Afterwards, on May 5, 1885, Sorin was allowed, against the plaintiff's objection, to intervene and to file an answer and cross bill, admitting his deed to the plaintiff; but alleging that it was only in trust for Sorin, and that the plaintiff, in violation of the trust, had refused to reconvey the land to Sorin, and had agreed to convey it to Brown; and claiming an equitable title in whatever should be set off to the plaintiff. The plaintiff and Brown demurred to the cross bill; and others of the defendants answered that bill, alleging that they were strangers to the controversy between the plaintiff and Sorin, and denying the title of both.

On May 18, 1885, the plaintiff and Brown filed a petition, under the act of March 3, 1875, c. 137, § 2, for the removal of the case into the Circuit Court of the United States, alleging that by reason of Sorin's intervention and appearance, answer and cross bill, a separate controversy was presented between citizens of different States, which could be fully determined as between them in that court, and in which the matter in dispute exceeded $500 in value; and that at the time of filing the petition for removal, and for five years before, the petitioners were citizens of Illinois, and Sorin was a citizen of Indiana, and none of the other defendants were citizens of Indiana, or had any interest in this controversy.

The case was thereupon removed into the Circuit Court of the United States, which sustained the demurrer to Sorin's cross bill, and dismissed that bill, and referred the case to a master, who filed his report on July 3, 1886.

On December 2, 1886, the plaintiff filed a stipulation between himself and Brown and Sorin, which was as follows: "It is hereby stipulated between Joseph T. Torrence, complainant, and John B. Brown, one of the defendants, and

Edward Sorin, also a defendant in the above-entitled cause, that said Edward Sorin is entitled to a lien to the extent of four hundred dollars per acre upon each and every acre of land which said complainant Torrence may recover in the above-entitled cause; and in any decree which may be entered therein the court may recognize and declare and make all necessary orders to enforce such lien. And the said defendant, Edward Sorin, withdraws all allegations contained in his answer in said cause filed, and all claim that the conveyance made by said Sorin to said Torrence, in said answer mentioned, was executed to convey the said title to said Torrence to be held by him in trust for said Sorin, and not as an absolute conveyance of said land; and, further, he withdraws and renounces any and all claims against and upon said land, other than for a lien to secure the purchase money of four hundred dollars per acre for the amount of land which may be recovered by said Torrence."

On the same day, the plaintiff filed a motion to remand the cause to the state court, on the ground that "by reason of said stipulation there no longer exists in the said cause any controversy, separable or otherwise, as between the said complainant and said Edward Sorin, cross complainant therein and defendant to the said original bill, and that by reason thereof this court can no longer have any jurisdiction of said cause."

The Circuit Court denied the motion to remand, and, after a hearing on pleadings and proofs, entered a final decree dismissing the bill. The plaintiff appealed to this court.

Mr. Charles M. Osborn for appellant.

Mr. Frederic Ullmann and *Mr. William Ritchie* for appellees.

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

The first question to be considered is whether the Circuit Court of the United States rightly exercised jurisdiction to hear and decide this case.

This question depends upon the act of March 3, 1875, c. 137, which was in force at the time of the removal into that court, and of the refusal to remand to the state court.

By section 2 of that act, as heretofore construed by this court, whenever, in any suit of a civil nature in a state court, where the matter in dispute exceeds the sum or value of $500, "there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them," any one of those interested in that controversy may remove the whole case into the Circuit Court of the United States. 18 Stat. 470, 471; *Barney* v. *Latham*, 103 U. S. 205; *Brooks* v. *Clark*, 119 U. S. 502.

But in order to justify such removal, on the ground of a separate controversy between citizens of different States, there must, by the very terms of the statute, be a controversy "which can be fully determined as between them;" and by the settled construction of this section, the whole subject matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. *Hyde* v. *Ruble*, 104 U. S. 407; *Corbin* v. *Van Brunt*, 105 U. S. 576; *Fraser* v. *Jennison*, 106 U. S. 191; *Winchester* v. *Loud*, 108 U. S. 130; *Shainwald* v. *Lewis*, 108 U. S. 158; *Ayres* v. *Wiswall*, 112 U. S. 187; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280; *Graves* v. *Corbin*, 132 U. S. 571; *Brown* v. *Trousdale*, 138 U. S. 389.

As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any one of the defendants, "Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter of the controversy, and that is for all the

purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Louisville & Nashville Railroad* v. *Ide*, 114 U. S. 52, 56; *Pirie* v. *Tvedt*, 115 U. S. 41, 43; *Sloane* v. *Anderson*, 117 U. S. 275; *Little* v. *Giles*, 118 U. S. 596, 601, 602; *Thorn Wire Hedge Co.* v. *Fuller*, 122 U. S. 535.

In *Shainwald* v. *Lewis*, above cited, which was a suit brought by one partner for a settlement of the partnership affairs, a judgment creditor of the defendant and a receiver appointed in a suit upon the judgment were admitted as defendants; and it was held that there was no separable controversy between them and the plaintiff which would entitle them to remove the case, the court saying: "The suit was brought to close up the affairs of an alleged partnership. The main dispute is about the existence of the partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case now which can be separated from that about the partnership, and fully determined by itself." 108 U. S. 161.

Accordingly, in a suit by a judgment creditor to have the property of his debtor sold and applied to the payment of his debt, after satisfying prior incumbrances thereon, the holders of which are made defendants, it has more than once been decided that there is no such separate controversy between the plaintiff and the holder of such an incumbrance, as will justify a removal; and this for the following reasons: There is but a single cause of action, the equitable execution of a judgment against the property of the judgment debtor, and this cause of action is not divisible. The judgment sought against the incumbrancer is incidental to the main purpose of the suit, and the fact that this incident relates to him alone does not separate this part of the controversy from the rest of the action. What the plaintiff wants is not partial relief, settling his rights in the property as against this defendant alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the

parties shall require. The answer of this defendant shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case. *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280; *Graves* v. *Corbin*, 132 U. S. 571, 588.

The present suit was a bill for partition of lands in Illinois, the principal object of which was to assign to all the tenants in common their shares in severalty. By the law of Illinois, indeed, the court might, in the suit for partition, determine all questions of conflicting or controverted titles, to the whole land or to any share thereof. But the determination of such questions of title was incidental to the main object of the suit, and in order to do complete justice between all the parties, and avoid further litigation. Illinois Rev. Stat. (ed. 1880) c. 106, §§ 1, 39; *Henrichsen* v. *Hodgen*, 67 Illinois, 179; *Labadie* v. *Hewitt*, 85 Illinois, 341; *Gage* v. *Lightburn*, 93 Illinois, 248.

The object of the suit was not merely the establishment of the title of the plaintiff in an undivided share of the land; but it was the partition of the whole land, and the conversion of his undivided share into an entire estate in a proportional part, as well as the establishment of his title against all the defendants. The controversy between the plaintiff and Brown and Sorin related only to the title claimed by the plaintiff in an undivided share; Sorin's whole claim was of an equitable estate in whatever should be set off to the plaintiff; and the other defendants denied that either the plaintiff or Brown or Sorin had any title whatever. Neither of the three, therefore, could recover judgment setting off to him any share in the land, without establishing a title, not only as between themselves, but also as against all the other defendants. The inevitable result is that the controversy of the plaintiff and Brown with Sorin was merely incidental to the main object of the suit, could not be determined as between them without the presence of the other defendants, and did not constitute such a separate controversy as would justify a removal into the Circuit Court of the United States.

Syllabus.

If the controversy between the plaintiff and Brown on the one side and Sorin on the other had been such as to justify a removal, there can be no doubt that after that controversy had been settled, as shown by the stipulation of the parties to it, the suit no longer really involved a dispute or controversy properly within the jurisdiction of the Circuit Court, and should therefore have been remanded to the state court, under section 5 of the act of March 3, 1875, c. 137. 18 Stat. 472; *Robinson* v. *Anderson*, 121 U. S. 522; *Texas Transportation Co.* v. *Seeligson*, 122 U. S. 519; *Graves* v. *Corbin*, 132 U. S. 571, 590.

But it is unnecessary to dwell upon that view of the case, because, for the reasons above stated, the original removal on the petition of the appellant was wrongful; and therefore the judgment must be reversed for want of jurisdiction, with costs against the appellant, and the case remanded to the Circuit Court with directions to render a judgment against him for costs in that court, and to remand the case to the state court. *Mansfield &c. Railway* v. *Swan*, 111 U. S. 379; *Graves* v. *Corbin*, above cited.

Judgment reversed accordingly.

SHARON v. TUCKER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 216. Argued March 15, 16, 1892. — Decided April 11, 1892.

Adverse possession of real estate in the District of Columbia, for the period designated by the Statute of Limitations in force there, confers upon the occupant a complete title upon which he can stand as fully as if he had always held the undisputed title of record.

A possession, to be adverse, must be open, visible, continuous and exclusive, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants.

A person who has acquired title by adverse possession may maintain a bill

Statement of the Case.

in equity against those who, but for such acquisition, would have been the owners, for the purpose of having his title judicially ascertained and declared, and to enjoin the defendants from asserting title to the same premises from former ownership that has been lost.

Such a bill is not a bill of peace, nor is it strictly a bill *quia timet*. The ground of the jurisdiction is the obvious difficulty and embarrassment in asserting and protecting a title not evidenced by any record, but resting in the recollection of witnesses, and the warrant for its exercise is found in the ordinary jurisdiction of equity to perfect and complete the means by which the right, estate or interest of holders of real property, that is their title, may be proved or secured, or to remove obstacles to its enjoyment.

THE court stated the case as follows:

This was a suit in equity to establish, as matter of record, the title of the complainants to certain real property in the city of Washington, constituting a part of square number one hundred and fifty-one, and to enjoin the defendants from asserting title to the same premises as heirs of the former owner.

The facts which gave rise to it, briefly stated, are as follows: In 1828, Thomas Tudor Tucker died seized of the premises in controversy. He had, at one time, held the office of Treasurer of the United States, and resided in Washington, but at the time of his death he was a resident of South Carolina. The property did not pass under his will but descended to his heirs at law. It does not appear that after his death any of the heirs took possession of the property or assumed to exercise any control over it. In 1837 the square was sold for delinquent taxes, assessed by the city against "the heirs of Thomas T. Tucker," and was purchased by Joseph Abbott, then a resident of the city. The taxes amounted to $38.76, and the sum bid by the purchaser was $250. In 1840 a tax deed, in conformity with the sale, was made to Abbott, purporting to convey to him a complete title to the square. It is admitted that the deed was invalid for want of some of the essential preliminaries in assessing the property and in advertising it for sale. It does not appear, however, that the purchaser had any knowledge of this invalidity. Early in the following year, 1841, he took possession of the square and

enclosed it with a board fence and a ditch with a hedge planted on one side of it. It was a substantial enclosure, sufficient to turn stock and keep them away. He was a stable-keeper, and, in connection with this business, cultivated the ground and raised crops upon it in 1841. From the time he took possession until 1854 the square was enclosed, and each season it was cultivated. In 1854 he leased the square to one Becket for the period of ten years at a yearly rent of one hundred dollars. Becket took possession under his lease and kept the ground substantially enclosed, and he occupied and cultivated it from that time up to 1862. In the fall of that year soldiers of the United States, returning from the campaign in Virginia, were encamped upon the square, and, as it appears, they committed such depredations upon the fence, buildings and crops that the lessee was obliged to abandon its cultivation. Abbott died in April, 1861, and, by his will, devised the square to his widow. In August, 1863, she sold and conveyed it to one Perry, and he kept a man in charge of the same, who lived in a small building which Becket had built and occupied during his lease of the premises under Abbott. In 1868, Perry sold the entire square to Henry A. Willard for the consideration of seventeen thousand six hundred dollars. He divided the square into small lots for buildings for residences, and upon one side of the square, fronting on T street, erected twelve substantial dwelling-houses, which have been since occupied up to the commencement of this suit. In 1872, Willard sold and conveyed a portion of the square, the premises in controversy, to J. M. Latta, trustee, for a valuable consideration, and from him the title has passed by regular conveyances to the complainants herein. From 1840 to 1863 the square was chiefly valuable for agricultural purposes, but since then, and especially of late years, its only value has been for buildings as residences, and has been so regarded by its owners. From 1840 up to the present time the taxes upon the property have been paid by Abbott and his successors in interest. None of the heirs of Mr. Tucker, nor any one claiming under the heirs, has paid or offered to pay any taxes assessed on the property, nor, since that date,

up to the commencement of these suits, have any of the defendants therein or their predecessors in interest asserted any claim to the property or interest in it, or attempted in any way to interfere with its possession or control. Soon after the sale to Perry, in 1863, the tax deed was passed upon by eminent counsel in the District, the late Richard S. Coxe and James M. Carlisle, and the title by it was pronounced by them to be indisputable. It was only a short time before the institution of this suit that the invalidity of the tax deed as a source of title was ascertained. A desire to dispose of the property led the complainants to have an investigation made and an abstract of title obtained. It was then discovered that they could not obtain any abstract of title which purchasers would accept, in consequence of certain defects in the assessment of the taxes under which the sale was made and the deed to Abbott was executed. They were consequently embarrassed and defeated in their efforts to dispose of the property. To remove this embarrassment this suit was accordingly brought by the complainants to obtain a judicial determination of the validity of their title and an injunction against the defendants claiming under the previous owner.

There was no substantial disagreement between the parties as to the facts, but the defendants insisted and relied solely upon the ground that a court of equity could afford no relief to the complainants, because they were not at the commencement of the suit in actual possession of the premises.

The court below, at special term, sustained this view, and entered a decree dismissing the bill. At general term it affirmed that decree, and to review this last decree the case is brought here by appeal.

Mr. C. J. Hillyer and *Mr. J. H. Ralston* for appellants.

Mr. Eppa Hunton and *Mr. Henry Wise Garnett* for appellees.

It is respectfully submitted that the evidence in these cases does not show such open, notorious and continuous possession

of the land in controversy as is necessary to establish a title by adverse possession.

Even if it should be considered that the complainants have established a title to the property by adverse possession, yet they are not entitled to the relief prayed for in their bill. A party claiming title by adverse possession alone cannot maintain a bill against the original owners on the ground that their title is a cloud upon his own. *Frost* v. *Spitley*, 121 U. S. 552.

Those only who have a clear legal and equitable title to land connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. *Orton* v. *Smith*, 18 How. 263; *Croat* v. *Brown*, 11 Maryland, 158; *Marks* v. *Main*, 4 Mackey, 559, 567; *Herrington* v. *Williams*, 31 Texas, 448, 460; *Holland* v. *Challen*, 110 U. S. 15; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Gage* v. *Kaufman*, 133 U. S. 471.

The proof shows the plaintiffs are out of possession, and they admit they have no legal title under the tax deed. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Peirsoll* v. *Elliott*, 6 Pet. 95.

The court below in affirming the decree of the equity court followed its decision in *Marks* v. *Main*, 4 Mackey, 559. It is submitted that this decision of the District Court in *Marks* v. *Main* is clearly right, and when applied to the facts in these two cases the dismissal of these bills followed as a necessary consequence.

The counsel for complainants in their brief seek to distinguish these cases from *Marks* v. *Main* by the statement that "partial occupation, payment of taxes and constant exercise of dominion such as was usual with owners and adapted to the nature and condition of the premises during the twenty-three years following 1861 were sufficient to continue and preserve the adverse character of a possession previously commenced by actual enclosure." They refer to the following authorities to sustain this position: *Ellicott* v. *Pearl*, 10 Pet. 412; *Ewing* v. *Burnet*, 11 Pet. 41; *Fletcher* v. *Fuller*, 120 U. S. 534.

The evidence shows no act of possession of the property

involved in these two suits (unless the payment of taxes can be so construed) since 1861.

Ellicott v. *Pearl* was a writ of right and did not involve the question of chancery jurisdiction. It decides that, when a party takes possession under a deed containing metes and bounds and builds on a part or encloses a part, the possession is of the whole tract included in metes and bounds.

Ewing v. *Burnet was an action of ejectment*, and the doctrine held (never seriously controverted) that to constitute adverse possession there need not be a fence or building, but for this purpose that visible and notorious acts of ownership are exercised over the premises.

Fletcher v. *Fuller* was an action of ejectment. In this case the court decides under what circumstances a deed may be presumed to have been given.

These cases have no bearing on the question of chancery jurisdiction.

In the 4th paragraph of the brief the proposition is laid down that "the relation of defendants to the premises and to the complainants authorizes the latter to seek relief in equity."

What is this relation? The defendants hold the absolute record title to this property. The complainants claim under a tax title admitted to be invalid and which is in fact void. The complainants have never been in possession, except so far as payment of taxes may constitute possession. Authorities are abundant and harmonious that payment of taxes and speaking publicly of the claim is not sufficient evidence of claim of right. *Ewing* v. *Burnet*, 11 Pet. 41; *Keefe* v. *Bramhall*, 3 Mackey, 551.

In *Reed* v. *Field*, 15 Vermont, 672, it was held that a tax deed of fifty years and payment of taxes under color of tax deed was not sufficient to show even color of title without showing validity of deed. In these cases the deed is admitted to be invalid.

See also *Naglee* v. *Albright*, 4 Wharton, 291; *Chapman* v. *Templeton*, 53 Missouri, 463; Angell on Limitation, § 396.

The case of *Bunce* v. *Gallagher*, 5 Blatchford, 48, cited in the brief, does not apply to these cases, because the jurisdiction in

that case was placed upon fraud, the well established ground of equitable jurisdiction.

The case of *Allen* v. *Hanks*, 136 U. S. 300, was an injunction on part of a married woman to stop the sale of her land, held as separate property, under executions for her husband's debts. The jurisdiction was maintained on the ground that she *was in possession.*

The case of *Holland* v. *Challen*, 110 U. S. 15, cited by counsel for complainants in their brief, is direct authority for the position assumed by defendants in these causes.

The relief was given in that case, but the court expressly puts its decision on a statute of Nebraska (quoted in the opinion of Justice Field) which authorized persons *whether in possession or not* to file a bill in equity for the purpose of quieting title to real estate. Justice Field proceeds to give the law on the subject prior to and independent of this statute. To entitle parties to relief independent of this statute, he says, page 19: "To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential. He must have been in possession of the property, he must have been disturbed by repeated actions at law, and he must have established his right by successive judgments in his favor." These three particulars do not concur in these cases — in fact, neither one exists. The old and familiar doctrine of equity has not been changed by statute in this district, and under authority of *Holland* v. *Challen*, the courts of equity have no jurisdiction over these cases.

Complainants' counsel, in their brief, further assert that no authority can be found to support the decision of the court below. *Holland* v. *Challen* is authority from this court for the doctrine which guided the court below to its decision. Other authorities are numerous, and the following cited: *Clark* v. *Smith*, 13 Pet. 195.

This was a case from Kentucky, the legislature of which had passed a law authorizing any person who was in possession of land, having already title thereto to summon into a court of chancery any other person holding any claim of title whatsoever for the purpose of examining and determining the

question of title and to remove the cloud upon the title of complainant. This court held that under the ordinary faculty of a court of chancery this relief could not be administered, but it was competent for the legislature of Kentucky to declare what is a cloud on the title and to authorize a court of chancery to clear up any such cloud. The jurisdiction was maintained expressly on the Kentucky statute.

In *Starks* v. *Starrs*, 6 Wall. 409, Mr. Justice Field, in delivering the opinion of the court, which was based upon a statute of Oregon, says:

"This statute confers a jurisdiction beyond that ordinarily exercised by courts of equity to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts suits would not lie for that purpose unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant and the right of the plaintiff had been sustained by successive judgments in her favor."

In *Phelps* v. *Harris*, 101 U. S. 370, Mr. Justice Bradley, in delivering the opinion of the court, again affirms that the ordinary jurisdiction of courts of equity, not enlarged by statute, does not embrace cases of this kind. See also *United States* v. *Wilson*, 118 U. S. 86.

These authorities sustain the decision of the court below, and it is believed that no case can be found which lays down a doctrine in conflict with it.

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

The title of the complainants is founded upon the adverse possession of themselves and parties, through whom they derive their interests, under claim and color of title, for a period exceeding the statutory time which bars an action for the recovery of land within the District of Columbia. The statute of limitation to such cases in force in the District is that of 21 James I, ch. 16. That statute, passed "for quieting of men's estates and avoiding of suits," among other things

declared that no person or persons should at any time thereafter make any entry into any lands, tenements or hereditaments but within twenty years next after his or their right or title shall thereafter have first descended or accrued to the same, and that in default thereof such persons not entering, and their heirs, should be utterly excluded and debarred from such entry thereafter to be made, any former law or statute to the contrary notwithstanding.

Twenty years is, therefore, the period limited for entry upon any lands within this District after the claimant's title has accrued. After the lapse of that period there is no right of entry upon lands against the party in possession, and all actions to enforce any such alleged right are barred. Complete possession, the character of which is hereafter stated, of real property in the District for that period, with a claim of ownership, operates therefore to give the occupant title to the premises. No one else, with certain exceptions — as infants, married women, lunatics and persons imprisoned or beyond the seas, who may bring their action within ten years after the expiration of their disability — can call his title in question. He can stand on his adverse possession as fully as if he had always held the undisputed title of record.

The decisions of the courts have determined the character of the possession which will thus bar the right of the former owner to recover real property. It must be an open, visible, continuous and exclusive possession, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but adversely to all titles and all claimants. In the present cases the adverse possession of the grantors of the complainants sufficient to bar the right of previous owners, is abundantly established within the most strict definition of that term.

The objection of the defendants to the jurisdiction of a court of equity in this case arises from confounding it with a bill of peace and an ordinary bill *quia timet*, to neither of which class does it belong, nor is it governed by the same principles. Bills of peace are of two kinds: First, those

which are brought to establish a right claimed by the plaintiff, but controverted by numerous parties having distinct interests originating in a common source. A right of fishery asserted by one party and controverted by numerous riparian proprietors on the river, is an instance given by Story where such a bill will lie. In such cases a court of equity will interfere and bring all the claimants before it in one proceeding to avoid a multiplicity of suits. A separate action at law with a single claimant would determine nothing beyond the respective rights of the parties as against each other, and such a contest with each claimant might lead to interminable litigation. To put at rest the controversy and determine the extent of the rights of the claimants of distinct interests in a common subject the bill lies, which is thus essentially one for peace. Second: bills of peace of the other kind lie where the right of the plaintiff to real property has been unsuccessfully assailed in different actions, and is liable to further actions of the same character, and are brought to put an end to the controversy. "The equity of the plaintiff in such cases arose," as we said in *Holland* v. *Challen*, 110 U. S. 15, 19, "from the protracted litigation for the possession of the property which the action of ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further

litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. Adams on Equity, 202; Pomeroy's Equity Jurisprudence, § 248; *Stark* v. *Starrs*, 6 Wall. 402; *Curtis* v. *Sutter*, 15 Cal. 259; *Shepley* v. *Rangeley*, 2 Ware, 242; *Devonsher* v. *Newenham*, 2 Schoales & Lef. 199." It is only where bills of peace of this kind — more commonly designated as bills to remove a cloud on title and quiet the possession to real property — are brought, that proof of the complainant's actual possession is necessary to maintain the suit. *Frost* v. *Spitley*, 121 U. S. 552, 556.

There is no controversy such as here stated in the present case. The title of the complainants is not controverted by the defendants, nor is it assailed by any actions for the possession of the property, and this is not a suit to put an end to any litigation of the kind. It is a suit to establish the title of the complainants as matter of record, that is, by a judicial determination of its validity, and to enjoin the assertion by the defendants of a title to the same property from the former owners, which has been lost by the adverse possession of the parties through whom the complainants claim. The title by adverse possession, of course, rests on the recollection of witnesses, and, by a judicial determination of its validity against any claim under the former owners, record evidence will be substituted in its place. Embarrassments in the use of the property by the present owners will be thus removed. Actual possession of the property by the complainants is not essential to maintain a suit to obtain in this way record evidence of their title to which they can refer in their efforts to dispose of the property.

The difference between this case and an ordinary bill *quia timet* is equally marked. A bill *quia timet* is generally brought to prevent future litigation as to property by removing existing causes of controversy as to its title. There is no controversy here as to the title of the complainants. The adverse possession of the parties, through whom they claim, was complete, within the most exacting judicial definition of the term. It is now well settled that by adverse possession for the period

designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter can maintain ejectment for the possession against such former owner should he intrude upon the premises. In several of the States this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall, of itself, constitute a complete title. *Leffingwell* v. *Warren*, 2 Black, 599; *Campbell* v. *Holt*, 115 U. S. 620, 623.

"As a general doctrine," says Angell in his treatise on limitations, "it has too long been established to be now in the least degree controverted that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independently of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest; and upon this acquiescence is founded the presumption of the existence of some substantial reason, (though perhaps not known,) for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive force."

As the complainants have the legal right to the premises in controversy, and as no parties deriving title from the former owners can contest that title with them, there does not seem to be any just reason why the relief prayed should not be granted. Such relief is among the remedies often administered by a court of equity. It is a part of its ordinary jurisdiction to perfect and complete the means by which the right, estate or interest of parties, that is, their title, may be proved or secured, or to remove obstacles which hinder its enjoyment. (Pomeroy's Equity Jurisprudence, vol. 1, sec. 171.) The form of the remedy will vary according to the particular circumstances of each case. "It is absolutely impossible," says Pomeroy, in his treatise, "to enumerate all the special kinds of relief which may be granted, or to place any bounds to the

power of the courts in shaping the relief in accordance with the circumstances of particular cases. As the nature and incidents of proprietary rights and interests, and of the circumstances attending them, and of the relations arising from them, are practically unlimited, so are the kinds and forms of specific relief applicable to these circumstances and relations."

In *Blight* v. *Banks*, 6 T. B. Monroe, 192, 194, a bill was filed by the complainant to supply the want of certain records or conveyances, under which he claimed title, said to have been executed and lost. A patent had been issued by the Commonwealth of Virginia for a large amount of property, which, by various intermediate conveyances, had become vested in the complainant. These conveyances had not been recorded, and on that ground the complainant alleged that his title was in jeopardy from creditors and innocent purchasers; that with great difficulty any title could be established at law, because the conveyances could not be given in evidence without parol proof; and that some of the witnesses were dead, and some of the original conveyances were lost and could not be found. His prayer was that his title might be rendered complete as a recorded title by the decree of the chancellor. The first question made in the case by the defendant was as to the jurisdiction of the court. It was contended that such omissions in completing a defective title were generally the fault of the grantees, and that equity would not sustain a bill for that purpose. But the Court of Appeals of Kentucky replied that it could not doubt the propriety of the interference of the chancellor in such case. "Equity," said the court, "will frequently interfere to remove difficulties in land titles, where a party cannot proceed without difficulty at law; when the conveyances are lost, or in the possession of the opposite party; or where the parties are numerous, and the proof hard of access; and in many such cases it will lighten the burden, and settle many controversies, and bring them into a small scope. And where the title is purely legal, for such and similar causes to those we have enumerated, equity has carved out a branch of jurisdiction, and a class of bills termed in the books ejectment bills, in which not only the title is made clear,

but the possession decreed also. No reason is perceived by us why the present case is not within the spirit of these cases. The difficulties in an unrecorded title, especially if it is derived through a long chain of conveyances, are familiar to our courts in this country. The danger to which the title is exposed from two classes of persons, creditors and subsequent purchasers, is often great and the facilities afforded from a title which can be read in evidence without other proof than the authentication annexed, are felt by every one who has to bring his title into court for attack or defence, and the present case will furnish a good comment on the propriety of the interference of the chancellor." The court, therefore, decreed the relief prayed. On a petition for a rehearing it reviewed its former opinion, the main point of which was the jurisdiction of the court of equity over the bill, and said:

"It is true that bills to make legal titles which are valid against all the world, except two descriptions of persons, recorded titles, and thus to protect them from creditors and innocent purchasers, have not been frequent. But if such bills cannot be allowed under one state of conveyances, it must certainly be said that there is a defect of justice in our country. A court of common law can give no relief in such a case, and if equity cannot do it then is the case a hopeless one. If, however, the principles which govern courts of equity are examined it will be found that there are many circumstances in this case, independent of defective conveyances, which sustain the jurisdiction," pp. 220, 221. (See also *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 449.)

In *Hord* v. *Baugh*, 7 Humph. 576, 578, a bill was filed by the complainant asking the aid of a court of chancery to set up a deed of bargain and sale, which was lost or destroyed before registration, the bargainor having died without executing another. The chancellor below dismissed the bill upon the ground that the bargainor having once conveyed the land, had parted with all his interest therein, and that the court had no jurisdiction of such a case. But the Supreme Court of Tennessee thought the chancellor erred, saying: "The loss of the deed is a casualty seriously endangering the complain-

ant's title, as he can maintain no action of ejectment without it. He then certainly must have a right to ask the aid of a court of chancery in his case, either by having the legal title vested in him as against the bargainor and his representatives, or by having the deed set up and established as in all other cases of lost deeds. The complainant may have his decree for either or both of these remedies."

In *Montgomery* v. *Kerr*, 6 Coldwell, 199, the same court sustained a bill and established the complainant's title where a deed of the property had been lost. The decree was that the complainant was entitled, by virtue of and under his deed, to hold the premises in fee simple, and that the defendant had no right, title or interest therein.

In *Bohart* v. *Chamberlain*, 99 Missouri, 622, 631, the proof showed that a deed of trust which had been executed by defendant to the plaintiff had been subsequently lost without being recorded. The court on being satisfied of the correctness of the finding of the lower court to this effect, said: "No doubt is entertained that a court of equity would have jurisdiction to afford the relief prayed for in the petition. One of the most common interpositions of equity is in the case of lost deeds and instruments. A court of equity in case of the loss of an instrument which affects the title or affords a security will direct a reconveyance to be made: citing *Stokoe* v. *Robson*, 19 Ves. 385; 1 Story's Equity Jur. secs. 81, 84; *Lawrence* v. *Lawrence*, 42 N. H. 109; 1 Mad. Ch. 24; Fonblanque's Equity, ch. 1, sec. 3. And the court added that "under the authorities cited the lower court might have directed a reëxecution of the deed of trust; but, as its powers were flexible, it could accomplish the same object by a declaratory decree, establishing the existence of the deed in question. 2 Pomeroy's Eq. sec. 827; *Garrett* v. *Lynch*, 45 Alabama, 204; 1 Pomeroy's Eq. secs. 171, 429."

Many other authorities to the same purport might be cited. They are only illustrative of the remedies afforded by courts of equity to remove difficulties in the way of owners of property using and enjoying it fully, when, from causes beyond their control, such use and enjoyment are obstructed. The

form of relief will always be adapted to the obstacles to be removed. The flexibility of decrees of a court of equity will enable it to meet every emergency. Here the embarrassments to the complainants in the use and enjoyment of their property are obvious and insuperable except by relief through that court. No existing rights of the defendants will be impaired by granting what is prayed, and the rights of the complainants will be placed in a condition to be available. The same principle which leads a court of equity upon proper proof to establish by its decree the existence of a lost deed, and thus make it a matter of record, must justify it upon like proof to declare by its decree the validity of a title resting in the recollection of witnesses, and thus make the evidence of the title a matter of record. It is, therefore,

Ordered that the decree of the court below be reversed, and the cause remanded to that court with directions to enter a decree declaring the title of the complainants to the premises described in their complaint, by adverse possession of the parties through whom they claim, to be complete, and that the defendants be enjoined from asserting title to the said premises through their former owner. Each party to pay his own costs.

STELLWAGEN *v.* TUCKER. Appeal from the Supreme Court of the District of Columbia. No. 217. Argued March 15, 16, 1892. Decided April 11, 1892.

MR. JUSTICE FIELD. The facts of this case are similar to those in No. 216, just decided, and the same principles of law control its disposition. A similar decree of reversal with directions must be entered, the form of the decree to be adapted to the changed interest caused by the death of one of the parties pending the suit.

Ordered accordingly.

Mr. C. J. Hillyer and *Mr. J. H. Ralston* for appellants.

Mr. Eppa Hunton and *Mr. Henry Wise Garnett* for appellees.

BRENHAM *v.* GERMAN AMERICAN BANK. (No. 2.)

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

No. 120. Submitted and Decided May 2, 1892.

On a petition for a rehearing the court vacates the judgment ordered in this case, (*ante*, 189,) and reverses the judgment, and remands the cause for further proceedings not inconsistent with the opinion, *ante*, 174.

THIS was a petition for leave to file a petition for rehearing in the case reported, *ante*, page 173. Among the causes assigned were the following:

The decision visits with severity your petitioner, who, in perfect good faith, with prudence and care, invested the trust money of its depositors in what at the time of the transaction was universally regarded under the decisions of this court as a form of negotiable security of the safest and best character.

In saying this your petitioner does not mean to be understood as contending that a rehearing ought to be granted because it is a hardship to the defendant to lose the case. Your petitioner deems it a duty as trustee for its depositors to invite the attention of your honors to the fact that by no possible precaution could your petitioner have had warning not to make this investment; that the result is a peculiar one, inasmuch as a settled rule of law is reversed by a divided court, and innocent parties made to suffer. This fact being brought to the court's attention is of cumulative force to induce the court to grant a reargument.

One word as to the order made in this case.

The case is returned to the court below with directions to dismiss the suit and to enter a general judgment for the city of Brenham. Should the court be still of the opinion these bonds are invalid, and their vitality, if there is any, should be destroyed utterly, the consideration at the bottom of them still lives, and the city is liable for the money she raised, notwithstanding the bonds are dead. *Little Rock* v. *National*

Bank, 98 U. S. 308, and cases cited. The complaint in the suit had not the *common counts*, and was not broad enough to reach this point, and to recover the money received by the city.

Would not the order, if the decision upon the bonds is to stand, be more in accordance with justice, if it allowed the defendant in error to amend the complaint and sue for this money had and received? Amendments are purely within the discretion of the court in furtherance of justice. The order cuts off the right to apply in the court below to amend, and therefore it is asked here. It can scarcely be said it is just for the city to avoid her bonds and keep the money she has derived from them too. It would seem but just to modify the order, at all events, to this extent.

Mr. A. H. Garland and *Mr. H. J. May* for petitioner.

Per Curiam. It is ordered by the court that leave be granted to file a petition for rehearing herein, which being considered,

It is ordered by the court that the judgment entered in this court on the 28th day of March, 1892, be, and the same is hereby, vacated and set aside, and a judgment is now this day entered reversing the judgment of the Circuit Court of the United States for the Western District of Texas, and remanding said cause for further proceedings not inconsistent with the opinion of this court hereinbefore filed, and the petition for rehearing is

Denied.

COOSAW MINING COMPANY *v.* SOUTH CAROLINA.

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

No. 1448. Argued March 14, 15, 1892. — Decided April 4, 1892.

The statute of the State of South Carolina, passed March 28, 1876, (acts of 1875-6, p. 198,) is capable of being construed either, when taken by itself, as conferring upon the Coosaw Mining Company the exclusive right of

digging, mining and removing phosphate rocks for an unlimited period, so long as it should comply with the terms of the statute, or, when taken in connection with the act of March 1, 1870, 14 Gen. Stats. So. Car. 381, as conferring such a right only for "the full term of 21 years" named in the latter act; and as the interpretation should be adopted which is most favorable to the State, it is *Held*, that such exclusive right expired on the termination of the 21 years named in the act of 1870.

Only that which is granted in clear and explicit terms passes by a legislative grant of property, franchises or privileges in which the government or the public has an interest.

A court of equity has jurisdiction over a bill filed by a State to prevent illegal interference with its control of the digging, mining and removing phosphate rock and phosphate deposits in the bed of a navigable river within its territories.

THE court stated the case as follows:

This suit was brought by the appellees, March 23, 1891, in one of the courts of South Carolina, and, subsequently, on the petition of the appellant, the defendant below, was removed into the Circuit Court of the United States. 45 Fed. Rep. 804. Its object was to obtain a decree enjoining the Coosaw Mining Company, its servants, agents and employés, from claiming any right, title, interest or grant in or to the phosphate rock and phosphatic deposits in Coosaw River in that State; from digging, mining or removing such rock and deposits in the bed of that river; and from obstructing by suit or otherwise any agent or other person, acting by authority of the State Board of Phosphate Commissioners, from digging, mining and removing the same.

The appellant claimed, in its answer, to have a contract with the State by which it acquired an exclusive right for an indefinite period to occupy, dig, mine and remove such rocks and deposits in Coosaw River, and that, in violation of the Constitution of the United States, the obligation of its contract had been impaired by a subsequent act of the legislature.

The decree below, rendered September 16, 1891 — the Chief Justice and Judge Simonton concurring — proceeded upon the ground that the appellant did have, at one time, and for a limited period, a contract with the State, of the kind mentioned, but that such period had expired before the insti-

tution of this suit. *South Carolina* v. *Coosaw Mining Co.*, 47 Fed. Rep. 225. The relief asked was, therefore, granted.

The principal question to be considered depends upon certain legislative enactments relating to phosphate rocks and phosphatic deposits in the navigable waters of South Carolina. It is necessary to ascertain the scope of those enactments.

By an act which took effect March 1, 1870, the State granted to certain named persons and their associates the right, for the full term of twenty-one years, to dig, mine and remove phosphate rocks and phosphatic deposits from the beds of the navigable streams and waters within the jurisdiction of the State of South Carolina. This grant was made upon the express condition that the grantees pay the State one dollar per ton for every ton of phosphate rock and phosphatic deposits, so dug, mined and removed, and five hundred dollars as a license fee before commencing business under the grant.

The act further provided that before commencing operations under authority of the act, the grantees, and their associates, should file, or cause to be filed, in the office of the state auditor, a bond in the sum of fifty thousand dollars, conditioned that they would make true and faithful returns to that officer, annually, on or before the first day of October, and oftener, if required, of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them, and punctually pay to the state treasurer, annually, on the first day of October, one dollar per ton for every ton of rocks and deposits by them so dug, mined and removed, during the year preceding; such bond to be renewed annually, and approved by the attorney general. 14 Gen. Stats. S. C. p. 381.

The Coosaw Mining Company, it is admitted, succeeded to all the rights given by this act.

On March 28, 1876, another act was passed entitled "An act to settle definitely the period at which returns shall be made of phosphate rocks and phosphatic deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina and the royalty shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein." This act is the foundation of

the appellant's claim of an exclusive right, for an indefinite period, to dig, mine and remove phosphate rocks and phosphatic deposits in that part of Coosaw River which it occupies. Its provisions are, therefore, given in full as follows:

"Whereas differences have arisen between the Coosaw Mining Company and the comptroller general as to the times and manner in which the said company shall make their returns of the number of tons of phosphate rocks and phosphatic deposits dug, mined and removed by them from the beds of the navigable streams and waters of the State, and also as to the times when the royalty thereon shall be paid; therefore, for remedy thereof,

"SECTION 1. *Be it enacted*," etc., "That the said Coosaw Mining Company and all other companies and persons engaged in digging, mining and removing phosphate rocks and phosphatic deposits from the bed of the navigable streams and waters of the State shall be, and they are hereby, required, from and after the passage of this act, to make to the comptroller general true and faithful returns of the number of tons of phosphate rocks and phosphatic deposits they have so dug, mined and removed and shipped, or otherwise sent to market, at the end of every month; and shall punctually pay to the state treasurer the royalty already provided by law to be paid thereon at the end of every quarter or three months, the first quarter to commence to run on the first day of March in the present year.

"SEC. 2. That the said Coosaw Mining Company, and all other companies and persons mentioned in the preceding section, shall, within ten days from the passage of this act, enter into new bonds, in the penal sums and in the manner and form already provided by law, but conforming, in their conditions, to the terms set forth in the said preceding section, and also pay to the state treasurer the royalty accrued up to the said first day of March of the present year. And whereas it is desirable that the said Coosaw Mining Company, and all other companies and persons engaged in digging, mining and removing phosphate rock and phosphatic deposits as aforesaid, shall accept the terms of this act, in order to make it binding on

them respectively; and whereas the said Coosaw Mining Company have already occupied so much of the Coosaw River as lies opposite to and south of Chisolm's Island, whereon their works are located, and to the marshes thereof, and have expended large sums of money in establishing themselves thereon with sufficient mining plant for mining and preparing for market the phosphate rocks and phosphatic deposits of that part of the said Coosaw River; therefore, in consideration thereof,

"SEC. 3. That the said Coosaw Mining Company, on accepting the terms of this act within ten days from the passage thereof, shall thenceforth have the exclusive right to occupy and dig, mine and remove phosphate rock and phosphatic deposits from all that part of the said Coosaw River above mentioned so long as and no longer than they shall make true and faithful returns of the number of tons thereof they shall so dig, mine and remove, and ship or otherwise send to market, and punctually pay the royalty thereon, as provided in the first section of this act.

"SEC. 4. That all other companies and persons engaged in digging, mining and removing phosphate rocks and phosphatic deposits as aforesaid under gift and grant of the State of South Carolina or by authority thereof, who shall accept the terms of this act within ten days from the passage thereof, shall thenceforth have the same exclusive right where they have respectively occupied and established themselves for mining purposes, and on the same limitations as are prescribed in the preceding section of this act.

"SEC. 5. That all acts and parts of acts inconsistent with this act be, and they are hereby, for the purpose of this act, repealed." Acts of South Carolina, 1875–6, p. 198.

The appellant accepted the terms of that act, and thereby, it is contended, acquired the exclusive right in question. The act which is supposed to have impaired the obligation of its contract with the State was that of December 23, 1890, creating a Board of Phosphate Commissioners, consisting of the governor, attorney general, comptroller general and two individual citizens, charged with the exclusive control and protec-

tion of the rights and interest of the State in the phosphate rocks and phosphatic deposits in its navigable streams and marshes. The latter act empowered the Board — if, upon full investigation and examination, they deemed it advisable — to require all persons or corporations digging or mining phosphate rock or phosphatic deposits in the navigable streams and marshes of the State, to pay a royalty not to exceed two dollars per ton for all or any phosphate rock so dug or mined, six months' notice being given before raising the royalty above one dollar.

It also authorized and directed the Board after the first day of March, 1891, "to take possession and control of the Coosaw River phosphate territory heretofore occupied by the Coosaw Mining Company," and to issue licenses to mine and remove therefrom phosphate rock and phosphatic deposits, in like manner as was then provided by law for the other navigable streams and waters of the State; each ton of phosphate rock or phosphatic deposits, the product of such mining operations, to be deemed the property of the State until the said parties paid thereon a royalty, to be fixed by the Board, at not exceeding two dollars per ton on each ton of phosphate rock or phosphatic deposits dug, mined and removed, and six months' notice to be given before raising the royalty above one dollar.

It was further provided that if any person interfered with, obstructed, molested or attempted to interfere with, obstruct or molest, the Board, or any one by them authorized or licensed, in the peaceable possession and occupation for mining purposes of any of the marshes and navigable streams and waters of the State, it was authorized, in the name and on behalf of the State of South Carolina, "to take such measures or proceedings as they may be advised are proper to enjoin and terminate any such molestation, interference or obstruction, and place the State, through its agents, the said Board of Phosphate Commissioners, or any one under them authorized, in absolute and practicable possession and occupation of the same."

Other sections of the act made it an offence, punishable by fine or imprisonment or both, at the discretion of the court,

for any person or persons to wilfully interfere with, molest or obstruct, or attempt to interfere with, molest or obstruct, the State or the Board of Phosphate Commissioners, or any one by them authorized or licensed, in the peaceable possession and occupation of any of the said marshes and navigable streams and waters of the State, "including the said Coosaw River phosphate territory," or who shall dig or mine, or attempt to dig or mine, any of the phosphate rock or phosphatic deposits of this State, without a license so to do by the Board. The Board were authorized and empowered to inquire into and protect the interests of the State in and to any phosphate deposits or mines, whether in the navigable waters of the State or in land marshes or other territory owned or claimed by other parties, and in the proceeds of any such mines, and to take such action for or in behalf of the State in regard thereto as they might find necessary or deem proper. All acts or parts of acts inconsistent with the provisions of the act of 1890 were repealed. Acts of South Carolina, 1890, p. 691.

Mr. Augustine T. Smythe and *Mr. Edward McCrady* for appellant.

I. The courts have no jurisdiction in equity over this case. The essential prerequisite to the jurisdiction of courts of equity is that there is no adequate remedy at law — otherwise the constitutional right to a trial by jury would be invaded and taken away. This fundamental rule has prevailed in England from the inception of equity jurisprudence, and always in the United States. *Hipp* v. *Babin*, 19 How. 271; *Parker* v. *Winnipiseogee M'f'g Co.*, 2 Black, 545; *Grandchute* v. *Winegar*, 15 Wall. 355, 373; *Lewis* v. *Cocks*, 23 Wall. 466; *Ellis* v. *Davis*, 109 U. S. 485; *Killian* v. *Ebbinghaus*, 110 U. S. 568; *Fussell* v. *Gregg*, 113 U. S. 550; *United States* v. *Wilson*, 118 U. S. 86; *Whitehead* v. *Shattuck*, 138 U. S. 146; *Scott* v. *Neely*, 140 U. S. 106; *Smyth* v. *N. O. Canal and Banking Co.*, 141 U. S. 656.

In the case before the court the complainant does not allege even that it is in possession of the property, or that such pos-

session has been disturbed, or that its right has been established. The fact is that the defendants have done nothing except submit the question at issue to the courts for settlement, and this is now pending, and complainant's right has never been established otherwise than in this proceeding. There is, therefore, no equity here.

Equity will not permit its remedies to be used to turn out one who is in possession. *People* v. *Simonson*, 10 Michigan, 335; nor to prevent one, who is in possession and claiming title, from reaping the legitimate fruits of possession. *Bell* v. *Chadwick*, 71 No. Car. 329; *Baldwin* v. *York*, 71 No. Car. 463. Even if neither party be in possession, the court will not interfere by injunction. *St. Louis, Kansas City &c. Railway* v. *Dewees*, 23 Fed. Rep. 691.

The appellees have a plain, adequate and complete remedy at law: (1) By action to determine and establish the disputed right to the property: (2) Under the general statutes of South Carolina: and it follows that the court below was without jurisdiction.

II. The statute of 1876, properly construed, conferred upon the Coosaw Mining Company, after its acceptance of it, an exclusive right for an indefinite period, so long as it complied with the terms of the act.

The general rule for construing statutes is, that where the meaning of the statute is plain, it is the duty of courts to construe it according to its obvious terms. In such a case there is no necessity for construction. *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Reese*, 92 U. S. 214, 244; *United States* v. *Central Pacific Railroad*, 118 U. S. 235, 240; *Louisville Gas Company* v. *Citizens' Gas Company*, 115 U. S. 683, 697.

Statutes, which are binding on States as contracts, are to be construed as contracts between natural persons, and no advantage is to be given to the State in such construction. Bac. Abr. Tit. Prerogative; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 344, 469; *Richards* v. *Dagget*, 4 Mass. 534, 537; *McMullen* v. *McCullough*, 2 Bailey (S. C.) 346; *Morton* v. *Comptroller General*, 4 So. Car. 430, 448; *Curran* v. *Arkan-*

sas, 15 How. 304, 308; *Murray* v. *Charleston*, 96 U. S. 442, 445; *Tennessee* v. *Whitworth*, 117 U. S. 139.

The Coosaw Mining Company was not a corporation. It was a mining partnership, and, as such, not subject to legislative control. It was already in possession and actual occupation of the entire Coosaw River, and further had the right to mine in all the other waters of the State in which it was mining, which contract the State could not alter without its consent. Differences had arisen between the company and the State as to the construction of that contract which it was desirable to settle.

The act in its title sets out, that it is to "settle" — not prescribe — that is, to amicably arrange existing differences, — and to define the period of making returns, and also to fix the terms on which it might be accepted.

The act then lays down the terms desired on the part of the State as new terms, to be suggested to the company, and as constituting a new contract between the company and the State.

The act admits that unless consented to by the company, the terms of the act would not be binding upon them, and that it was desirable on the part of the State that the company should accept, and make themselves liable to the terms of the act.

And the act further admits that the company had already expended large sums of money in the purchase of sufficient plant, to mine certain portions of the Coosaw River.

It proposed, therefore, to the company, that, in consideration of their accepting the terms stated in the act, and in consideration of the expenditures which they had made, and for the further condition, implied in the act, that they were to continue to maintain such plant and continue such operations theretofore conducted, it should have the exclusive right to mine in that part of the Coosaw River only so long as, and no longer than, they should make true and faithful returns and pay the royalty prescribed in the act.

Assuming this to be a contract between individuals, would any question be made as to the right of the company to con-

tinue their mining operations, so long as they fulfilled the conditions contained in the contract.

The legislature itself recognizes the fact that a consideration has been asked and paid; that both sides have given and taken, and that the terms and conditions of the contract as expressed in the act are therefore binding on both sides.

Is not this, therefore, a contract, based upon valuable consideration, paid to the State by the company? If so, then, under the cases cited, it must be construed as though the contract was made between the individuals.

And if it is, then it must be construed in favor of the company, for the only ground upon which the court below rested its decision in favor of the State, was that it must be construed liberally to the State, and all doubts resolved in her favor.

In construing the act of 1876 no reference can be made to the act of 1870. The established principle is, that while recourse may be had to the doctrine of *in pari materia* to resolve a doubt, it can never be called into action to create a doubt; that when the wording of a statute is clear in itself and leads to no absurd conclusions, it is not allowable to go elsewhere in search of conjectural constructions; and that when there is a difference between an older and a junior statute, especially where the latter has a repealing clause, it is presumed that the legislature intended that there should be a difference, and the prior act must be considered repealed.

The rule of construction "*in pari materia*" is resorted to for the purpose of ascertaining the meaning of a statute, when explanation is necessary, either because of seeming conflict in its own provisions, or incompleteness of detail in its subject matter, or a doubt as to the sense in which uncertain words or phrases are used. In such cases, and to preserve harmony and consistency, the rule is resorted to.

But the rule carries the limitation, that where the statute is itself plain, the rule cannot be resorted to, nor can its clear language be controlled by the supposed policy of a former one. Therefore where the words of a statute, as in this case,

are not doubtful, these words are the best guide to legislative intention, and if they differ from former acts, it must be held that the legislature in using them, intended that there should be a difference. The act of 1876, set out expressly to make alterations and changes in the existing law, and in order that there might be no question or doubt as to this purpose, adds the clause repealing all acts or parts of acts inconsistent with the provisions of this act. It seems impossible to add by way of argument anything which would make more clear, or more plain, the declaration in the act sustaining the claim of the defendants to the continuing right to mine, in Coosaw River, than the words: "That upon accepting the terms of the act they should have exclusive right to occupy and mine in said river, 'so long as and no longer than' they should make true and faithful returns of the number of tons, and punctually pay the royalty thereon." Upon this the defendants stand. They have made true and faithful returns, and have punctually paid the royalty on the rock mined, as provided in the section of the act, and having so done, they claim the right to continue to dig, and to mine in said territory, "*so long as and no longer than*" said conditions shall be fulfilled. *Market Co.* v. *Hoffman*, 101 U. S. 112, 115.

Mr. Henry A. M. Smith and *Mr. George S. Mower* for appellees.

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

The Coosaw Mining Company undoubtedly acquired by the act of 1870, and upon the conditions therein prescribed, the right, for the full term of twenty-one years, to dig, mine and remove phosphate rocks and phosphatic deposits in the navigable waters of South Carolina. But the right thus acquired was not made an exclusive one. The State was at liberty, so far as that act was concerned, to grant similar rights to other associations, corporations or persons. This is not disputed.

Did the appellant, by its acceptance of the act of 1876, ac-

quire an exclusive right with respect to that part of Coosaw River then occupied for the purposes of its business? If this question be answered in the affirmative — as, in view of the express language of the act, it must be — the State is, nevertheless, entitled to a decree, upon the issue as to the impairment of the obligation of the alleged contract, unless it be held that that act gave an exclusive right to the Coosaw Mining Company, *in perpetuity*, conditioned only upon its meeting the terms prescribed by the third section, namely, that it would make true and faithful returns of the number of tons of phosphate rock and phosphatic deposits dug, mined, removed, shipped or otherwise sent to market, and pay the royalty as provided for in the first section of that act. It cannot be denied that the third section, if it be construed literally and without reference to other sections or to the act of 1870, will bear this interpretation. But the act of 1876, if interpreted, as it ought to be, in connection with that of 1870, will, to say the least, bear equally another construction, namely, that the right granted by the original act for the term of twenty-one years, was made, by the act of 1876, exclusive, *only during the remainder of that term*, as to the part of Coosaw River occupied by the appellant's works, "so long as and no longer than" it made the returns and paid the royalty prescribed by the latter act. Under the latter construction, the right of the appellant, by the acts of 1870 and 1876, to dig, mine and remove phosphate rocks and phosphatic deposits in the navigable waters of the State, ceased altogether after the expiration of twenty-one years from March 1, 1870. If the act of 1876 materially altered that of 1870, in respect to the times and manner of making returns, or the royalty to be paid, the Coosaw Mining Company received in consideration therefor what it did not previously have, that is, an exclusive right, for a limited period, in the particular part of Coosaw River which it occupied when the act of 1876 was passed.

If the act of 1876 is fairly susceptible of either of the constructions we have indicated, as we think it is, the interpretation must be adopted which is most favorable to the State.

The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. *Rice* v. *Railroad Co.*, 1 Black, 358, 380; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 666; *Hannibal &c. Railroad* v. *Missouri River Packet Co.*, 125 U. S. 260, 271; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 49; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 80; *State* v. *Pacific Guano Co.*, 22 So. Car. 50, 83, 86. Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. *Holyoke Co.* v. *Lyman*, 15 Wall. 500; *The Binghamton Bridge*, 3 Wall. 51, 75. This principle, it has been said, "is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell* v. *Grandjean*, 111 U. S. 412, 438.

The wisdom of the rule adverted to is well illustrated by the present case. Neither the title nor the preamble of the act of 1876 suggests the purpose on the part of the Coosaw Mining Company, or of any other association or corporation, to obtain, or the intention of the legislature to grant, a new right to dig, mine and remove phosphate rocks and phosphatic deposits, much less a grant of such a right in perpetuity. The title discloses only a purpose to settle definitely the time for making returns of rocks and deposits, so dug, mined and removed, to establish the royalty to be paid, and to fix the terms on which the act might be accepted by the parties named in it. If the parties, so named, had in mind to acquire a grant for an indefinite period, their purpose was concealed under the general words in the title, "and also to fix the terms on which this act may be accepted by the parties named therein." Turning to the preamble, which has been said to be a key to open the understanding of a statute, we find that the occasion of the passage of the act of 1876 was a dispute between the Coosaw Mining Company and the comptroller general of the

State, not as to the right of that company to dig, mine and remove phosphate rock and phosphatic deposits, but only as to the times and manner in which it should make its returns, and pay the prescribed royalty; and that "for remedy thereof" the act was passed. Neither the title nor the preamble indicates a purpose to enlarge the right given by the act of 1870 for twenty-one years to one for an indefinite period. While express provisions in the body of an act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions. In *United States* v. *Fisher*, 2 Cranch, 358, 386, Chief Justice Marshall said: "Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." *United States* v. *Palmer*, 3 Wheat. 610, 631. This rule is especially applicable in States whose constitutions, like that of South Carolina, provide that "every act or resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title." *Meyer* v. *Car Co.*, 102 U. S. 1, 11, 12. So, in *Beard* v. *Rowan*, 9 Pet. 301, 317: "The preamble in the act may be resorted to, to aid in the construction of the enacting clause, when any ambiguity exists." The ambiguity here referred to is not simply that arising from the meaning of particular words, but such as may arise, in respect to the general scope and meaning of a statute, when all of its provisions are examined. Interpreting the act of 1876, with such aid as may be properly derived from its title and preamble, we are of opinion that the legislature did not intend to grant the appellant an exclusive right, for an indefinite period, but only an exclusive right, during the balance of the term of twenty-one years fixed by the act of 1870; and not even an exclusive right for that period except upon the performance of the conditions set

forth in the act of 1876 as to making returns and paying the prescribed royalty.

It results that the contention of the State must be sustained, whether we apply the rule requiring public grants to be favorably construed for the government, or whether, independently of that rule, we give effect to the intention of the legislature as disclosed by the words of the statute.

It is contended by the appellant that this case is not one of which a court of the United States, sitting in equity, could take cognizance. In meeting this question, the counsel for the State have placed some reliance upon the provisions in the act of 1890 authorizing the Board of Phosphate Commissioners, in the name and on behalf of the State, "to take such measures or proceedings, as they may be advised are proper, to enjoin and terminate" any molestation, interference or obstruction of the peaceable possession and occupation for mining purposes of the navigable streams of the State, either by the Board, or by any one licensed or authorized by it, and to take such action, for and in behalf of the State, as they deem proper for the protection of its interests. This statute is not important here except as showing the authority of that board to bring suits, in the name of or for the State, to protect its interests. The suit may have been cognizable in the state court, sitting in equity. But if it was not one of which the Circuit Court of the United States, sitting in equity, could properly take cognizance, (*Payne* v. *Hook*, 7 Wall. 425, 430; *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98,) the pleadings, upon removal of the case from the state court, should have been reformed so as to make it a case to be tried at law. It is necessary, therefore, to inquire whether, according to the principles of equity, as recognized in the courts of the United States, the State can obtain relief by a suit in equity.

The grounds of equity jurisdiction in such cases as the one before us are, substantially, those upon which courts of equity interfere in cases of waste, public nuisance and purpresture.

The case of *United States* v. *Gear*, 3 How. 120, 121, 133, bears upon this question. The United States, claiming to be the owner of certain lands upon which there was a lead mine,

brought an action of trespass *quare clausum fregit* against the party in possession. They also brought a suit in equity for an injunction to stay waste. This court held, in the equity case, that digging ore from lead mines upon the public lands was such waste as entitled the United States to a writ of injunction to restrain it.

In *City of Georgetown* v. *Alexandria Canal Company*, 12 Pet. 91, 98, it was said to be "now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the attorney general . . . upon the principle that equity can give more adequate and complete relief than can be obtained at law."

In *Attorney General* v. *Richards*, 2 Anstr. 603, an information in equity in the name of the Attorney General, to restrain the erection of wharves and docks in a certain harbor, and to abate those erected, was sustained, the court observing that "where the King claims and proves a right to the soil, where a purpresture and nuisance have been committed, he may have a decree to abate it." In *Attorney General* v. *Forbes*, 2 My. & Cr. 123, 133, it was said by the Lord Chancellor that "in informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the Attorney General to take it on himself to sue as representing the public." In reply to the suggestion that an application to the High Court of Chancery to prevent a nuisance to a public road was never heard of before, he said: "Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbors; and the Court of Exchequer, as well as this court, acting as a court of equity, has a well established jurisdiction, upon a proceeding by way of information, to prevent nuisances to public harbors and public roads; and, in short, generally to prevent public nuisances." So in *Gibson* v. *Smith*, 2 Atk. 182, in which an injunction was sought to restrain a defendant from opening mines upon an estate held by him under a deed containing reservations against waste, and the opening of mines, and in which it was objected that the matter was not for the determination of a court of equity, Lord Chancellor Hard-

wicke said: "The plaintiff may certainly come into this court to restrain the defendant from opening the mines, etc., even if he has only threatened to do it; nor is it necessary the plaintiff should have waited till the waste is actually committed, where the intention appears, and the defendant, even by his answer, insists on his right to do it."

An instructive case upon this subject is *Attorney General* v. *Jamaica Pond Aqueduct*, 133 Mass. 361, 363, 364. That was an information in equity, in the name of the Attorney General, to restrain a corporation from doing certain illegal acts the necessary effects of which would be not only to impair the rights of the public in the use of one of the great ponds of Massachusetts for purposes of fishing and boating, but to create a nuisance by lowering the pond and exposing upon its shores slime, mud and offensive vegetation detrimental to the public health. It was held, upon the authority of numerous cases, American and English, that where the nuisance is a public one, an information by the Attorney General was the appropriate remedy. After observing that the preventive force of a decree in equity, restraining the illegal acts before any mischief was done, would give a more efficacious and complete remedy than an indictment, or proceedings under a statute for the abatement of the nuisance, the court said: "There is another ground upon which, in our opinion, this information can be maintained, though perhaps it belongs to the same general head of equity jurisdiction of restraining and preventing nuisances. The great ponds of the Commonwealth belong to the public, and, like the tidewaters and navigable streams, are under the control and care of the Commonwealth. The rights of fishing, boating, bathing and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. . . . If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the Attorney General to restrain and prevent the mischief." So, in Eden on Injunctions: "The usual, and perhaps the more correct, mode of proceeding in

equity in cases of public nuisance is by information at the suit of the Attorney General," p. 267. Mr. Justice Story said that an information in equity at the suit of the Attorney General would lie in cases of purpresture and public nuisance, the jurisdiction of courts of equity being sustained because of "their ability to give a more complete and perfect remedy than is attainable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigations." Eq. Jur. §§ 922, 923, 924; *The People* v. *Vanderbilt*, 26 N. Y. 287, 293; *District Attorney* v. *Lynn & Boston Railroad Co.*, 16 Gray, 242, 245; Kerr on Injunctions, 262, 263; 1 Joyce on Injunctions, 120.

These principles are applicable to the present case. The remedy at law for the protection of the State in respect to the phosphate rocks and phosphatic deposits in the beds of its navigable waters is not so efficacious or complete as a perpetual injunction against interference with its rights by digging, mining and removing such rocks and deposits without its consent. The Coosaw Mining Company, unless restrained, will not only appropriate to its use property held in trust for the public, but will prevent the proper administration of that trust, for an indefinite period, by obstructing others, acting under lawful authority, from enjoying rights in respect to that property derived from the State. These conflicting claims cannot be so effectively or conclusively settled by proceedings at law, as by a comprehensive decree covering all the matters in controversy. Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of Coosaw River. Such security was properly given by the decree below.

Decree affirmed.

UNITED STATES *ex rel.* JONES *v.* COUNTY COURT OF MACON COUNTY.

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

No. 257. Argued March 29, 30, 1892. — Decided April 11, 1892.

The judgment below is affirmed upon the authority of *United States* v. *County of Macon*, 99 U. S. 582.

THIS was a petition for a writ of mandamus to compel the levy of a tax to satisfy a judgment recovered against Macon County upon bonds issued by the county. The bonds were of the same issue which was before this court in *United States* v. *County of Macon*, 99 U. S. 582, and the remedy sought for was the same remedy which was prayed for in that suit. The court below dismissed the writ upon the authority of that case.

Mr. George A. Sanders for plaintiff in error. *Mr. T. K. Skinker* and *Mr. Joseph Shippen* filed briefs for same.

Mr. Ben Eli Guthrie for defendant in error.

THE CHIEF JUSTICE: The judgment is affirmed upon the authority of *United States* v. *County of Macon*, 99 U. S. 582.

KELLAM *v.* KEITH.

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

No. 269. Argued and submitted April 1, 1892. — Decided April 11, 1892.

On the authority of *Stevens* v. *Nichols*, 130 U. S. 230, *Jackson* v. *Allen*, 132 U. S. 27, and *La Confiance Compagnie* v. *Hall*, 137 U. S. 61, the decree below in this case is reversed and the cause remanded with directions to

remand it to the Circuit Court, it not appearing in the record that the diverse citizenship which was the cause of removal from the State Court existed at the commencement of the action.

In such case the appellees are entitled to their costs in this court and in the Circuit Court.

THIS was a suit for the cancellation of a deed, and to compel a reconveyance of land, commenced in the District Court of Shawnee County in the State of Kansas. The complaint did not disclose the citizenship of the parties. The defendants, before pleading, presented a petition as follows for the removal of the cause to the Circuit Court of the United States:

"And now come the said defendants Edward P. Kellam and Cyrus K. Holliday, by Rossington, Smith & Dallas and John T. Morton, their attorneys, and represent and aver that in this action the matter in dispute exceeds, exclusive of costs and interest, the sum and value of five hundred dollars, and in fact exceeds, exclusive of interest and costs, the sum of two thousand dollars, and that in this suit there is a controversy which is wholly between citizens of different States, the said plaintiff being a citizen of the State of Nebraska and both of said defendants being citizens of the State of Kansas, and that the controversy can be fully determined as between them, the said plaintiff and said defendants.

"These defendants therefore ask that this cause be removed into the Circuit Court of the United States in and for the District of Kansas to be held in said district; that this court accept this petition and the bond herewith filed and proceed no further in this action, and that this cause be removed into said Circuit Court."

After removal the Circuit Court ordered the pleadings to be recast, whereupon the plaintiff filed a bill in equity in which the parties were described as follows: "Morrell C. Keith, of North Platte, Nebraska, and a citizen of the State of Nebraska, brings this his bill against Edward P. Kellam, of Topeka, and a citizen of the State of Kansas, and Cyrus K. Holliday, of Topeka, and a citizen of the State of Kansas; and thereupon your orator complains and says, etc."

The case then proceeded to judgment, and, a decree for the plaintiff being rendered, the defendants appealed to this court.

Mr. W. H. Rossington, *Mr. Charles Blood Smith*, *Mr. Everett J. Dallas* and *Mr. John T. Morton*, for appellants, submitted on their brief.

Mr. E. S. Quinton for appellee. *Mr. A. B. Quinton* and *Mr. A. Bergen* were with him on the brief.

THE CHIEF JUSTICE: Upon the authority of *Stevens* v. *Nichols*, 130 U. S. 230; *Jackson* v. *Allen*, 132 U. S. 27; *La Confiance Compagnie* v. *Hall*, 137 U. S. 61, and other cases, the decree in this case must be reversed, at the costs of appellants in this court and in the Circuit Court, and the cause remanded to the Circuit Court with directions to remand it to the state court.

NATIONAL EXCHANGE BANK OF BALTIMORE *v.* PETERS.

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

No. 1369. Submitted April 4, 1892. — Decided April 18, 1892.

The Judiciary Act of March 3, 1891, 26 Stat. c. 517, pp. 826, 827, having provided that no appeals shall be taken from circuit courts to this court except as provided in that act and having repealed all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error contained in that act, and the joint resolution of March 3, 1891, 26 Stat. 1115, having provided that nothing contained in that act shall be held to impair the jurisdiction of this court in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to this court before July 1, 1891, it is *Held*, that an appeal to this court from a judgment entered in a circuit court November 18, 1890, appealable before July 1, 1891, could not be taken after July 1, 1891.

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

Mr. Robert M. Hughes and *Mr. Alfred P. Thorn* for the motion.

Mr. William F. Frick, *Mr. John Neely* and *Mr. G. M. Dillard* opposing.

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

This was a bill brought against the receiver of an insolvent national bank and its late directors, in the Circuit Court of the United States for the Eastern District of Virginia, to which a demurrer was sustained and the bill dismissed, November 18, 1890. On August 20, 1891, an appeal was allowed to this court, bond for costs given and approved, and citation issued and served. The case comes before us on a motion to dismiss.

Section 4 of the Judiciary Act of March 3, 1891, (26 Stat. c. 517, pp. 826, 827,) provides: "That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error [or] otherwise, from said District Courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same." By section 14 of that act, section six hundred and ninety-one of the Revised Statutes, and section three of the act of February 16, 1875, c. 77, (18 Stat. 316,) and "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act," were repealed.

By section 5 it is provided that appeals or writs of error

may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the court is in issue; from the final sentences and decrees in prize causes; in cases of conviction of a capital or otherwise infamous crime; in any case involving the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. But nothing in the act was to affect the jurisdiction of this court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

In view of the general rule that if a law conferring jurisdiction is repealed, without any reservation as to pending cases, all such cases fall with the law, *Railroad Company* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141, a joint resolution was passed on March 3, 1891, providing "that nothing in said act shall be held or construed in anywise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it;" and it was added, "or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one." 26 Stat. 1115, 1116.

The case in hand did not come within either of the six classes of cases specified in section five; and as the appeal was not taken until after July 1, 1891, it must be dismissed. *Wauton* v. *DeWolf*, 142 U. S. 138. When the decree was entered, appellants had two years thereafter in which to take an appeal to this court. The act and resolution of March 3, 1891, declared that the right must be exercised prior to July 1, 1891. Although the appellate powers of this court are given by the Constitution, they are nevertheless limited and regulated by acts of Congress. *Durousseau* v. *United States*, 6 Cranch, 307,

314. In that case it was held that the affirmative description of jurisdiction implied a "negative on the exercise of such appellate power as is not comprehended within it." And here the appellate jurisdiction is not left to inference, but is taken away in terms after the date mentioned.

Appeal dismissed.

BROWN *v.* MASSACHUSETTS.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 839. Argued April 6, 1892. — Decided April 18, 1892.

A defendant indicted in a state court for forging discharges for money payable by a municipal corporation, with intent to defraud it, pleaded in abatement to the array of the grand jury, and to the array of the traverse jury, that all the jurors were inhabitants of the municipality, but did not at that stage of the case claim in any form a right or immunity under the Constitution of the United States. After conviction, the defendant, by motion in arrest of judgment, and by exception to the jurisdiction of the court, objected that the proceedings were in violation of the Fourteenth Amendment to the Constitution of the United States for the same reason, and also because the selectmen of the municipality who prepared the jury list, and took the principal part in drawing the jurors, were at the same time actively promoting this prosecution. The highest court of the State held the objections taken before verdict to be unfounded, and those after verdict to be taken too late. *Held*, that this court had no jurisdiction to review the judgment on writ of error.

An indictment was found by the grand jury in the superior court for the county of Nantucket and Commonwealth of Massachusetts, on c. 204, §§ 1, 2, of the Public Statutes of Massachusetts, containing twenty-four counts, each of which was for forging, or for uttering, a discharge for money payable by the county of Nantucket, or by the town of Nantucket, with intent to defraud the county, or the town.

The town and county of Nantucket are geographically identical; the selectmen of the town have the powers of county commissioners; the town may raise money to pay the expenses of the county; and the treasurer of the town is county treasurer. Mass. Pub. Stat. c. 22, § 29; c. 23, § 4.

Statement of the Case.

By the general jury act of Massachusetts, in every town, lists of persons qualified to serve as jurors are prepared annually by the selectmen, and are subject to revision by the town in town meeting; and all grand jurors and traverse jurors are drawn by lot from the names on such lists. Mass. Pub. Stat. c. 170, §§ 6–22. That act contains the following provisions:

"Sec. 38. In indictments and penal actions for the recovery of a sum of money or other thing forfeited, it shall not be a cause of challenge to a juror that he is liable to pay taxes in a county, city or town, which may be benefited by such recovery.

"Sec. 39. If a party knows of an objection to a juror in season to propose it before the trial, and omits to do so, he shall not afterwards be allowed to make the same objection, unless by leave of the court.

"Sec. 40. No irregularity in a writ of *venire facias*, or in the drawing, summoning, returning or empanelling of jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict."

The act of Massachusetts concerning proceedings before judgment in criminal cases contains this provision: "No motion in arrest of judgment shall be allowed for a cause existing before verdict, unless the same affects the jurisdiction of the court." Mass. Pub. Stat. c. 214, § 27.

The defendant pleaded in abatement to the array of the grand jury, and afterwards to the array of the traverse jury, upon several grounds, the only one of which relied on at the argument in this court was "because the names of said jurors were not drawn from the list of jurors in the manner provided by law." The district attorney filed a replication to each plea; and at the hearing thereon it appeared that the crimes charged in the indictment were committed, if at all, in regard to vouchers presented to the town and county treasurer, with intent to defraud the town or the county; and the defendant requested the court to rule, "that by reason of bias and interest a grand jury" (or "a jury") "drawn and made up from

the inhabitants of the town and county of Nantucket was not competent to make a presentment" (or "to try an indictment") "for crimes against the county or town treasury." The court declined so to rule, and overruled each plea; the defendant duly excepted to each ruling, and pleaded not guilty, and was thereupon tried and convicted; and his exceptions were overruled by the Supreme Judicial Court of Massachusetts, for reasons stated in the rescript sent down to the superior court as follows: "The jurors were not disqualified to serve by reason of interest as inhabitants of the town or county of Nantucket." The opinion then delivered is annexed to the transcript of the record, as required by Rule 8 of this court, and is reported in 147 Mass. 585.

The defendant then filed in the Superior Court a motion in arrest of judgment, renewing the same objections to the grand and traverse juries; and further alleging that before the finding of the indictment the selectmen had been directed, by a vote of the town at a meeting duly warned, to prosecute the defendant for the offences described in the indictment, and pursuant to that vote employed counsel, and a majority of them, with the approval of the others, made a complaint against the defendant for those offences before a trial justice, who was himself an inhabitant and voter of the town, and had taken part in the town meeting and in its vote, and had there declared that the defendant was guilty, and, before the making of the complaint, had advised and counselled with the selectmen as to the furtherance of the prosecution; that the selectmen prosecuted the complaint, and obtained an order from the justice requiring the defendant to recognize for his appearance before the superior court, and prepared evidence and sought out witnesses to be produced against him before the grand jury; that while engaged in furthering such prosecution the selectmen prepared the list from which were drawn the grand and traverse jurors who found and tried the indictment against the defendant; that at the town meeting at which such jurors were drawn no one was present, except the selectmen, and the constable who had served the warrant for the meeting; that of the twenty-three grand jurors who found

the indictment, all but five had been present at the town meeting first mentioned, and had joined in the vote there adopted; and that for these reasons "the presentment and the trial and conviction of the defendant were in conflict with the provisions of the constitution of this Commonwealth, and in particular of the provisions of the twelfth article of the Declaration of Rights, and were in conflict with the Constitution of the United States of America, and in particular with the provisions of the Fourteenth Amendment thereto."

Together with the motion in arrest of judgment, the defendant filed an "exception to the jurisdiction," containing like allegations, and further alleging that by reason of the facts alleged the grand jurors had no authority to present, and the traverse jurors had no authority to try, the indictment against the defendant, and the court had no jurisdiction to receive the presentment or to try the matter thereof.

At the hearing of this motion and exception the district attorney admitted the facts alleged therein. The court overruled the motion and the exception. The defendant appealed from the order overruling the motion in arrest of judgment, and alleged exceptions to the overruling of his exception to the jurisdiction.

The Supreme Judicial Court of Massachusetts affirmed the order, and overruled the exceptions, for reasons stated in its rescript to the superior court as follows: "A motion in arrest of judgment can be sustained only for errors apparent on the record. The record discloses no error. The exception to the jurisdiction is nothing but a motion in arrest of judgment under another name."

In the opinion then delivered, and duly transmitted to this court with the record, the Supreme Judicial Court, after deciding the case upon the grounds stated in this rescript, added: "It is difficult to see how any question deserving serious consideration arises under the Constitution, either of this State or of the United States. In view of the authorities cited in the former opinion in this case, it can hardly be argued that a legislature has no constitutional authority to provide that mere inhabitancy in a town or county shall not disqualify one

from sitting as a juror to try a prisoner for unlawfully obtaining money from the treasury of the town or county. It has not been contended before us, that our statute forbidding the allowance of a motion in arrest of judgment for a cause existing before verdict, unless it affects the jurisdiction of the court, is unconstitutional, nor that the rule which confines proceedings upon motions in arrest to matters apparent upon the record is in conflict either with the Federal or State Constitution. We are of opinion that there was no error in the proceedings in the superior court." 150 Mass. 334, 343.

The superior court thereupon sentenced the defendant to imprisonment in the house of correction for two years and six months, and he sued out this writ of error.

By the practice in Massachusetts, where a bill of exceptions or an appeal in matter of law is taken to the Supreme Judicial Court, the question of law only goes to that court, and the record, unless ordered up by that court, remains in the court below; and therefore this writ of error was addressed to the superior court. Mass. Pub. Stat. c. 150, §§ 7, 12; c. 153, § 15; *McGuire* v. *Commonwealth*, 3 Wall. 382; *Bryan* v. *Bates*, 12 Allen, 201, 205; *Commonwealth* v. *Scott*, 123 Mass. 418.

Mr. R. D. Weston-Smith (with whom was *Mr. H. W. Chaplin* on the brief) for plaintiff in error.

The composition of the grand jury and the traverse jury exclusively from the inhabitants of the county and town of Nantucket made them necessarily a partial tribunal. Impartiality is of course never absolute, but always relative. Nevertheless it is a requirement, and it is for the courts — and under the Fourteenth Amendment for this court — to draw the line in any given case. The plaintiff in error was presented by a grand jury and tried by a trial jury, composed exclusively of the town and county corporations against which his alleged crime was directed. This was in violation of the first principles of justice. These grand and petit jurors were all disqualified.

The position of the selectmen as acting prosecutors under a

vote of the town made them incompetent, under the Fourteenth Amendment, to prepare the preliminary list of jurors. It made them incompetent to compose, in their individual capacity, substantially the whole town meeting held to revise that list and make it final. Seven men who were prosecuting the plaintiff in error for the offences finally embodied in the indictment against him made up a list, from which, exclusively, was drawn the grand jury which indicted him, and from which was made up the trial jury. The fruits of this action are seen in the fact that eighteen out of the twenty-three grand jurors were persons who had voted for the prosecution which these prosecutors were promoting before them. A grand jury so made up was as to this defendant a mere travesty of a grand jury, and was a nullity. The objection to it was jurisdictional; *McGregor* v. *Crane*, 98 Mass. 530; *Richardson* v. *Welcome*, 6 Cush. 331; and as such may be taken at any stage. When an objection of this character goes to the roots of the administration of justice, it is never too late to take it. This objection was one of such gravity that it could not be waived. *Hopt* v. *Utah*, 110 U. S. 574; *Hill* v. *People*, 16 Michigan, 351; *Williams* v. *Ohio*, 12 Ohio St. 622; *Cancemi* v. *People*, 18 N. Y. 128; *Harris* v. *People*, 128 Illinois, 585; *McGregor* v. *Crane*, cited above; *Richardson* v. *Welcome*, cited above.

If any state statute stands in the way of the plaintiff in error upon this point, it is, when it operates upon objections so important as are now made, in conflict with the Fourteenth Amendment, as unduly clogging remedies. *Callan* v. *Wilson*, 127 U. S. 540.

Even if this new question of fact does not, within the strictest meaning of the word "go to jurisdiction," it involves so gross an impropriety, and an abuse of the forms of justice so extreme as, in a proper exercise of judicial discretion, to vitiate the whole proceeding. *Hopt* v. *Utah*, cited above; *Edson* v. *Edson*, 108 Mass. 590; *Oakley* v. *Aspinwall*, 3 N. Y. 547.

The fact that eighteen out of twenty-three grand jurors had joined in the vote for the prosecution which was being

carried on before them by the agents of their town, whom they had helped to constitute such, made them, substantially, prosecutors, and disqualified them. Their action violated the first principle of justice: that no man shall be prosecutor and judge at the same time. This objection is, like the objection last referred to, of so vital a character that it cannot be waived. It is jurisdictional, or quasi-jurisdictional, and may be raised at any stage of the cause.

Mr. Albert E. Pillsbury, Attorney General of the State of Massachusetts, for defendant in error.

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

In order to give this court jurisdiction, under section 709 of the Revised Statutes, to review on writ of error a decision of the highest court of a State against a title, right, privilege or immunity claimed under the Constitution of the United States, it must, as observed by Chief Justice Waite in *Spies* v. *Illinois*, "appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way." 123 U. S. 131, 181.

In the case at bar, the only ground, on which it has been argued that the judgment of the Supreme Judicial Court of Massachusetts should be reversed, is that the plaintiff in error has been deprived of his liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, because the grand jury by which he was indicted, and the traverse jury by which he was tried and convicted, were wholly composed of inhabitants of the town and county of Nantucket, which the indictment charged him with intending to defraud; and because the selectmen of the town, who prepared the jury list, and took the principal part in drawing the jurors, were at the same time actively promoting this prosecution.

No objection that the proceedings were in violation of the Constitution of the United States was taken in any form,

either expressly, or by any possible inference or implication, before verdict.

Nor was any such objection duly presented afterwards. In Massachusetts, as elsewhere, the errors suggested could not be availed of by motion in arrest of judgment, unless appearing on the face of the record. *Commonwealth* v. *Edwards*, 12 Cush. 187; *Carter* v. *Bennett*, 15 How. 354. And by the statutes of the State, the defendant was not entitled, after verdict, to object to the qualifications of the jurors, or to any irregularity in drawing them; nor could he move in arrest of judgment for any cause existing before verdict, and not affecting the jurisdiction of the court. Mass. Pub. Stat. c. 170, §§ 39, 40; c. 214, § 27. The objections taken did not affect the jurisdiction of the court in which the plaintiff in error was indicted and convicted, but only the regularity of the proceedings in obtaining the grand and traverse jurors. *Ex parte Harding*, 120 U. S. 782. The anomalous "exception to the jurisdiction," filed after verdict, was held, and rightly held, by the state court to be nothing but a motion in arrest of judgment under another name.

The judgment of the highest court of the State was put upon the ground that these objections were not open after verdict, independently of the opinion of that court that the objections had no merits. As that ground was sufficient to support the judgment, no federal question is involved, and this court has no jurisdiction. The case cannot be distinguished in principle from *Baldwin* v. *Kansas*, 129 U. S. 52.

Writ of error dismissed for want of jurisdiction.

WINDETT v. UNION MUTUAL LIFE INSURANCE COMPANY.

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

No. 253. Argued March 31, April 1, 1892. — Decided April 18, 1892.

If a mortgagor, who has agreed by the terms of the mortgage that he will pay all taxes, and that the mortgagee, in case of sale for breach of condition, shall be allowed all moneys advanced for taxes, or other liens or assessments, with interest, neglects to pay taxes duly assessed, and the land is duly sold for the non-payment of such taxes, and the validity of the deed made to the purchaser is doubtful, the mortgagee, upon a bill for foreclosure, is entitled to be allowed a sum paid by him to buy up the tax titles, exceeding the amount of unpaid taxes and interest by a very small part only of the penalties accrued.

An agreement to pay an attorney at law a retainer for professional services which are never performed is not to be implied.

In Equity, to foreclose a mortgage. The mortgagor having failed to pay the taxes on the mortgaged premises, they were sold for taxes. The mortgagee bought in the tax titles from the purchaser, and filed this bill to foreclose the mortgage. The mortgagor set up in reduction of the mortgage debt a claim for retainers as attorney at law of the mortgagee for services never performed, and further contested the allowance of the amount paid by the mortgagee to acquire the tax titles, on the ground that the sales were void, by reason of non-compliance with the provisions of the Statutes of Illinois in this respect. The master allowed the sum paid for the acquisition of the tax titles, and disallowed the amounts claimed for retainer, allowing only amounts for services actually performed. From the decree rendered on that basis the defendant appealed.

Mr. Arthur W. Windett in person for appellant.

I. The tax titles, sales and deeds were unlawful, null and void for want of the statutory notice to the occupants of the property in possession. *Gage* v. *Bani*, 141 U. S. 344.

II. The tax titles held by Gage not being liens, or encumbrances, they did not impair the security, nor endanger the title; consequently the outlay for the purchase of them was unnecessary, and not authorized by the trust. *Williams* v. *Townsend*, 31 N. Y. 411; *Atwater* v. *West*, 28 N. J. Eq. 361; *Burnet* v. *Deniston*, 5 Johns. Ch. 35; *Anthony* v. *Anthony*, 23 Arkansas, 479; *Dale* v. *McEvers*, 2 Cowen, 118; *Rapplye* v. *Prince*, 4 Hill, 119.

III. Neither Gage claiming under tax deeds and titles, nor the company as his assignee, is entitled to active relief in a court of equity, even though the tax deeds were regular and legal. *Gage* v. *Bani*, 141 U. S. 344.

IV. The taxes, having been satisfied by the sales, were extinct, and were not a lien, charge or incumbrance on the mortgaged property; and neither Gage, nor the company as his assignee, could claim reimbursement from the landowner, the mortgagor, nor from the State. *Smith* v. *Prall*, 133 Illinois, 308.

V. The court had not jurisdiction in a chancery foreclosure to deal with the tax titles, or claims or with the holder of them. *Gage* v. *Perry*, 93 Illinois, 176; *Bozarth* v. *Saunders*, 113 Illinois, 181; *McAlpin* v. *Zitzer*, 119 Illinois, 273.

VI. It was error to adopt and confirm the master's report. The master exceeded his authority by the terms of the reference, which restricted him to the truth of the bill, and the amount due on the note, and did not direct him to report conclusions as to the matters of defence, *i.e.* the questions as to the alleged outlay to Gage, and the claims for professional services. These were judicial questions which the court could not delegate to its ministerial officer. *DeLeuw* v. *Neely*, 71 Illinois, 473; *Mosier* v. *Norton*, 83 Illinois, 519.

Mr. P. S. Grosscup and *Mr. J. H. Drummond* for appellee.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity by a corporation of Maine against a citizen of Illinois to foreclose a deed of trust, in the nature

of a mortgage, of land in Chicago, made by the defendant to the plaintiff on July 12, 1869, to secure the payment of his note of that date for $7500, payable in five years, with interest at the rate of eight per cent; and containing covenants that the premises were "free and clear of all liens and incumbrances," and that the mortgagor would "in due season pay all taxes and assessments on said premises, and exhibit once a year receipts of the proper persons to said party of the second part, showing payment thereof;" and a power to sell on any breach of condition, and out of the proceeds, after paying all expenses, "including all moneys advanced for taxes, insurance or other liens and assessments, with the interest thereon at the rate of ten per cent per annum from the date of payment, all which advances shall be secured by this trust," to pay the principal and interest of the note to the mortgagee, and any surplus to the mortgagor.

This bill was filed February 10, 1882, after default in payment of principal and interest of the mortgage debt. The master, to whom it was referred to state the account between the parties, reported that there was due to the plaintiff the sum of $20,556.11. The defendant excepted to the master's report in two respects; and appealed from a final decree rendered for the plaintiff in accordance with that report.

1. The defendant failed to pay the taxes assessed on the land from 1869 to 1879, and the land was sold and conveyed for non-payment of these taxes to Asahel Gage. The plaintiff's president urged the defendant to redeem the land from the tax sales, (as he might, under the Revised Statutes of Illinois, c. 120, § 210, by paying the amounts for which the land was sold, with interest at the rate of ten per cent, and certain penalties,) and told him that otherwise the plaintiff would be obliged to take steps to protect itself. The defendant promised to pay the taxes and interest, but insisted that the tax deeds were void, for want of previous notice to the tenants of Gage's purchases as required by c. 120, § 216, of the same statutes. The defendant never paid the taxes, or took any steps towards redeeming the land. After waiting two years, the plaintiff, on August 1, 1881, bought in Gage's

tax titles for the sum of $3750, which exceeded the amount of unpaid taxes and interest by the sum of $300 only, equal to a very small part of the penalties accrued. The master allowed the plaintiff this sum of $3750, with interest at the rate of ten per cent, amounting to $1809.24.

The defendant argued that the plaintiff could not be allowed for the taxes, because they had been extinguished by the tax sales and deeds; and could not recover on the tax titles, because they were void, and because equity would not enforce them.

But the plaintiff did not set up the tax deeds as a ground of suit, but only as evidence of clouds upon his title, arising out of the mortgagor's own neglect to pay the taxes. It is at least doubtful, upon the evidence, whether Gage did not give notice to the tenants of the tax sales; and there is no evidence whatever of any invalidity in the taxes, the sales or the deeds, in any other respect. In this state of things, the mortgagee was not bound to take the risk of contesting the tax titles, and the sums paid to extinguish those titles were reasonable expenses chargeable to the mortgagor by the terms of the mortgage.

2. The defendant, who is an attorney at law, claimed, by way of set-off, the sum of $2500 for professional services, and the further sum of $5000 for a general retainer by reason of the president having, as the defendant testified, said that he "wished to engage him professionally in behalf of the company with reference to fifteen or twenty cases, litigated or complicated cases, growing out of their foreclosure proceedings and claims upon property."

The master allowed the defendant the sum of $600 for professional services actually rendered, and the evidence does not satisfy us that they were worth more.

The plaintiff's claim for a retainer for services in suits to be brought in the future was rightly disallowed by the master. No express agreement to pay a retainer was proved, and an agreement to pay a retainer for services which are never performed is not to be implied.

Decree affirmed

CRAWFORD *v.* NEAL.

NEAL *v.* CRAWFORD.

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

Nos. 186, 278. Argued March 21, 1892. — Decided April 18, 1892.

The jurisdiction of a Federal court by reason of diverse citizenship is not defeated by the mere fact that a transfer of the plaintiff's interest was made in order, in part, to enable the purchaser to bring suit in a court of the United States, provided the transfer was absolute, and the assignor parted with all his interest for good consideration.

The statutes forbidding the transfer by a debtor of his property with intent to hinder, delay or defraud creditors do not invalidate a conveyance by a debtor to a *bona fide* creditor, with intent to prefer him.

The burden of setting aside a conveyance by a debtor as made with intent to hinder, delay or defraud creditors is on the attacking creditor; but where the fraudulent intent on the grantor's part is made out, and the circumstances are suspicious, then the purchaser must show that he paid full value; and if this is shown it must then be made to appear that the purchaser had full knowledge of the fraud.

The findings and conclusions of a master upon conflicting testimony are to be taken as presumptively correct, and unless some obvious error in the application of the law has intervened, or some serious or important mistake has been made in the consideration of the evidence, the decree should stand.

The continued possession by an insolvent debtor of his real estate after the transfer of it to a creditor by way of preference may be explained by the surrounding circumstances.

Of two conveyances made by an insolvent debtor at the same time to two individuals, one may be held to be valid as a preference of a *bona fide* creditor, and the other invalid as made with an intent to hinder, delay or defraud creditors, unless the two transactions are so intermingled as to make them necessarily but one transaction, in which case both will be void.

THE court stated the case as follows:

This was a bill filed by Charles A. Neal in the Circuit Court of the State of Oregon for the county of Linn, July 1, 1886, against James H. Foster, John A. Crawford, William Craw-

ford, Ashby Pearce, John R. Baltimore, J. L. Liles, E. Walden, and W. H. Goltra, and subsequently removed, on the application of the complainant, to the Circuit Court of the United States for the District of Oregon. The bill was in the nature of a creditor's bill, seeking to set aside certain conveyances of real (and some personal) property by the defendant James H. Foster to the defendants John A. Crawford, William Crawford and Ashby Pearce, upon the ground that they were made to hinder, delay and defraud the complainant and certain of the defendants, as judgment creditors of the said Foster. Complainant was a citizen of the State of Illinois and defendants were citizens of the State of Oregon, and complainant claimed as the assignee of two judgments, the first rendered in the state circuit court, March 8, 1886, in favor of Sibson, Quackenbush & Co., for $14,037.87, with costs and interest, and the second, rendered in the same court and on the same day, in favor of W. C. Noon & Co., for the sum of $1920.35 with interest. The defendants Goltra, Walden, Liles and Baltimore were also judgment creditors of Foster.

Answers and replications having been filed, the cause was referred to a master to take testimony and to report his findings of fact and conclusions of law thereon.

The master found the various judgments, and that execution had been issued and returned unsatisfied upon those in favor of Sibson, Quackenbush & Co. and W. C. Noon & Co.; that Foster was insolvent on February 6, 1884, and had so continued since that time, and had no property out of which the judgments of complainant and the other creditors could be satisfied; that on February 6, 1884, Foster conveyed to John A. Crawford certain parcels of real estate numbered from one to five, and certain personal property, and to William Crawford another parcel of real estate known as the "brick store property," numbered six, and that on February 7, Foster conveyed to Ashby Pearce a certain other parcel numbered seven, and a small amount of personalty; and that the parties to these transfers, at the time they were made, agreed upon the prices of the property, which aggregated $79,000.

"That at the time of the transfer the said several parcels of

property, real and personal, so transferred by Foster to J. A. Crawford, were fairly and reasonably worth —

Tract 1 & 2	$30,000	
" 3	2,500	
" 4	500	
" 5	3,000	
Book accounts	3,000	
Grain sacks	3,000	
Total		$42,000
The property conveyed to William Crawford at the time of the transfer was actually worth		18,000
The real property conveyed to Ashby Pearce was at the time of the transfer actually worth	$3,500	
And the personal property	700	
Total		4,200
		$64,200"

The master further found —

"XVIII. That in 1867 J. H. and John Foster were partners in a mercantile business under the firm name of J. H. Foster & Co., and in that year bought the Magnolia mill from Wm. Crawford for $16,000, paying $6000 cash and executing five notes for $2000 each, of date July 20, 1867. These notes were secured by a mortgage on the mill property and a brick store, which mortgage was duly recorded.

"That in 1876 J. H. Foster bought out John Foster's interest in the mills and business and assumed all the debts and liabilities of J. H. Foster & Co., and thereafter individually continued the business under the same firm name.

"That the business of the Crawfords with J. H. Foster was, for a considerable time, conducted under the name of Crawford Bros., and was transacted by John A. Crawford, who was the agent and representative of Wm. Crawford.

"That on or before the 6th day of February, 1884, J. H. Foster was owing said J. A. Crawford on notes and accounts

for money lent and water rent the sum of $27,733, which was then due and unpaid, and that at the time said J. A. Crawford was also liable as surety for $16,000, or thereabouts, upon endorsements which he had made for the accommodation of said Foster.

"That on said 6th day of February, 1884, said J. A. Crawford, as a part of the consideration for said transfer, executed and delivered to J. H. Foster his note for $10,000, with the understanding that said Foster should hold said note as a security that said Crawford should perform a verbal agreement then made between said J. A. Crawford and said Foster, to the effect that said Crawford should purchase the wheat of or satisfy divers persons who held warehouse receipts of said Foster for wheat stored by them with said Foster in his warehouse, and which wheat Foster had converted to his own use, to the amount, in all, of about 20,000 bushels, and save said Foster harmless therefrom.

"That said J. A. Crawford then agreed with said Foster that, as a part consideration for the transfer of said property, he would assume and pay the said $16,000 for which he was security for said Foster as aforesaid.

"That all of said indebtedness of said J. H. Foster to said J. A. Crawford was at the date of said transfer surrendered to said Foster and cancelled, as a part of the consideration for said property so deeded and transferred as aforesaid, and that said Crawford has since taken up and cancelled said wheat receipts and satisfied said note of $10,000, and has since said 6th day of February, 1884, paid said debts on which he was security for said Foster and caused the same to be cancelled as to said Foster.

"That the purchase of said property from said J. H. Foster by J. A. Crawford, as aforesaid, was made in good faith, and that full value was paid therefor.

"That the defendant Ashby Pearce was an accommodation maker only of the note to J. H. Foster & Co. which said Pearce afterward paid to John Conner; that at the date of the transfer by J. H. Foster to said Pearce as aforesaid said Foster was indebted to Pearce in the amount of said note so

paid by Pearce as surety for Foster; said note was for $5000; that the purchase of said property by Pearce was in good faith, and that more than full value was paid therefor.

"That on the said 6th day of February, 1884, said J. H. Foster was not indebted to William Crawford; that the mortgage referred to in finding XVIII was prior to its satisfaction on the record, which took place on the 31st of July, 1883, paid in full; that said mortgage was satisfied of record by Wm. Crawford on the last-mentioned date; that no valid consideration for the transfer of the brick block to said Crawford by said Foster passed from said Crawford to said Foster; that said conveyance of said brick building by said Foster to said Crawford was a voluntary one.

"That since the transfer of said brick building by said Foster to said Wm. Crawford the latter has expended thereon in permanent improvements some $2000."

And as conclusions of law the master reported:

"I. That the complainant's bill should be dismissed as to defendants Ashby Pearce and John A. Crawford.

"II. That the deed of J. H. Foster to defendant Wm. Crawford is constructively fraudulent and void as against the complainant and the other creditors of said Foster named in the pleadings and should be cancelled and set aside."

Exceptions were filed to the master's report by complainant and by William Crawford.

The case as to Goltra was disposed of adversely to him upon a cross-bill filed by Foster and the Crawfords, and, as he did not appeal, requires no further reference. The defendants Foster, the Crawfords and Pearce, in addition to denying that any of the conveyances were fraudulent or without consideration, or made to hinder, delay or defraud creditors, denied that the complainant was the real owner of the two judgments of which he claimed to be the assignee, and averred that they were transferred to him without his knowledge and without consideration; that said transfers were made for the sole and only purpose, and with the object and intention, of collusively giving or attempting to give jurisdiction to the Federal court, and that Sibson, Quackenbush & Co. and W. C. Noon & Co.

were and had ever been, since the judgments were rendered, the real owners thereof, respectively; and that complainant had no interest in either of them.

The case was heard upon the bill and answers, the testimony and the exceptions to the master's report, and a decree entered dismissing the bill as to the defendants John A. Crawford and Ashby Pearce, and setting aside the conveyance by Foster to William Crawford, and directing a sale of the property included in that conveyance and the application of the proceeds, first, to the satisfaction of the judgments held by complainant as assignee and the costs and expenses of the sale, and second, to the satisfaction of other judgments referred to in the pleadings. From this decree Neal and William Crawford, severally, took appeals to this court.

The opinion of Judge Deady, holding the Circuit Court, will be found reported in 36 Fed. Rep. 29.

Mr. John H. Mitchell for William Crawford and John A. Crawford.

The principles of the statute of 13 Eliz. c. 5, have been incorporated into the Oregon statutes with this modification, which has also been adopted in most of the States: that is, that when the question of the validity of a conveyance of property depends upon its fraudulent character it must be shown that the grantee participated in the fraud, and the fact that the grantor alone is guilty is not sufficient to invalidate the conveyance.

The Oregon statute is taken from the New York code and is a copy of it.

In *Stearns* v. *Gage*, 79 N. Y. 102, and in *Parker* v. *Conner*, 93 N. Y. 118, it was held that when a valuable consideration had been paid, actual notice on the part of the grantee of the grantor's fraudulent intent is necessary to avoid the conveyance to creditors and others. The Supreme Court of Oregon hold to the same rule. *Coolidge* v. *Henecky*, 11 Oregon, 327.

The Oregon statute as to fraudulent conveyances is in substance similar to, and almost identical in language with the

statute of the State of Virginia on that subject. In *Peters* v. *Bain*, 133 U. S. 670, 686, this court said: "In controversies arising under this statute, involving as they do the rights of creditors locally and a rule of property, we accept the conclusions of the highest tribunal as controlling. *Jaffray* v. *McGehee*, 107 U. S. 361; *Lloyd* v. *Fulton*, 91 U. S. 479; *Allen* v. *Massey*, 17 Wall. 351."

An assignment for the benefit of creditors, preferring unsecured creditors, is not *prima facie* fraudulent. *Kruse* v. *Prindle*, 8 Oregon, 158. Foster had a right to make a preference as between his creditors. The right to make a preference resulted from the dominion which the owner has over his property. It is a part of his proprietorship. The law has not said he shall divide his estate *ratably* among his creditors. It has left him the discretion to act as he wills, provided only he acts with honest intent to pay a valid debt, and does not under cover of such a disposition stipulate for a benefit to himself. *Eldridge* v. *Phillipson*, 58 Mississippi, 270; *Estes* v. *Gunter*, 122 U. S. 450, 455; *Brooks* v. *Marbury*, 11 Wheat. 78; *Kruse* v. *Prindle*, 8 Oregon, 158.

A conveyance upon a valuable consideration cannot be declared void as to creditors, though made with a fraudulent purpose on the part of the vendor, unless the vendee participates in or had notice of such purpose. *Astor* v. *Wells*, 4 Wheat. 466; *Worthy* v. *Coddell*, 76 N. C. 82; *Prewitt* v. *Wilson*, 103 U. S. 22.

Fraudulent intent upon the part of the debtor alone is not sufficient. *Bonser* v. *Miller*, 5 Oregon, 110; *Prewitt* v. *Wilson*, 103 U. S. 22.

Mr. C. E. S. Wood (with whom was *Mr. George H. Williams* on the brief) for Neal.

I. John Crawford was practically and in equity a cograntee with his brother William Crawford; and if the conveyance to William Crawford is void, then the whole transaction is void: for a conveyance to a grantee for a valid consideration is void if the grantee knew that a conveyance to a cograntee was

fraudulent and fictitious. *Swartz* v. *Hazlett*, 8 California, 118; *Lewis* v. *Caperton*, 8 Gratt. 148.

II. A conveyance founded in part upon a fraudulent consideration will not be sustained to the extent of the honest consideration, but is void altogether. *Baldwin* v. *Short*, 26 N. E. Rep. 928.

III. A conveyance made to secure part of the property to the grantee upon a valid consideration, but to cover in the residue for the grantor, is void as to the whole. *Swinford* v. *Rogers*, 23 California, 233; *Chase* v. *Walker*, 26 Maine, 555; *Rice* v. *Cunningham*, 116 Mass. 466; *Macomber* v. *Peck*, 39 Iowa, 351.

IV. It is immaterial whether the property is parcelled out in one or several deeds and whether the papers are executed on the same day or not. If done to effect the same design, all must be regarded as one transaction. *Mussey* v. *Noyes*, 26 Vermont, 462; *Burrows* v. *Lehndorf*, 8 Iowa, 96; *Berry* v. *Cutts*, 42 Maine, 445; *Spaulding* v. *Strang*, 38 N. Y. 9.

V. A conveyance in fraud of the grantor's creditors is void although the grantee pays the full value if he participated in the fraudulent purpose. *Gardinier* v. *Otis*, 13 Wisconsin, 460.

VI. Where the grantor remains in possession and continues to manage the property as before, his declarations made in connection therewith are admissible. *Redfield* v. *Buck*, 35 Connecticut, 328.

VII. Possession is part of the *res gestæ;* and where the grantor remains in possession, his acts and declarations are competent evidence explanatory of them. *United States* v. *Griswold*, 7 Sawyer, 296.

When the *bona fides* of a transfer is attacked by creditors, and some evidence has been given tending to show a common design between the grantor and the grantee to defraud, declarations of the grantor after the transfer are admissible. *Hartman* v. *Diller*, 62 Penn. St. 37; *Deakers* v. *Temple*, 41 Penn. St. 234.

Possession and management after sale are badges of fraud. *Lukins* v. *Aird*, 6 Wall. 78; *Callan* v. *Statham*, 23 How. 477. Where the grantor, being greatly in debt, with suit threaten-

ing, conveyed his land for a consideration about one-half its value, and continued in possession the same as before, the conveyance was held to be void as against creditors. *Hudgins* v. *Kemp*, 20 How. 45.

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

If the transfers of the judgments to the complainant were fictitious, the plaintiffs therein continuing to be the real parties in interest, and the complainant but a nominal or colorable party, his name being used only for the purpose of jurisdiction, then the objection to the jurisdiction of the Circuit Court would be well taken; but if the transfers were absolute and the judgment creditors parted with all their interest for good consideration, then the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States court, would not be sufficient to defeat the jurisdiction. *McDonald* v. *Smalley*, 1 Pet. 620; *Barney* v. *Baltimore*, 6 Wall. 280; *Williams* v. *Nottawa*, 104 U. S. 209; *Manufacturing Co.* v. *Bradley*, 105 U. S. 175, 180; *De Laveaga* v. *Williams*, 5 Sawyer, 573, per Mr. Justice Field.

It was established by the testimony of members of the firm of Sibson, Quackenbush & Co. that their judgment was sold to Neal for his note for $5000; that the firm was not concerned in any way in the result of the pending litigation, and had parted with its entire interest in the judgment; and by the testimony of a member of the firm of W. C. Noon & Co. that that firm sold its judgment to Neal for $500, absolutely and without condition. The plaintiffs in these judgments retained no interest whatever therein.

But it is said that Neal knew nothing about the transaction; that the alleged consideration was never paid; and that the state courts had previously held the conveyances valid, thus justifying the inference that the purchase was in pursuance of a collusive attempt to relitigate the question in the United States courts.

It is true that the averments of the cross-bill filed against Goltra and admitted by his demurrer, show that Goltra attacked the validity of the conveyances in the state Circuit Court; that the conveyances were sustained; and that his appeal to the Supreme Court was dismissed; but, as already said, the mere existence of the wish to bring suit in the United States court, as a motive for the purchase of these judgments, is not enough if the purchase was in fact made.

The record discloses that Neal was interested in milling property in Oregon, in which W. M. Ladd and his father, of the firm of Ladd & Tilton, were also interested; that one Wilcox managed the property for them; that Sibson, Quackenbush & Co. were successors of Sibson, Church & Co., the membership of the firms being the same, except that Church had retired; that Sibson, Church & Co. were largely indebted to Ladd & Tilton, and the liquidation of its affairs was being conducted by Sibson, Quackenbush & Co., to whom all the assets had passed, Wilcox managing the liquidation on behalf of the Ladds; that Sibson, Church & Co. had been the agents of the old mill; and that Sibson, Quackenbush & Co. were the agents of the new, in which Neal had an ownership. That W. M. Ladd was the attorney in fact of Neal, and Wilcox the managing man for Neal as well as the Ladds. That Wilcox purchased the judgments, and paid for them, respectively, by a note for $5000, and one for $500, signed for Neal by Ladd, and that the $5000 note was turned in by Sibson, Quackenbush & Co. on the indebtedness of Sibson, Church & Co., and so paid; and that the $500 was paid at once by Ladd & Tilton. Wilcox, who conducted the business in respect of these purchases, was not called as a witness by defendants Crawfords and Pearce, although it clearly appeared that he could have given all the details. The fair inference is that what was done was within the powers conferred by Neal on Ladd and Wilcox, and as the sales were absolute, and without any trust or reservation in favor of the judgment creditors, the conclusion of the Circuit Court on this branch of the case was manifestly right.

The statute of 13 Eliz. c. 5 has been in the main reënacted

in the various States of the Union. In Oregon it is provided that: "Every conveyance or assignment in writing or otherwise of any estate or interest in lands or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void." And it is further provided that the question of fraudulent intent in all cases arising under that section shall be "deemed a question of fact, and not of law," and that the section "shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." 2 Hill's Ann. Laws Oregon, 1887, pp. 1373, 1374, §§ 3059, 3062, 3063.

A collusive transfer, placing the property of a debtor out of the reach of his creditors, while securing to him its beneficial enjoyment, is not to be tolerated; yet an insolvent debtor may prefer a creditor, even though the latter has knowledge of such insolvency. The effect of the preference may be to delay his other creditors, but if the transaction is in good faith and made with the intention of paying the preferred debt, and without any secret trust; the conveyance by which the preference is effected is not fraudulent. And the extinguishment of an existing indebtedness is a valuable consideration for a purchase made in good faith.

The burden is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud. These we understand to be the principles applied by the Supreme Court of Oregon in passing upon the statute of that State. *Kruse* v. *Prindle*, 8

Oregon, 158; *Lyons* v. *Leahy*, 15 Oregon, 8; *Philbrick* v. *O'Connor*, 15 Oregon, 15; *Weber* v. *Rothchild*, 15 Oregon, 385; *Weaver* v. *Owens*, 16 Oregon, 301; *Taylor* v. *Miles*, 19 Oregon, 550. And this court accepts the construction given to such a state statute as controlling. *Peters* v. *Bain*, 133 U. S. 670.

The cause was referred to a master to take testimony therein, "and to report to this court his findings of fact and his conclusions of law thereon." This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107.

The master found that John A. Crawford paid on behalf of Foster not less than $10,000 in satisfaction of the holders of warehouse receipts of Foster for wheat stored by them, but which Foster had converted to his own use; also about $16,000 upon endorsements which he had made for the accommodation of Foster; and further satisfied an indebtedness of Foster to himself, amounting, on the 6th of February, 1884, to the sum of $27,737.23; and that this total of $53,737.23 constituted the consideration of the conveyance and transfer by Foster to him of property reasonably worth $42,000; and as to Ashby Pearce, the master found that he was an accommodation endorser for Foster on a note for $5000, which he was obliged to pay; and that this was the consideration of the conveyance and transfer to him of property, real and personal, of the value of $4200.

The learned judge of the Circuit Court stated, in his opinion, that on the argument it was tacitly conceded that the conveyance to Pearce was made for a full consideration and for no other purpose than to prefer him to other creditors; and that concession is, in effect, made here, and, even if it were not, the evidence admits of no other conclusion.

The Circuit Court also reviewed the evidence as to Foster's condition on February 6, 1884, and found that he had lost largely by reason of a decline in flour during the winter, and was short about 20,000 bushels of wheat, "for which he had given receipts, on any one of which he was liable at any moment to a criminal prosecution;" that there was no room to doubt that John A. Crawford was then liable as surety on Foster's paper for $15,900; "that he afterwards paid the same as part of the consideration of the transfer to him;" that Crawford paid out from $10,000 to $15,000, say $12,500, in settling with farmers and others holding Foster's wheat receipts for 19,541 bushels, that the latter had used; and that in addition Crawford, as part of the consideration for the purchase, applied an open account of $5803 due from Foster to him; and so that Crawford unquestionably paid a consideration of $34,113 for the property, which was "more than it would have probably sold for at sheriff's sale, and more than three-fourths of the value that the master places upon it, which in my judgment is its full market value."

But the master included in the total paid certain notes of Foster held by Crawford, amounting to $16,930, with interest, and while the Circuit Judge held that the evidence, in respect of these notes and their being cancelled as part payment for the property was conflicting, he nevertheless thought that the weight of the evidence sustained the result arrived at by the master. The contention of complainant was that while the notes were paid at some time, this was before the transfer of the property, when they were fraudulently revived for the purpose of being made a part of the consideration thereof; but upon the whole, the judgment of the court was that the "Foster notes in question were existing obligations between the parties at the date of the transfer, and that, whether this be so or not, the purchase was made in good faith and for a valuable and even adequate consideration." We concur that the consideration was not in any view so inadequate as to raise an inference of bad faith, and that it probably exceeded the value of the property conveyed.

Some stress is laid in argument upon the possession by Fos-

ter, after the transfer, of the mill and his residence. It is not contended that such possession of realty rendered the transaction fraudulent *per se*, (*Phettiplace* v. *Sayles*, 4 Mason, 312, 321,) but that it afforded persuasive evidence of fraud in fact.

But, as the court remarks, the surrounding circumstances must be taken into account. The two men were friends of many years standing. They had grown old together, and when Foster failed, and transferred a large part of his property to Crawford, his principal creditor, there was nothing unreasonable in the employment of the former by the latter to run the mill at seventy-five dollars a month and the use of the dwelling. This is what was done according to the testimony, and the explanation was properly held to be satisfactory.

And so as to Foster's declarations. Expressions of hope of recovery indulged in by a person reduced to poverty by large losses must be taken with many grains of allowance, and those testified to here as indicative of the retention of an actual interest in the property fall short of overcoming the explicit evidence to the contrary.

The case as to William Crawford is of much more difficulty.

We cannot accept the view of complainant's counsel that it is impossible to hold the conveyance to William Crawford invalid without also setting aside that to John A. Undoubtedly the rule is that a transaction void in part for fraud in fact is entirely void, but here the transactions were so distinct that while the circumstances surrounding the one should be given due weight so far as they may bear upon the other, a result adverse to the validity of the one does not necessarily compel a like result as to the other. The instruments were several; the grantees, the property conveyed, the alleged consideration, were all different and disconnected; and although John A. acted for his brother in obtaining the deed, yet we are not prepared to hold that error was committed in declining to treat the conveyances as constituting parts of a single transaction and rendering John A. a cograntee with William.

The case as to William turned upon the existence, unpaid,

of certain notes against Foster, which he claimed were outstanding on the 6th of February, 1884, and surrendered as the consideration for the conveyance of the "brick store property."

The master found that in 1867 William Crawford sold the Magnolia mill property to J. H. and John Foster for $16,000, receiving $6000 in cash and taking five promissory notes of the Fosters for $2000 each, bearing date July 20, 1867, maturing in one, two, three, four and five years after date, respectively, and secured by a mortgage on the mill and other property duly executed and recorded; that it was contended on behalf of William Crawford that these notes were taken up by J. H. Foster's notes, six in number, for $16,000, bearing date July 20, 1883, five of them for $2000 each, payable in one, two, three, four and five years after date, and one for $6000 payable in one year after date, which notes were produced and put in evidence. That the mortgage was cancelled of record by Crawford on July 31, 1883. That in 1876, J. H. Foster bought the interest of his brother John in the business and property of J. H. Foster & Co., and assumed all the liabilities of the late firm, this being four years after the maturity of the last of the five notes given for the mill by the two Fosters. That during all these years Foster was doing a lucrative business and was expending considerable sums in the improvement and development of his mill property, and in embarking in new ventures. That in 1876 Foster paid large sums to John A. Crawford in money and by transfer of notes of other people. And the master concluded that the probabilities were strong that John Foster would have insisted upon the taking up of the notes either by payment or the substitution of new notes in 1876 when J. H. Foster bought him out; and that William Crawford would not, while J. H. Foster was doing so large a business and paying over so much money, allow these original notes to run until the interest amounted to three-fifths of the principal. But aside from the probability that these notes were paid long before the satisfaction of the mortgage, the master referred to the positive testimony that upon the passage of the law known as the mortgage tax

law, which went into operation in 1883, the then county clerk of Linn County called the attention of William Crawford to the fact that the records disclosed an unsatisfied mortgage in his favor against Foster, and asked him to call and see about it, which Crawford did, and, expressing surprise that the mortgage was still on the record and remarking that it had been paid off several years before, cancelled it; also to the evidence of a banker in Albany that in 1878 or 1879 his attention was called to the fact that this mortgage was unsatisfied of record, and he asked Foster in relation to it, and was told by him that the mortgage was paid; also to the sworn return to the assessor of taxes made by William Crawford in 1881, giving his notes as aggregating $5000. The master also commented on the unreasonable character of the inference that Crawford would cancel a valid mortgage on good property by taking unsecured notes therefor, especially in view of the fact that his debtor would not pay his interest, and in view of the further fact that Foster already owed John A. Crawford an amount which, with William's claim, approximated the value of Foster's entire estate.

The master further found that the attempt to explain away the testimony and circumstances to which he had referred, on the theory that Crawford was seeking to avoid taxation, and had made an agreement with Foster that he would pay the taxes on the unsecured notes if Crawford would satisfy the mortgage by taking them, was without weight, for it was just as easy for Foster to pay the taxes on the mortgage as upon the notes.

The Circuit Court discussed the evidence at length, and considered the testimony of William Crawford that the first series of notes were exchanged for the second series, and that the latter were unpaid, when, at his brother's suggestion, William gave them to him for the purpose of purchasing the property then conveyed to William by Foster, as improbable in all its essential features. Judge Deady rehearsed the testimony of the various witnesses and pointed out that it overcame that of William, and John A., and Foster, and dwelt upon the improbability that Foster, who between the giving

of the original notes in 1867 and the transfer in 1884 had expended $40,000 on the mill property, had built the brick block in question, which cost probably not less than $12,000, his dwelling-house, and his share of the Albany water works, would allow a mortgage to secure a debt of $10,000 to remain on his mill for seventeen years; and that Crawford would permit the unpaid interest on such debt to accumulate to $6000, and then take a note for the amount without interest or security. And he expressed dissatisfaction with the explanation as to the cancellation of the mortgage, that it was done to avoid the operation of the mortgage tax law of 1882; and held that the decided weight of the evidence supported the conclusion that the mill notes were paid before the conveyance to William Crawford was made, and that therefore that conveyance was without consideration and fraudulent against the creditors of Foster.

We have patiently examined the evidence contained in the record, and it is impossible for us to reverse the decree for error or mistake in the conclusions of the master and the court, depending, as they do, upon the weighing of conflicting testimony, and entitled, as they are, to every reasonable presumption in their favor.

The decree must be

Affirmed.

MEYERHEIM *v.* ROBERTSON.

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

No. 279. Argued April 5, 6, 1892. — Decided April 18, 1892.

Laces made by machinery out of linen thread were imported in 1881 and 1882, and charged with duty at 40 per cent *ad valorem*, as "manufactures of flax, or of which flax shall be the component material of chief value, not otherwise provided for," under Schedule C of § 2504 of the Revised Statutes (p. 462). The importers claimed that they were chargeable with a duty of only 30 per cent *ad valorem*, as "thread lace," under the same schedule (p. 463). *Held*, that, as the evidence clearly showed that

the goods were invariably bought and sold as "torchons," and not as thread laces, and that thread lace was always hand-made, it was proper to direct a verdict for the defendant, in a suit brought by the importer against the collector to recover an alleged excess of duty.

THE case is stated in the opinion.

Mr. Edwin B. Smith (with whom were *Mr. William Stanley* and *Mr. Stephen J. Clarke* on the brief) for plaintiffs in error.

Mr. Assistant Attorney General Parker for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought in the Superior Court of the city of New York, in November, 1882, by Siegmund Meyerheim, William Kempner and Henry Strahlheim, against William H. Robertson, late collector of the port of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover $764.50, as an alleged excess of duties exacted on the importation of certain goods into the port of New York in the years 1881 and 1882. The case was tried before a jury in June, 1888, and a verdict rendered for the defendant, on which there was a judgment in his favor, for costs.

The importation was of certain laces made by machinery out of linen thread, and with them certain laces of the same material made by hand. The defendant assessed duty upon all the laces at 40 per cent *ad valorem*, under the provision of Schedule C of § 2504 of the Revised Statutes, (p. 462,) which imposed that rate of duty on "flax or linen thread, twine and pack-thread, and all other manufactures of flax, or of which flax shall be the component material of chief value, not otherwise provided for." The plaintiffs claimed that the goods were dutiable at only 30 per cent *ad valorem*, as "thread lace and insertings," under the same Schedule, p. 463.

After the suit was brought, the Secretary of the Treasury refunded to the plaintiffs all excessive sums exacted upon such

of the above importations of laces of linen thread as were made by hand, leaving the controversy only as to those laces of linen thread which were made by machinery. All the laces, whether made by hand or machinery, were known, bought and sold as "torchons," and the issue presented was whether or not machine-made torchons were dutiable as "thread lace," or as "manufactures of flax, or of which flax shall be the component material of chief value, not otherwise provided for."

The articles were made wholly of linen thread, and, therefore, of flax. It clearly appeared by the testimony of one of the plaintiffs that he never heard the machine-made goods bought and sold as thread laces, but invariably as "torchons." The testimony on the part of the defendant was to the same effect, and showed that thread lace was always hand-made.

The defendant requested the court to direct a verdict in his favor, while the plaintiffs claimed to go to the jury. A verdict for the defendant was directed, and the plaintiffs excepted.

We do not think there was any question for the jury, on the evidence.

Judgment affirmed.

ROBERTSON *v.* SALOMON.

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

No. 272. Argued April 4, 5, 1892. — Decided April 18, 1892.

Elastic webbings, used as gorings for shoes, some composed of worsted and india-rubber, and the rest of cotton, silk and india-rubber, imported in March and June, 1884, were assessed with duties, the former as "gorings," at 30 cents per pound and 50 per cent *ad valorem*, under Schedule K of § 2502 of Title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 509, and the latter at 35 per cent *ad valorem*, as "webbing, composed of cotton, flax or any other materials, not specially enumerated or provided for in this act," under Schedule N of the same section. *Id.* 514. The importers claimed that they were dutiable at 30 per cent *ad valorem* under said Schedule N, (*Id.* 513,) as

"india-rubber fabrics, composed wholly or in part of india-rubber, not specially enumerated or provided for in this act." *Held,* that the assessment of duties, as made, was correct.

"Goring" and "gorings" make their first appearance in the act of March 3, 1883.

The cases of *Davies* v. *Arthur*, 96 U. S. 135, and *Beard* v. *Nichols*, 120 U. S. 260, do not control the present case.

The Circuit Court erred in not submitting to the jury the question whether the goods were or were not known in this country, in trade and commerce, under the specific name of goring, and in directing a verdict for the plaintiffs.

THE case is stated in the opinion.

Mr. Assistant Attorney General Parker for plaintiff in error.

Mr. Edwin B. Smith (with whom was *Mr. Stephen G. Clarke* on the brief) for defendants in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law, brought October 15, 1884, in the Superior Court of the city of New York, by Bernard J. Salomon and Samuel Mendel Phillips against William H. Robertson, late collector of the port of New York, to recover an alleged excess of duties, amounting to $288.20, on certain goods imported into that port in March and June, 1884. The case was removed by the defendant, by *certiorari*, into the Circuit Court of the United States for the Southern District of New York, and was tried there, before a jury, in January, 1888. There was a verdict for the plaintiffs, for $157.08 as to certain of the goods, and for the defendant as to certain others of them; whereupon a judgment was entered for the plaintiffs for $157.08 damages, $46.85 costs, and $6.67 interest, making in all $210.60. To review that judgment, the defendant has sued out a writ of error.

The goods in question were invoiced as "elastic webbings." Some of them were composed of worsted and india-rubber, and the remainder of cotton, silk and india-rubber. The col-

lector assessed duties on the worsted and rubber goods at the rate of 30 cents per pound and 50 per cent *ad valorem*, and on the cotton, silk and rubber goods at the rate of 35 per cent *ad valorem*. The plaintiffs paid such duties under a protest, which stated the grounds of their dissatisfaction to be "that under existing laws, and particularly by Schedule N of the tariff act of March 3, 1883, said goods were liable at no more than 30 per cent *ad valorem*, as fabrics in part india-rubber, not otherwise specially enumerated or provided for." The duties claimed to have been levied and paid in excess of the lawful rate amounted, with interest, in the case of the worsted and rubber goods, to $125.04, and in the case of the cotton, silk and rubber goods to $32.04.

The bill of exceptions states as follows: "To further sustain the issue upon their part, the plaintiffs called witnesses who testified substantially that the goods in question are used to insert in the upper part of shoes and gaiters; that the rubber is an essential part of the article; and that it could not be used for the purpose for which it is intended without rubber. That it is sometimes known as elastic webbings, and that it is also known under the name of elastic goring. That there are webbings in which rubber is not a component part. That there are many kinds of webbings, such as surgical webbings, suspender webbings and upholstery webbings. That all narrow woven fabrics are considered webbings. That the articles in question in this action were woven on the loom. That webbings are always woven on the loom."

The defendant put in evidence which tended to show that the elastic webbing in controversy was bought and invoiced as "elastic webbing," but was sold in the market in the United States as "goring;" that the general trade name for it in the United States was "goring;" that it was never made on braiding machines or by hand; that "elastic webbing" was a term known in trade and commerce in the United States prior to 1883, applicable to goods like the plaintiff's importation; that the term "elastic webbing," applied to goods like those in question, had been known in trade and commerce, as the foreign name, since and prior to 1883, in and among importers

and large dealers, but that "goring" was the American name, and the article was so called because it was used to make gores of, and formed the goring of a Congress shoe; and that the shoe manufacturer called them gores. It was also admitted at the trial, that all the testimony contained in the bill of exceptions as to trade designation and use was likewise true immediately prior to and on March 3, 1883.

At the close of the case, the defendant moved the court to direct a verdict for him, upon the general ground that the plaintiffs had not established their contention, and specifically as to the goods composed of worsted and rubber, that it appeared from the testimony that they were known in this country under the specific name of "goring;" and that, especially since the word "goring" was inserted first into the worsted clause by the act of March 3, 1883, it more specifically described the goods in question than "fabrics in part of india-rubber." That motion was denied by the court, and the defendant excepted.

The defendant then asked to have submitted to the jury the question whether or not the merchandise composed of worsted and rubber was known in trade and commerce, and among large dealers in this country, under the name of "goring;" which motion was denied by the court, and the defendant excepted.

The court then directed a verdict for the plaintiffs for the respective amounts sought to be recovered by them. To this ruling the defendant excepted.

At the time the goods in question were imported, they were subject to duty under § 2502 of Title 33 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 121, 22 Stat. 488.

Schedule I, "Cotton and Cotton Goods," of § 2502, provided as follows (p. 506) in regard to duties: "Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum *ad valorem*."

Schedule K, "Wool and Woollens," (p. 509): "Webbings,

gorings, suspenders, braces, beltings, bindings, braids, galloons, fringes, gimps, cords and tassels, dress trimmings, head nets, buttons, or barrel buttons, or buttons of other forms for tassels or ornaments, wrought by hand, or braided by machinery, made of wool, worsted, the hair of the alpaca, goat, or other animals, or of which wool, worsted, the hair of the alpaca, goat, or other animals is a component material, thirty cents per pound, and in addition thereto, fifty per centum *ad valorem*."

Schedule N, "Sundries," (p. 514): "Webbing, composed of cotton, flax, or any other materials, not specially enumerated or provided for in this act, thirty-five per centum *ad valorem*."

And the same schedule, (p. 513): "India-rubber fabrics, composed wholly or in part of india-rubber, not specially enumerated, or provided for in this act, thirty per centum *ad valorem*. Articles composed of india-rubber, not specially enumerated, or provided for in this act, twenty-five per centum *ad valorem*."

The collector levied on the goods composed of worsted and india-rubber 30 cents per pound and, in addition thereto, 50 per cent *ad valorem*, and on those composed of cotton, silk and india-rubber 35 per cent *ad valorem*.

The plaintiffs claimed that the goods were india-rubber fabrics, composed wholly or in part of india-rubber, not specially enumerated or provided for in the act, and, therefore, subject to a duty of only 30 per cent *ad valorem*.

We are of opinion that the judgment must be reversed. It appears distinctly that the goods in question were used to insert in the upper part of shoes or gaiters, and that, while each of the two kinds was called "webbing," it was also known as "goring." The worsted and india-rubber article was dutiable as webbing or as goring, at 30 cents per pound and, in addition, 50 per cent *ad valorem;* while the cotton, silk and india-rubber article was dutiable as webbing composed of cotton or any other materials not specially enumerated or provided for in the act, at 35 per cent *ad valorem*.

It is very clear that the words "goring" and "gorings" make their first appearance in the act of March 3, 1883; and

their insertion in that act must have had reference not merely to their absence from previous statutes, but in connection with such absence, to the construction which this court had put upon prior statutes in which those words did not appear, in reference to the duties leviable on articles of the character of those in question in this suit. Although the goods in question were composed wholly or in part of india-rubber, those composed of worsted and india-rubber were specially enumerated or provided for as "gorings," under Schedule K; and those composed of cotton, silk and india-rubber were specially enumerated and provided for in Schedule N, as "webbing, composed of cotton, flax or any other materials;" and all of them, therefore, were excepted from the 30 per cent duty imposed on india-rubber fabrics by Schedule N.

The cases of *Arthur* v. *Davies*, 96 U. S. 135, in 1877, in regard to goods imported in 1873, and of *Beard* v. *Nichols*, 120 U. S. 260, in regard to goods imported in 1878 and 1879, relied upon by the plaintiffs, do not control the present case.

In *Arthur* v. *Davies*, the articles in question were suspenders or braces, made of india-rubber, cotton and silk, cotton being the component material of chief value, and suspenders or braces made of india-rubber, cotton and silk, cotton being the component material of chief value, a few threads of silk being introduced for purposes of ornament. It was held that the goods were dutiable under § 22 of the act of March 2, 1861, (12 Stat. 191,) which imposed a duty of 30 per cent on "braces, suspenders, webbing or other fabrics, composed wholly or in part of india-rubber, not otherwise provided for," and to an additional duty of 5 per cent *ad valorem* imposed on the same articles by § 13 of the act of July 14, 1862, (12 Stat. 556,) and not to a duty of 50 per cent *ad valorem*, imposed by § 8 of the same act, (12 Stat. 552,) "on manufactures of india-rubber and silk, or of india-rubber and silk and other materials." This was held on the ground that, if the articles were technically and commercially braces and suspenders, composed in part of india-rubber, they took their dutiable character from that source.

In *Beard* v. *Nichols*, the goods were webbing made of

india-rubber, wool and cotton, and were used for gores in making Congress boots, and without the rubber would not have been adapted to that use. They were not wrought by hand nor braided by machinery, but were woven in a loom, and appear to have been substantially like the goods in question in the present case, made of worsted and india-rubber. They were held to be dutiable at 35 per cent *ad valorem*, under § 2504 of the Revised Statutes, Schedule M, "Sundries," (p. 477,) which imposed that rate of duty on "braces, suspenders, webbing or other fabrics, composed wholly or in part of india-rubber, not otherwise provided for;" and not to a duty of 50 cents per pound and, in addition thereto, 50 per cent *ad valorem*, under Schedule L of § 2504, "Wool and woollen goods," (p. 472,) as "webbings" of which wool or worsted was a component material. That decision was put upon the ground on which it is there stated that the decision in *Arthur* v. *Davies* had been put, namely, that ever since 1842, webbing composed wholly or in part of india-rubber had been a subject of duty *eo nomine*.

But the act of March 3, 1883, does not impose a duty on "webbing composed wholly or in part of india-rubber," as did subdivision 10 of § 5 of the act of August 30, 1842, (5 Stat. 555,) and as did Schedule C of § 11 of the act of July 30, 1846, (9 Stat. 44,) and as did § 22 of the act of March 2, 1861 (12 Stat. 191,) and as did § 13 of the act of July 14, 1862, (12 Stat. 556).

By the act of March 3, 1883, Schedule K, a duty is imposed on webbings and gorings of which wool or worsted is a component material, without reference to the fact whether the article contains india-rubber or not; and by Schedule N of the same act a duty is imposed on webbing composed of cotton, flax or any other materials, without reference to the fact whether it contains india-rubber or not.

We are of opinion that the goods composed of worsted and india-rubber were dutiable as gorings at 30 cents per pound and, in addition thereto, 50 per cent *ad valorem*, if they were known in this country, in trade and commerce, under the specific name of goring; that, whether they were or not so

known was, on the evidence, a question for the jury; that the court erred in not submitting that question to the jury; that the goods composed of cotton, silk and india-rubber were subject to a duty of 35 per cent *ad valorem;* and that the court erred in directing a verdict for the plaintiffs.

The judgment is

Reversed, with a direction to grant a new trial, and to take further proceedings in conformity with this opinion.

NESBIT *v.* RIVERSIDE INDEPENDENT DISTRICT.

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

No. 212. Submitted March 15, 1892. — Decided April 18, 1892.

When the constitution of a State forbids "county, political or other municipal corporations" within the State to "become indebted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporation in excess of such limit are invalid without regard to any recitals which they contain.

A holder of such bonds for value, is bound to take notice of the amount of the taxable property within the municipality at the date of their issue, as shown by the tax list, and is charged with knowledge of the over-issue.

When a second suit is upon the same cause of action, and between the same parties as a former suit, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined.

Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or the other coupons, and gives rise to a separate cause of action.

A judgment against a municipal corporation in an action on coupons cut from its negotiable bonds, where the only defence set up was the invalidity of the issue of the bonds by reason of their being in excess of the amount allowed by law, is no estoppel to another action between the same parties, on the bonds themselves and other coupons cut from them, where the defence set up is such invalidity, coupled with knowledge of the same by the plaintiff when he acquired the bonds and coupons.

Statement of the Case.

THE court stated the case as follows:

This was an action on five bonds purporting to have been issued by the School District, defendant. The case was tried by the court without a jury. Special findings of facts were made, of which the following are the only ones material to the questions presented:

"2d. The value of the taxable property within the boundaries of the Independent district, as shown by the State and county tax lists, was for the year 1872 forty-one thousand four hundred and twenty-six dollars, and for the year 1873 sixty-eight thousand three hundred and seven dollars.

"3d. That on the 26th and 27th days of March, 1873, the indebtedness of said Independent district, exclusive of the bonds declared on in this action, exceeded the sum of thirty-five hundred dollars.

"4th. That the bonds sued on in this action bear date March 27, 1873, maturing ten years thereafter, are five in number, for five hundred dollars each, or $2500.00 in the aggregate, exclusive of interest, are numbered 14, 15, 16, 17 and 18, and that the signatures thereon are the genuine signatures of the officers of the district purporting to sign the same, and that said bonds, with the accrued interest, now amount to the sum of five thousand six hundred and ninety-five dollars, which bonds and interest coupons were produced in evidence by plaintiff. The said bonds and interest coupons are in all respects alike except as to number, and each coupon refers to the number of the bond to which it belongs and to said act under which it was issued. All of said bonds contain the following provision in the body thereof: This bond is issued by the board of directors of said Independent school district under the provisions of chapter 98 of the Acts of the Twelfth General Assembly of the State of Iowa, and in conformity with a resolution of said board dated the 26th day of March, 1873. A copy of the act referred to is printed on the back of the bonds. The exhibits attached to plaintiff's petition are correct copies of said bonds and coupons.

"4½. That all of said five bonds and the coupons attached

belong to the same series and were issued at the same time, under the same circumstances and part of the same transaction.

"5th. That the plaintiff, who is a citizen of Great Britain, bought these bonds and all the interest coupons belonging thereto as an investment from one Henry Hutchinson on the 20th day of December, 1877, paying him therefor the sum of two thousand dollars; that said plaintiff, when she made such purchase, had no other knowledge concerning the bonds or of the facts connected with their issuance than she was chargeable with from the bonds themselves and from the provisions of the constitution and laws of the State of Iowa.

"6th. That said bonds were issued without consideration.

"7th. That plaintiff brought suit in the United States Circuit Court at Des Moines, Iowa, against the said Independent District of Riverside upon certain of the interest coupons belonging to the bonds Nos. 14 and 15, being two of the bonds included in the present action, and in the petition in that cause filed the plaintiff averred that she was the owner of the two bonds Nos. 14 and 15 and the coupons thereto attached, and asked judgment upon the six coupons then due and unpaid. To this petition the defendant answered that at the time the bonds were issued the indebtedness of the district exceeded five per cent of the taxable property of the district, as shown by the State and county tax lists, and that the bonds were, therefore, void under the provision of the constitution of the State of Iowa; that no legal or proper election upon the question of issuing the bonds was held; that the bonds were issued under the pretence of building a school-house with the proceeds thereof, but the same has not been built nor was it intended that it should be built; that the district received no consideration for the bonds, and that the same are fraudulent and void; that plaintiff is not a *bona fide* holder of said bonds.

"The case was tried to the court and judgment was rendered in favor of plaintiff for the full amount of the six coupons declared on in that cause. It is shown by evidence *aliunde* that the five bonds bought by plaintiff were in possession of plaintiff's counsel at the trial of the action at Des Moines, and

that bonds Nos. 14 and 15 were actually produced and exhibited to the court at such trial and offered in evidence. It is not shown that at such trial the fact that plaintiff had bought and was the owner of bonds Nos. 16, 17 and 18, was made known to the court. The judgment entry in said cause shows that on that trial it appeared from the evidence that when said bonds Nos. 14 and 15 were issued the indebtedness of the district, exclusive of these bonds, exceeded the constitutional limitation of five per cent; that the judges trying said cause were divided in opinion upon the question whether the recitals in the bond estopped the defendant from showing this fact against plaintiff, and certified a division of opinion on this question, judgment being rendered in favor of plaintiff. It does not appear that the cause was taken to the Supreme Court upon the question certified.

"8th. Under the statutes of Iowa, in force in 1872 and 1873, regulating the assessment of property for the purpose of state and county taxation, the lists thereof could not be computed before the month of August, and in March, 1873, when these bonds were issued, the last computed tax list was for the year 1872."

Upon these facts judgment was entered in favor of the defendant, (25 Fed. Rep. 635,) to reverse which judgment this writ of error was sued out.

Mr. W. Willoughby and *Mr. B. W. Lacy* for plaintiff in error.

I. It appears from the findings that all five of the bonds and coupons were part of the same series, and their purchase by plaintiff one transaction, and that all the defences made in this action as to the five bonds were made in the former action as to two of these bonds, including the question as to whether plaintiff was an innocent holder, and that all of the testimony on such question produced by defendant in the present action as to the five bonds was in existence and could have been produced in the former action as to the two bonds and the six coupons attached thereto upon which judgment was asked.

Upon this state of facts there could be no serious question that plaintiff's recovery in the former action was conclusive of his right to recover in this under the doctrine laid down in *Beloit* v. *Morgan*, 7 Wall. 619, and *Aurora* v. *West*, 7 Wall. 82. A like doctrine is laid down by many other courts, including the Supreme Court of Iowa in the case of *Whitaker* v. *Johnson County*, 12 Iowa, 595, in which case it was directly alleged by defendant that the plaintiff had notice of the defences to the coupons in the second action.

We need not, however, discuss this line of cases farther, as we think it will be conceded that the judgment in the case at bar was erroneous if the doctrine announced by this court in *Beloit* v. *Morgan* and *Aurora* v. *West* is to control; but it is urged that this doctrine has been materially modified in the case of *Cromwell* v. *County of Sac*, 94 U. S. 351. But however much this later case may have limited or explained the doctrine understood to be announced in the former cases, it does not in our judgment justify or authorize the conclusions reached by the court below in the case at bar, where the facts are materially different. As appears from the 5th and 7th findings all five of the bonds were purchased by plaintiff at one date, of one person, for a fixed consideration for the whole, without actual knowledge of any defences to them, and thus holding them, she brought the first action on certain of the coupons attached to two of the five bonds. In such first action the defendant set up every defence which was subsequently pleaded in the present action, expressly alleging "that plaintiff is not a *bona fide* holder of said bonds." The court in such former action found that said bonds were issued in violation of the constitutional limitation, but held that defendant was estopped from showing such fact by the recitals on the bonds, thus necessarily finding that plaintiff was an innocent holder of the coupons upon which that action was brought. The question, therefore, as to whether plaintiff was an innocent holder of the coupons involved in the former action was an issue directly raised by the pleadings therein, and which the judgment showed was necessarily determined in favor of the plaintiff. But if, as the court below finds in

this action, the purchase of all five of the bonds and coupons was one transaction, then, if plaintiff was an innocent holder of the coupons involved in the former action, she was necessarily an innocent holder of the bonds upon which the present action was brought, and defendant is estopped by the former adjudication from further litigating the question; and this conclusion in no way conflicts with the doctrine in the *Cromwell Case*, but is in entire harmony therewith.

There are additional grounds for urging that in any view of the case, the former adjudication operates as an estoppel in the present action as to bonds Nos. 14 and 15, and the remaining coupons attached thereto. The former judgment was based on coupons attached to these very bonds. As appears from the 7th finding, the petition in the former action averred in terms that plaintiff was the owner of said bonds Nos. 14 and 15, and the coupons attached, and the answer, setting up every defence now pleaded, included the express allegation "that plaintiff is not a *bona fide* holder of said bonds," that is, bonds 14 and 15. It therefore appears that the very ground upon which the court below defeats recovery in the present action, viz.: that plaintiff is not an innocent holder of the bonds in suit, was expressly and in terms pleaded in the former action, at least as to said bonds Nos. 14 and 15, and was therein decided adversely to defendant. Not only was it practically impossible for the plaintiff to have been an innocent holder of the coupons involved in the former action without at the same time being an innocent holder of the two bonds to which they were attached, but the allegations of the answer therein on this point, as well as the other points, were in terms directed to the bonds themselves, and such bonds were produced and exhibited to the court and offered in evidence. Therefore as to bonds 14 and 15, and the fourteen coupons attached to each, plaintiff was entitled to judgment upon the special finding even if we concede the most adverse doctrine concerning the effect of former adjudications.

II. The next point urged by us is, that the court erred in determining by its judgment, based on its special findings,

that plaintiff was not an innocent holder of the bonds in suit. *Constructive* notice of facts could not affect plaintiff's character as a *bona fide* holder of negotiable paper, and nothing could so affect it short of actual notice of defences or actual bad faith, both of which elements are excluded by the special findings.

This question has been much discussed by both the English and American courts, and the rule adopted has, at different periods, undergone radical changes. The exact doctrine for which we are contending is, we think, correctly stated in Daniel on Negotiable Instruments as follows: "Parties negotiating for negotiable instruments are not bound to take notice of public records, which would affect them with notice were they dealing with the subject matter. And, therefore, when there is nothing on the face of the bill or note to give notice of any defects, the fact that a deed of trust securing its payment contains recitals which show that equities or offsets exist between the original parties does not weaken the position of a *bona fide* holder without actual notice."

The question of the effect upon recitals in the bonds of this constructive notice, is the subject of much discussion in the cases of *Buchanan* v. *Litchfield*, 102 U. S. 278, and *Dixon County* v. *Field*, 111 U. S. 83, as also in *Cromwell* v. *Sac*, before referred to, but there is no suggestion therein that such constructive notice has any bearing upon the *bona fides* of plaintiff's holding of the bonds. The implication from what is said is quite the reverse.

It seems to us that in considering the question of constructive notice to plaintiff the court below has perhaps confused the bearing which such constructive notice would properly have if the question of the validity of the bonds was an entirely open one, with the bearing which such constructive notice has upon plaintiff's character as an innocent holder. But the former question has been already adjudicated. Therefore the question of constructive notice of the extent to which the defendant district could properly become indebted, no matter how material it would have been in the former action as affecting the force to be given to the recitals on the bonds,

or as affecting other defences therein set up, cannot be considered in this action, unless such constructive notice bears on plaintiff's character as an innocent holder of the bonds in suit, and that it does not so affect her character seems to us to be fully determined by the decisions before cited.

No appearance for defendant in error.

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

Article 11, sec. 3, of the constitution of Iowa of 1857 ordains that "no county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation — to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness." Under that section, the limit of indebtedness which the district could incur at the date of the issue of these bonds was $2071.30. It was already indebted in a sum exceeding $3500, and the five bonds of themselves aggregated $2500, or nearly $500 more than the amount of debt the district could lawfully create. Aside, therefore, from the fact that they were issued without consideration, they were invalid by reason of the constitutional provision, and created no obligation against the district. They were issued at the same time and as one transaction, and were purchased by plaintiff together and in one purchase. If not charged with knowledge of the prior indebtedness, she was with the fact that, independent of such indebtedness, these bonds alone were an over-issue, and beyond the power of the district; for she was bound to take notice of the value of taxable property within the district, as shown by the tax list. *Buchanan* v. *Litchfield*, 102 U. S. 278; *Northern Bank* v. *Porter Township*, 110 U. S. 608; *Dixon County* v. *Field*, 111 U. S. 83. In the first of those cases, on page 289, it is said that "the purchaser of the bonds was certainly bound to take

notice, not only of the constitutional limitation upon municipal indebtedness, but of such facts as the authorized official assessments disclosed concerning the valuation of taxable property within the city for the year 1873;" and in the last, on page 95, that "the amount of the bonds issued was known. It is stated in the recital itself. It was $87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers." So when the plaintiff purchased these bonds she knew, or at least was chargeable with knowledge of the fact, that they were unlawfully issued, and created no obligation against the district. She could not therefore claim to be a *bona fide* purchaser, no matter what recitals appeared on the face of the instrument.

But the question which is most earnestly pressed upon our attention is the estoppel which is alleged to have been created by the judgment against the district in the United States Circuit Court at Des Moines, upon coupons detached from the two bonds numbered 14 and 15. Is this a case of estoppel by judgment? The law in respect to such estoppel was fully considered and determined by this court in the case of *Cromwell* v. *County of Sac*, 94 U. S. 351. It was there decided that when the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined.

Now, the present suit is on causes of action different from those presented in the suit at Des Moines. Bonds 16, 17 and 18 were not presented or known in that suit; and while bonds 14 and 15 were presented, alleged to be the property of

plaintiff, and judgment asked upon six coupons attached thereto, yet the cause of action on the six coupons is distinct and separate from that upon the bonds or the other coupons. Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper.

By the rule laid down in *Cromwell* v. *County of Sac*, the judgment in the suit at Des Moines is conclusive in this case only as to the matters actually litigated and determined. What were they? The defence pleaded was this: That at the time the bonds were issued the indebtedness exceeded five per cent, and the bonds were therefore void; that the district received no consideration; and that the plaintiff was not a *bona fide* holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were issued exceeded the constitutional limitation of five per cent; but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals. But this case does not turn upon that question at all, and nothing was determined here antagonistic to the adjudication there. An additional fact, that of notice from the amount of the bonds purchased, was proved.

The effect of recitals in municipal bonds is like that given to words of negotiability in a promissory note. They simply relieve the paper in the hands of a *bona fide* holder from the burden of defences other than the lack of power, growing out of the original issue of the paper, and available as against the immediate payee. Suppose two negotiable promissory notes, issued at the same time, and as a part of the same transaction.

In a suit on the first, brought by a purchaser before maturity, the maker proves facts constituting a defence as against the payee, but fails to bring home notice of these facts to the holder before his purchase; the judgment must go in favor of the holder, for the words of negotiability in the note preclude the maker from such a defence as against him. In a suit on the second of such notes may not the maker couple proof of notice to the holder, with that of the original invalidity of the note, and thus establish a complete defence against the holder? Is he precluded by the first judgment, and his failure in that to prove notice to the holder? That is precisely this case. In the suit at Des Moines no notice to the holder was shown. The recitals cut off the defence pleaded, of original invalidity. In this action notice is proved, and an additional fact is put into the case, which makes a new question. The effect of recitals is one thing; that of recitals coupled with notice is another. The one question was litigated and determined in the Des Moines suit; the other is presented here. Surely an adjudication as to the effect of one fact alone does not preclude in the second suit an inquiry and determination as to the effect of that fact in conjunction with others. Infancy is pleaded in an action on a contract, and an adjudication is made establishing it as a defence. In a second suit between the same parties on a different cause of action, though created at the same time, may not the plaintiff prove ratification after majority? Many reasons may induce or prevent the introduction into the first case of all the facts. It was well said in *Cromwell* v. *County of Sac*, page 356, that: "Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence in one action, which may not exist in another action upon a different demand, such as the smallness of the amount, or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting, in a subsequent action, other demands arising out of the same transaction."

Syllabus.

This case may be looked at in another light. The defence pleaded in the Des Moines suit was, that at the time of the issue of the two bonds then disclosed there was a prior indebtedness of the district exceeding the constitutional limitation; and that defence was the one adjudged to be precluded by the recitals. Here an additional defence is, that the five bonds in suit themselves created an over-issue. That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defence, irrespective of prior indebtedness. So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the court in that case, which of themselves create a perfect defence.

We see no error in the judgment, and it is

Affirmed.

Mr. Justice Harlan dissented.

CROTTY v. UNION MUTUAL LIFE INSURANCE COMPANY.

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

No. 248. Argued March 28, 1892. — Decided April 18, 1892.

A promise by the insurer in a policy of life insurance to pay the amount of the policy on the death of the assured to "M. C., his creditor, if living;" if not then to the executors, etc. of the assured, is a promise to pay to that creditor, if he continues to be a creditor, and if not, then to the executors, etc.; and in an action on the policy by the creditor, if sufficient time elapsed between the making of the policy and the death of the assured to warrant an assumption that the debt may have been paid, it is incumbent on the plaintiff to prove the continuance of the relation and the amount of the debt.

The fact that an insurance company does not object to answers made to questions on a blank sent out by it for securing proof of the death of

Statement of the Case.

the assured, does not prevent it from challenging the truth of any statement in such answers.

Life Insurance Company v. *Francisco*, 17 Wall. 672, distinguished from this case.

On January 31, 1883, defendant in error, defendant below, insured the life of Michael O'Brien. The language of the policy was this: "Does promise Michael O'Brien, of Lockford in the State of California to pay to said Michael O'Brien the sum of ten thousand dollars (any indebtedness to the company on account of this contract to be first deducted therefrom) at the office of the company in Portland, Maine, on the fifteenth day of January in the year nineteen hundred and forty-one, or if said Michael O'Brien shall die before that time, to pay said sum within ninety days after notice and satisfactory proofs of death shall have been furnished to the company at its said office, to Michael Crotty his creditor if living; if not, then to the said Michael O'Brien's executors, administrators or assigns, upon the following conditions." On January 2, 1885, plaintiff in error, plaintiff below, commenced his action in the Circuit Court of the United States for the Northern District of California to recover on the policy. The complaint contained these allegations:

"Third. That plaintiff was at the time of effecting said policy of insurance, and at the time of the death of said Michael O'Brien, a creditor of said Michael O'Brien for various sums of money, which this plaintiff had at various times advanced to the said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien.

"Fourth. That on the 15th day of September, 1883, at the city of Boston, State of Massachusetts, the said Michael O'Brien died.

"Fifth. That on the 14th day of January, 1884, plaintiff furnished the defendant with proof of the death of said Michael O'Brien in this case, and otherwise performed all the conditions of the said policy of insurance on his part."

The answer denied specifically that O'Brien was ever indebted to plaintiff, and denied that plaintiff ever performed

the conditions of the policy, except by furnishing proofs of the death of O'Brien. In the proofs of death, which were on a blank furnished by the insurance company, were these questions and answers: "3. In what capacity or in what title do you make the claim? As creditor and beneficiary named in the policy. 17. If the claim is made under an assignment, give the date, name of assignor and the consideration. The claim by me as creditor of deceased and beneficiary named in the policy." On the trial the only evidence furnished by the plaintiff of his interest in the policy was that contained in the policy itself and in these two statements in the proofs of death. The court instructed the jury to find a verdict for the defendant, to reverse which judgment plaintiff sued out this writ of error

Mr. Frederic D. McKenney for plaintiff in error.

Mr. J. H. Drummond for defendant in error.

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

Without noticing other questions discussed by counsel, it is sufficient to consider that of plaintiff's interest in the policy. It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced. *Cammack* v. *Lewis*, 15 Wall. 643, in which a policy of $3000, taken out to secure a debt of $70, was declared "a sheer wagering policy." *Connecticut Mutual Life Insurance Co.* v. *Schaefer*, 94 U. S. 457, 461, in which it was said: "In cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt." *Warnock* v. *Davis*, 104 U. S. 775.

Confessedly, plaintiff sues as a creditor of O'Brien. Within the language quoted, the amount of his insurable interest was

the amount of his debt; and the question is whether the policy and the proofs of death contained sufficient evidence of such insurable interest. It is unnecessary to enter into the disputed question, as to how far a policy of insurance taken out by a creditor on the life of his debtor is affected by a change in the relations between debtor and creditor prior to the maturity of the policy; for here the contract was between the insured, O'Brien, and the company; the promise of the company was to him, and to pay to him at the maturity of the policy, with a proviso that if the insured died before the end of the term payment should be made "to Michael Crotty, his creditor, if living; if not, then to the said Michael O'Brien's executors," etc. The words "if not" grammatically stand in antithesis to the words immediately prior, "if living;" and yet considering the purpose of the contract, and the words which follow directly thereafter, it would seem not unreasonable that they refer to a determination of the relation of creditor, and as though the language was, "if not a creditor, then to the said Michael O'Brien's executors," etc. If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectible by his executors or administrators. In 2 May on Insurance (3d ed.,) sec. 459*a*, the author says: "A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums and expenses should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property." *Central Bank* v. *Hume*, 128 U. S. 195, 205. But whatever doubts may exist as to the law applicable to such cases, or the rights of action on such a policy, the plaintiff in this case put his own construction on the contract, and tendered an issue which was accepted by the company. He alleged that he was a creditor at the time of the contract, and at the time of the death. Upon the issue thus presented the case went to trial. The

promise of the policy is to pay to Michael Crotty, his creditor, if living; and it is contended that this is an admission on the part of the company sufficient to justify a verdict against it. If an admission at all, it is good only as an admission of the date at which it was made, to wit, the date of the policy. The relation of debtor and creditor is not a permanent one, like that of parent and child, but one which may vary from day to day, changing both in fact and amount, according to the successive business transactions between the parties. So, admission or proof that the relation of debtor and creditor existed between two parties at one date is not admission or proof that months thereafter the same relation and to the same amount subsisted. If it were proven that the relation of debtor and creditor existed at the date of the issuing of the policy, and the beneficiary died the succeeding day, it might be that the nearness of the two dates would carry with it an inference that the relation still subsisted; but it would not do to rest on the same inference when many months had intervened between the date of the policy and the time of death.

Again, the indebtedness of O'Brien to plaintiff, if any existed, was a matter peculiarly within the knowledge of plaintiff; and if that indebtedness is an essential factor in his right to recover, justice requires that he should by affirmative testimony establish both the fact and the amount.

Still, again, not only does justice between the parties, but also that public policy which denounces wagering contracts, require that the proof of indebtedness should be distinct and satisfactory. It would tend to a successful consummation of wagering contracts in insurance if the mere recital in the policy was held sufficient to sustain a recovery in favor of the alleged creditor, no matter how long after the date of the policy the death of the insured happened. Admissions, whether direct or incidental, should never be carried beyond their actual extent, or the reasonable inferences therefrom, and should not be invoked to work injustice to parties litigant, or thwart the demands of sound public policy.

Neither can the statements of the plaintiff in his proofs of

death be considered evidence in his favor of the fact that he is a creditor, or the amount of the debt. All that there is in the proofs of death is his own statement, and surely a plaintiff cannot make his sworn statements at another time and place sufficient evidence, on a trial, of the existence of an essential and disputed fact. These statements are evidence against the claimant, and not against the insurance company. *Insurance Co.* v. *Newton*, 22 Wall. 32. Nor is the fact that the proofs of death were received by the insurance company without question an admission on its part of the truth of all the matters stated therein. The purpose of proofs of death in life insurance and proofs of loss in fire insurance cases is to put the insurance company in possession of the facts concerning the death or loss as claimed by the beneficiary or insured upon which it is to base its determination as to making or refusing payment, and when it receives such proofs without question it is an admission on its part that they are in form sufficient, but not that all the facts stated therein are true.

The policy in this case called for proofs of death; and the company by its answer admitted that satisfactory proofs had been furnished. The fact that, in the blank it prepared and sent to be filled out, it asked many questions which were answered by the claimant, and the proofs thus made were received without objection, did not prevent the company from challenging in court the truth of any fact stated therein essential to the plaintiff's right of recovery, and did not amount to an admission on its part respecting such fact. The case of *Life Insurance Company* v. *Francisco*, 17 Wall. 672, is cited by plaintiff as authority for a contrary view. There is perhaps a sentence or two in the opinion which, detached from the rest, and considered apart from the facts of the case, might justify the claim of plaintiff. That was a suit on a contract of life insurance. The insured died before the policy was actually issued. If it had been issued it would have contained a stipulation that "payment of the loss would be made within ninety days after notice of the death, and due proof of the just claim of the assured." The beneficiary was the wife of the insured. On the trial the plaintiff offered evidence to

prove the contract and the death of her husband; that she had filled up in the presence of the company's agent the blank forms which it had furnished, and which were always used in making proofs of death; and that he had received without objection and retained them; but offered no evidence as to the contents of those papers. She rested her case upon this testimony, and the court refused an instruction that she could not recover. This court held that such instruction was properly refused. Of course, as a wife, she had an insurable interest. Proof of the contract and of her husband's death established the fact of her right to recover, unless she had failed to furnish due proofs of her just claims; but as the company received them without objection, and did not return them for correction, it was properly held that they were sufficient. All that was in fact determined was that if the proofs were retained without objection the court could not declare them insufficient.

Further, in the case before us, the blank which was furnished to the plaintiff by the company, and upon which he prepared the statements, contained this notice:

"This blank is furnished (upon application) for the convenience and assistance of the representatives of the insured, and the company reserves the right to consider and determine the question of its liability under any policy without prejudice or presumption by reason of the delivery hereof."

So the party had full information in advance that the company's right to challenge its liability would not be in any manner prejudiced by the receipt of these proofs of death, or any statements therein.

We see no error in the ruling of the court below, and its judgment is

Affirmed.

Mr. Justice Gray was not present at the argument and took no part in the decision of this case.

WHITE *v.* RANKIN.

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

No. 259. Argued and submitted March 30, 1892. — Decided April 18, 1892.

A bill in equity for the infringement of letters patent for an invention was in the usual form, and did not mention or refer to any contract with the defendants for the use of the patent. There was a plea setting up an agreement in writing between the plaintiff and one of the defendants to assign to him an interest in the patent, on certain conditions, which it was alleged he had performed, and certain other matters which it was alleged had given the defendants a right to make, use and sell the patented invention. The plea being overruled the defendants set up the same defence by answer. To this there was a replication, and a stipulation in writing was entered into, admitting that the defendants had made and sold articles containing the patented inventions, and that a certain written agreement between the plaintiff and one of the defendants had been made, to the purport before mentioned, and certain proceedings had been had in pursuance thereof. Thereupon the Circuit Court entered a decree dismissing the bill "for want of jurisdiction;" *Held*,

(1) The decree was erroneous, because the jurisdiction was clear on the face of the bill, and the Circuit Court did not decide the case on the facts contained in the stipulation, nor adjudicate on the legal effect of those facts, while it had jurisdiction to try the case;

(2) The cases of *Wilson* v. *Sandford*, 10 How. 99; *Hartell* v. *Tilghman*, 99 U. S. 547, and others, explained;

(3) The Circuit Court ought to have proceeded to hear the case on the merits and the proofs put in.

THE case is stated in the opinion.

Mr. M. A. Wheaton for appellant submitted on his brief.

Mr. Francis J. Lippitt for appellees. *Mr. D. L. Smoot* filed a brief for same.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought April 19, 1878, in the Circuit Court of the United States for the District of California,

by George W. White, a citizen of California, against Ira P. Rankin, A. P. Brayton, John Howell and James M. Thompson, citizens of California, for the infringement of letters patent No. 44,145, granted to George W. White and Austin G. Day, as assignees of George W. White, the inventor, September 6, 1864, for seventeen years from August 23, 1864, for an "improved apparatus for roasting and reducing ores;" and also for the infringement of letters patent No. 46,287, granted to George W. White, as inventor, February 7, 1865, for seventeen years from that day for an "improved apparatus for calcining ores." All of the interest of Day in patent No. 44,145 was conveyed by him to White before September 20, 1876.

The bill is in the usual form of bills in equity for the infringement of letters patent. It alleges that the defendants, since September 20, 1876, and before the filing of the bill, without the license of the plaintiff and without any right so to do, have manufactured, used and sold machines embracing the inventions covered by both of the patents and infringing the same. It contains no mention of, or reference to, any contract with the defendants for their use of either of the patents. The prayer of the bill is in the usual form, for a perpetual injunction, an account of profits, an assessment of damages and an increase of the latter to an amount not exceeding three times the sum at which they shall be assessed. It also prays for a discovery from the defendants as to the number of furnaces they have made since September 20, 1876, how the same were constructed, whether they have not on hand a large number, and how many, of such furnaces, and how the same are constructed.

The defendants demurred to the bill on the ground that it showed no case for a discovery or for relief, and that the discovery demanded was in aid of the enforcement of a penalty. The demurrer was sustained as to discovery, with leave to the plaintiff to amend. The bill was then amended by striking out the prayer for an increase of damages and by waiving all right to a penalty.

The defendants then put in a plea to the bill, setting up that the plaintiff, on February 13, 1875, agreed in writing to assign

to the defendant Thompson a one-fourth interest in the two patents in question, with a corresponding one-fourth interest in all patents that the plaintiff might thereafter obtain for improvements made by him on said inventions, and a corresponding interest in all reissues and extensions of said patents, in case Thompson should, within sixteen months thence ensuing, elect to take the said assignment; that within the sixteen months Thompson elected to take it, and in due time thereafter performed every act necessary to entitle himself to it, and duly demanded of the plaintiff the execution and delivery of the said assignment, to which Thompson became entitled as of June 13, 1876; that the plaintiff White failing to execute and deliver the same to Thompson on demand, the latter, on August 31, 1876, brought suit against White in the District Court of the 19th Judicial District of California, in and for the city and county of San Francisco, to compel a specific performance of the said contract and for other relief; that White appeared and defended the suit; that the issues raised by the pleadings were duly tried and determined by the said District Court, which, on November 22, 1877, made a decree containing the following findings of fact: (1) That the contract set up in the complaint of Thompson was made between the parties; (2) that Thompson made to White a loan of $1000, and delivered to White a note and agreement mentioned in the contract, and received from White his notes for $1000; (3) that Thompson elected to take the assignment of one-fourth of the patent rights mentioned in the contract, and made known to White his said election before and upon the expiration of the sixteen months; (4) that at the expiration of that time, Thompson, at San Francisco, with reasonable diligence sought White for the purpose of demanding from him an assignment of one-fourth of the said patent rights, and prepared to tender and deliver to White, in payment therefor, White's said notes and Thompson's assignment of the income of the said one-fourth, in accordance with the terms of the contract; (5) that White knew of Thompson's purpose and evaded him; (6) that, at the expiration of the sixteen months, Thompson, by writing addressed to and received by White,

demanded an assignment of one-fourth of the said patent rights, and offered to pay the consideration and perform the conditions imposed upon him by the contract; (7) that, on July 11, 1876, Thompson made to White a personal tender of White's said notes and an assignment of the income of said one-fourth, and demanded from White an assignment of the one-fourth; (8) that White made no objections to any of the said offers or tenders of performance; (9) that, between the first offers of performance and the commencement of that suit, on September 1, 1876, Thompson made efforts to settle the matter without litigation; (10) that Thompson, at the expiration of the sixteen months, was, and ever since had been and still was, willing and ready to perform the conditions on his part to entitle him to the assignment of the said one-fourth, and in due time made tender of performance; that, from such findings of fact, the court was of opinion, as a conclusion of law, that Thompson was entitled to an assignment of one-fourth of said patent rights as of June 13, 1876, and to an account; that thereupon it was decreed (1) that White execute and deliver to Thompson a proper deed transferring and assigning to him, as of June 13, 1876, a one-fourth interest in the two inventions secured by the said two patents, with a corresponding interest in all patents that White might have obtained since February 13, 1875, or might thereafter obtain, on improvements made by him on said inventions, and a corresponding interest in all reissues and extensions of said patents; (2) that Thompson, on the delivery of such deed, should surrender to White his said notes, and execute and deliver to him an assignment of the income of said one-fourth, to run for the period of two years from June 13, 1876, unless the sum of $4000 should be sooner realized; and (3) that if White should fail, for five days from the date of the decree, to obey it, then the clerk of the court, as special commissioner, should execute and deliver the deed to Thompson, and receive for White the notes and assignment of income; that it was referred to a commissioner to ascertain and report certain matters, and among them the profits lost and the damages sustained by Thompson since June 13, 1876, in consequence

of White's failure to make the assignment; that, White having failed for more than five days after the entry of the decree to execute and deliver the assignment, the special commissioner, on January 31, 1878, received for White from Thompson the notes of White and the assignment of income mentioned in the decree, and executed and delivered to Thompson a deed transferring to the latter, as of June 13, 1876, a one-fourth interest in the two inventions secured by the said two patents, with a corresponding one-fourth interest in all patents that White might have obtained since February 13, 1875, or might thereafter obtain, on improvements theretofore or thereafter made by White on said inventions, and a corresponding interest in all reissues and extensions of the patents; that that deed was duly recorded in the Patent Office; that the other commissioner, before referred to, took depositions as to the account, and on October 25, 1880, returned them and his report to the Superior Court of the city and county of San Francisco, which by law had superseded the said District Court; that the cause came on for hearing upon White's motion for a final decree on the report, and, the judge who entered the decree of November 22, 1877, being no longer on the bench, the motion was heard and determined by a different judge, who, treating that decree as a nullity, entered an order, on February 4, 1881, against the objection of Thompson, setting aside and vacating all proceedings in the cause subsequent to the filing of the answer, restoring the cause to the calendar for trial, and charging Thompson with all the costs accrued up to the time of the order; that afterwards, on February 15, 1881, on the motion of White and against the objection of Thompson, the order of February 4, 1881, was amended so as to declare that the decree of November 22, 1877, and also the conveyance of January 31, 1878, and all proceedings in the action subsequent to the filing of the answer, were vacated and set aside, and the cause restored to the calendar for trial, and that Thompson should be charged with all the costs of the suit; that on April 5, 1881, Thompson appealed to the Supreme Court of California from the action of the Superior Court in its orders of February 4 and

15, 1881, and the appeal was undetermined and still pending; that at the time of the grievances mentioned in the bill in this suit Thompson was, and still is, the owner of and entitled to one-fourth of the inventions and patent rights mentioned in the bill, and to make, use and vend the furnaces; and that every furnace involving the said inventions, made, used and sold by the defendants, was made, used and sold under Thompson's said right and by virtue of his authority.

The plaintiff, in August, 1883, put in a replication to that plea. On April 1, 1884, the defendants filed a supplement to their plea, setting forth that on June 15, 1883, the Supreme Court of California sustained the appeal of Thompson, reversed the said orders of the Superior Court of February 4 and 15, 1881, and remanded the cause to that court for further proceedings not inconsistent with the opinion of said Supreme Court.

On August 11, 1884, the Circuit Court of the United States, on a hearing on the supplementary plea, overruled it, with leave to the defendants to file an amended plea. On August 25, 1884, they filed a plea setting up that Thompson, at the time of the grievances mentioned in the bill, was and still is the owner of and entitled to one-fourth of the inventions and patent rights mentioned in the bill, and entitled to make, use and vend the said furnaces; and that every furnace involving said inventions, made, used and sold by the defendants, was made, used and sold under Thompson's said right and by virtue of his authority. To the plea a replication was filed by the plaintiff in September, 1884. On the 29th of April, 1885, the Circuit Court entered an order overruling the plea and assigning the defendants to answer the bill.

On May 29, 1885, the defendants put in an answer to the bill, denying that the plaintiff, since September 20, 1876, had been and still was the exclusive owner of the two patents, denying that they had, without right, manufactured, used and sold furnaces covered by said patents, denying that they had infringed upon or violated any rights held by the plaintiff under the patents, and setting up that the defendant Thompson was and, ever since June 13, 1876, had been, the owner of

one-fourth of the inventions covered by the patents, and that every furnace manufactured, used and sold by the defendants, involving the said inventions, was manufactured, used and sold under the authority and license of Thompson as owner aforesaid of one-fourth of said inventions. A replication was filed to the answer in June, 1885.

On the 26th of February, 1886, a stipulation signed by the solicitors for the respective parties was filed, headed "Stipulation of submission and agreed facts," wherein it was admitted on behalf of the defendants, that after June 13, 1876, and before November 22, 1877, the defendants made and sold more than four furnaces involving devices and inventions described in and covered by the two patents in question, and that the said making and selling were done at the instance and by the direction of the defendant Thompson, "who asserts that he had authority so to do under the contract, decree and deed hereinafter mentioned." The stipulation then sets out the agreement of February 13, 1875, between White and Thompson, the complaint of Thompson against White filed August 31, 1876, in the suit in the state court, the answer of White to that complaint, the decree of November 22, 1877, the deed of January 31, 1878, the orders of February 4 and 15, 1881, made in the state court, the bill of exceptions for a second appeal to the Supreme Court of California, (which contains an order made by the Superior Court of the city and county of San Francisco, on August 26, 1884, ordering judgment in favor of Thompson against White and that White convey to Thompson a one-fourth interest in the patents and a corresponding one-fourth interest in all patents and patentable improvements on said inventions made by White prior to June 13, 1876, upon the delivery by Thompson to White of the notes mentioned in the complaint in the suit in the state court and the payment by Thompson to White of $4000,) the report of the commissioner in the suit of Thompson against White as to profits and damages, and copies of the two patents. By the stipulation it was admitted by the defendants that nothing had been paid by Thompson to White under the decree of August 26, 1884; and it was further agreed that

the cause should be brought on for hearing upon the pleadings therein and in accordance with the terms of the stipulation.

The cause having been heard by the Circuit Court of the United States for the Northern District of California, to which it had been transferred, that court entered a decree on October 10, 1887, that the bill be "dismissed for want of jurisdiction." From that decree the plaintiff appealed to this court. He having since died, his administrator has been substituted as appellant.

We are of opinion that the decree of the Circuit Court must be reversed. That decree was that the bill of complaint be dismissed for want of jurisdiction. The jurisdiction is clear on the face of the bill. The case stated by the bill arises on the patents. There is no suggestion in the bill that there was ever any contract or agreement, or attempt to make one, between the plaintiff and the defendant Thompson, or that either the plaintiff or the defendants claim anything under any contract. The averment in the bill that the defendants have made, used and sold machines containing the patented inventions without the license of the plaintiff and without any right so to do, cannot be regarded as raising any question on any alleged license or contract.

The Circuit Court did not decide the case upon the facts contained in the stipulation, nor did it adjudicate upon the legal effect of those facts. It did not hold that those facts were facts in the case and then dismiss the bill because the existence of those facts as facts removed the case from the cognizance of the court. It appears to have dismissed the bill on the simple ground that the defendants set up a contract of license from White. The bill being purely a bill for infringement, founded upon patents, what was set up by the defendants was set up as a defence and as showing the lawful right in them to do what they had done, and as a ground for the dismissal of the bill because they had not infringed the patents, although they had made and sold more than four furnaces involving the inventions covered by the patents. The decree was not one upon the facts of the case, but was

simply a decree that the court had no jurisdiction to try the case. The subject matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it. All of the parties to the suit were citizens of California, and if jurisdiction did not exist under the patent laws it did not exist at all.

Reliance is placed by the defendants upon the cases of *Wilson* v. *Sandford*, 10 How. 99; *Hartell* v. *Tilghman*, 99 U. S. 547; and *Albright* v. *Teas*, 106 U. S. 613.

In *Hartell* v. *Tilghman*, *supra*, the head-note of the report is that "a suit between citizens of the same State cannot be sustained in the Circuit Court, as arising under the patent laws of the United States, when the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention." But in the case now before the court, the Circuit Court did not find that there was a subsisting, valid contract governing the rights of the defendants in the use of the invention. The Circuit Court found nothing as to the existence or validity of the contract, decree or deed, mentioned in the stipulation. The stipulation provides that, at the hearing, the contract, complaint, answer, decree and deed, set forth in the stipulation, may be offered in evidence, subject to such objections as might be urged against the originals thereof. The stipulation further states that the defendants do not admit that anything is due to the plaintiff from Thompson, and that they do admit that nothing had been paid by Thompson to the plaintiff under the decree of the state court of August 26, 1884, and since the making thereof. All these matters and questions ought to have been adjudicated by the Circuit Court before it could find ground to determine whether or not it should dismiss the bill. Until it had so adjudicated those questions, the decision in the case of *Hartell* v. *Tilghman* could not apply.

In that case, a reference to the bill, in the records of this court, as filed in the Circuit Court November 2, 1874, shows that Tilghman, in addition to setting out his patent, stated that it had been his practice to put up such fixtures as were

required to work his patented invention at the premises of the parties desiring to obtain a license, and then to demonstrate its practicability and instruct the parties in its use, with the previous understanding, however, that if successful and satisfactory, the parties should then repay the expenses incurred by him, and execute a regular form of license contract adopted by him; that a copy of the form of license adopted by Tilghman at the time was annexed to his bill, and it is there found; that about midsummer, 1873, one of the defendants applied to his agent to obtain a license to use the patented invention; that the nature of the license and agreement issued by the plaintiff, the mode of accounting and of changing the license rate was explained to him, and he then agreed to execute a license and agreement accordingly; that, on the faith of that agreement, machinery was supplied and erected by Tilghman at the works of the defendants, and a demand was then made by Tilghman's agent for the repayment of the cost of the machinery and for the execution of the regular license and agreement; that, after much delay, the cost of the machinery was repaid to Tilghman, but the defendants, on April 25, 1874, positively refused to execute the license and agreement, being the same issued to others in the same business; that the defendants were then served with notice to desist from using the patent process; that several monthly payments of royalty had previously been received from the defendants on the faith of their promise to execute a regular license and agreement; that, since their refusal so to do, the defendants had continued to send monthly reports of work done and checks therefor to the agent of Tilghman, as if in payment under a license, but such checks were returned to them, as they had no authority to use said process; that the right had been reserved to Tilghman and his agents, in all licenses executed by him, to visit and inspect machines operating his said process; and that, on the 26th of June, 1874, his agents formally applied for and were refused admission at both factories of the defendants, the foreman in each case asserting the express directions of the defendant Hartell not to admit either of them. One of the interrogatories put in

the bill was whether a license was not tendered to the defendants to execute, and whether they had not refused to execute it. The rest of the matters in the bill were in the usual form of a bill for the infringement of a patent.

Thus, in that case, the plaintiff showed distinctly in his bill that he had made an agreement with the defendants, and under it had supplied them with machinery; that they had used such machinery and paid him royalty for its use, and had continued, after they refused to execute a regular license and agreement, to send reports of work done and checks in payment therefor, as if in payment under a license; and that they had violated a right claimed by the plaintiff and his agents to visit and inspect machines operating his process. Those allegations amounted substantially to saying that what the defendants had done they claimed to have done rightfully, under an agreement with the plaintiff. That is a very different case from the one stated in the bill in the present suit.

In the opinion in *Hartell* v. *Tilghman*, it is stated that the plaintiff in that suit set out in the bill what the court understood to be a contract with the defendants for the use by the latter of his invention; that he declared that the defendants had paid him a considerable sum for the machines necessary in the use of the invention, and also the royalty which he asked, for several months, for the use of the process secured by the patent; and that he alleged that afterwards the defendants refused to do certain other things which he charged to have been a part of the contract, and thereupon he forbade them further to use his patent process and then charged them as infringers. The Circuit Court had decided in favor of the plaintiff, and this court reversed the decree, with directions to dismiss the bill without prejudice. That was done by this court in view of the averments of the bill, and on a consideration of the evidence in the case, as to the verbal agreement made between the parties, and the transactions between them which took place under it.

The case of *Wilson* v. *Sandford*, 10 How. 99, is cited by the court in *Hartell* v. *Tilghman*. In that case, the bill was filed to set aside a contract which the plaintiff had made with the

defendants for the use of machines under a patent belonging to the plaintiff, and to restrain the use of them, as infringements, on the ground that the contract had been forfeited by the refusal of the defendants to comply with its conditions.

The case of *Albright* v. *Teas*, 106 U. S. 613, was the case of a bill, where the parties were citizens of the same State, brought in a court of that State for moneys alleged to be due under a contract whereby certain patents granted to the plaintiff were transferred to the defendant. The bill prayed for an accounting of the amounts due the plaintiff for royalties under the contract, and for a decree therefor. The case was removed into the Circuit Court of the United States, but that court held, on final hearing, that it had no jurisdiction, because the case did not arise under any law of the United States, and remanded the case to the state court. This court affirmed the decree, citing as authority *Wilson* v. *Sandford*, and *Hartell* v. *Tilghman*.

In *Dale Tile M'f'g Co.* v. *Hyatt*, 125 U. S. 46, the cases above referred to were reviewed, and it was stated that it had been decided in those cases that a bill in equity in the Circuit Court of the United States, by the owner of a patent, to enforce a contract for the use thereof, or to set aside such a contract because the defendant had not complied with its terms, was not a case arising under the patent laws; and it was said that the bill in *Hartell* v. *Tilghman* alleged that the defendants had broken a contract by which they had agreed to pay the plaintiff a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition. The same view was taken of *Albright* v. *Teas*.

The case of *Marsh* v. *Nichols*, 140 U. S. 344, is to the same purport.

We are entirely satisfied that the Circuit Court ought not to have dismissed the bill in this case for want of jurisdiction, but ought to have proceeded to hear it upon the merits and the proofs put in; and the decree is

Reversed, and the cause remanded to the Circuit Court with a direction to hear it upon the merits.

PENDLETON *v.* RUSSELL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 236. Argued and submitted March 24, 1892. — Decided April 18, 1892.

Four children of S. H. P., deceased, recovered judgment in the Circuit Court of the United States for the Western District of Tennessee against a life insurance company, a corporation of New York, on a policy insuring the life of the deceased, to which judgment a writ of error was sued out, but citation issued against only one of the plaintiffs. On this the company gave a supersedeas bond, securing the sureties by pledging or mortgaging some of its property. Proceedings were then taken in the courts of New York, under direction of the Attorney General of that State, which resulted in the dissolution of that corporation, and the appointment of a receiver of its property, who, by directions of the court, appeared in this court and prosecuted the writ of error in order to release the property pledged. After sundry proceedings the judgment of the Circuit Court was eventually reversed, and the case was remanded to the Circuit Court. A new trial was had there, but without summoning in the receiver, who did not appear, and judgment was again obtained against the company. This judgment was filed in the proceedings in New York as a claim against the assets of the company in the hands of the receiver, and the claim was disallowed by the highest court of that State. *Held*, that the appearance of the receiver in this court for the purpose of securing a reversal of the judgment below and the release of the mortgaged property gave to the Circuit Court in Tennessee no jurisdiction over the case, after the dissolution of the corporation, which could bind the property of the company in the hands of the receiver, or prevent the receiver from showing that the judgment was invalid because rendered against a corporation which had at the time no existence, and possessed no property against which the judgment could be enforced.

THE court stated the case as follows:

The facts out of which the present case arises, briefly stated, are as follows: On the 14th of July, 1870, the Knickerbocker Life Insurance Company of New York, for a stipulated annual premium of $364.60, issued a policy for the sum of ten thousand dollars on the life of Samuel H. Pendleton, payable to the claimants on his death. By its terms, the failure to pay the annual premium on the days designated, or to pay at

maturity any note, obligation or indebtedness given for the premium, rendered the policy void. The first premium was paid. The second premium, falling due on the 14th of July, 1871, was not paid. For it the assured drew two drafts on parties in New Orleans and gave them to the agent of the company, one a sight draft, for $44.50, which was paid, the other for $325, payable three months after date, which was presented to the drawees for acceptance, and afterwards, on its maturity, for payment, but it was neither accepted nor paid.

The assured having died, an action was brought in September, 1875, by the claimants — his children — upon the policy, against the insurance company, in a state court of Tennessee, to recover the amount of the insurance. On motion of the company, the action was transferred to the Circuit Court of the United States for the Western District of Tennessee. The cause was there tried, and, in May, 1881, a judgment was recovered by the claimants for $15,175. To review the judgment a writ of error from the Supreme Court of the United States was sued out by the company, and a supersedeas bond given in the sum of twenty thousand dollars. To secure the sureties on that bond the company mortgaged certain of its property situated in Brooklyn, New York, to the amount of fifteen thousand dollars, and assigned to them a mortgage for six thousand dollars on property in Jersey City. Upon the writ of error a citation was issued, but by some oversight or inadvertence both the writ and citation were directed to and served only upon one of the four defendants in error. Whilst the cause was pending in the Supreme Court of the United States upon this writ of error, an action was brought in the Supreme Court of New York by the attorney general of the State, in the name of the people of New York, against the insurance company to dissolve the corporation and forfeit its corporate rights, privileges and franchises, and, on the 29th of December, 1882, a judgment to that effect was rendered, dissolving the company and forfeiting its corporate privileges, rights and franchises, and appointing Charles H. Russell receiver of the property of the corporation. Soon afterwards the receiver ascertained the pendency of the cause in the

Supreme Court of the United States, and also the execution of the supersedeas bond, the mortgage of the property of the insurance company in Brooklyn, and the assignment of the mortgage on property in Jersey City, by way of indemnity of the sureties for their liability upon the bond. He reported the facts to the court whose officer he was and obtained authority to employ counsel to argue the cause upon the hearing on the writ of error in the Supreme Court of the United States. Counsel was accordingly retained for that purpose, and argument was had by him in 1884, and in January, 1885, that court rendered judgment reversing the judgment of the Circuit Court and awarding a new trial. 112 U. S. 696. But, according to its customary practice, it retained the mandate until its adjournment. Whilst thus retained the claimants filed a petition for reargument, which was sent to the counsel employed by the receiver. Before the petition was disposed of, it was discovered that the writ of error and citation were issued to only one of the four parties who were plaintiffs below, and the Supreme Court, of its own motion, entered an order requiring the party to the writ of error to show cause why the decision should not, for that reason, be vacated and the writ of error dismissed. Thereupon the receiver, by petition, stating to the court his ignorance, until that time, of the proceedings in question, applied for an amendment, reciting the incumbrance upon the property and the mortgage made, and the assignment of another as indemnity to the sureties, and thereupon the court made an order amending the writ of error and citation so as to include the names of the other three claimants, but not otherwise changing the record as to parties, upon condition that the other claimants have their day in court by the allowance of a reargument. This condition was accepted by counsel on both sides, and the case was reargued, after which the judgment was again reversed and a new trial ordered, and a mandate was issued pursuant to the original decision. 115 U. S. 339.

With the exception of securing counsel for the argument in the Supreme Court, the receiver took no part in the conduct of the defence in this cause, or in any subsequent proceedings,

Counsel for Plaintiffs in Error.

beyond directing that the mandate of the Supreme Court, issued upon its judgment of reversal, be sent to the lower court. He did not exercise any other control over the action than as mentioned. The mandate was filed with the clerk of the Circuit Court for the Western District of Tennessee in December, 1885, and in pursuance of it the former judgment was set aside, and thereupon the case was entered on the calendar for a new trial. The receiver was not substituted as a party to the action nor was he served with any process whatever, and on January 25, 1886, the claimants took judgment by default against the insurance company for the sum of $17,560.12. They then filed a certified copy of the judgment with the receiver, basing a claim upon it, for its amount, to share to that extent in the funds of the dissolved corporation in the custody of the receiver. The claim was rejected by the receiver, but, by the direction of the court, was sent to a referee to determine its validity; and he reported, substantially, the facts stated above, upon which he found that the judgment was without jurisdiction, so far as the assets under the control of the court were concerned; that it had no binding force except as against property discoverable in Tennessee; that the claim presented was not a legal charge and was not entitled to a distributive share of the assets of the company. The report of the referee was confirmed by the Supreme Court at special term, but its order to that effect was reversed by the general term of the Supreme Court, and an order made that the receiver allow the claim as valid against the assets of the company and pay the same in due course of administration of his trust. From that order the receiver appealed to the Court of Appeals of the State, and that court reversed the order of the Supreme Court at general term and confirmed the order of the Supreme Court at special term. 106 N. Y. 619. Its judgment having been remanded to the Supreme Court of the State, it was there entered, and from this judgment, thus entered, the cause is brought to this court on writ of error.

Mr. A. Walker Otis for plaintiffs in error.

Mr. J. A. Dennison for defendant in error submitted on his brief.

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

The only question presented for our determination is whether the judgment of the Circuit Court of the United States for the Western District of Tennessee, rendered on the 25th of January, 1886, was valid as a claim against the estate of the dissolved insurance corporation in the hands of its receiver, to be allowed in the distribution of its assets. The Court of Appeals, in affirming the order of the Supreme Court of New York at special term, disallowing the claim, held that the judgment was invalid, and placed its decision on the ground that the United States Circuit Court had not, at the time, jurisdiction of the defendant. The error alleged is that the court, in this ruling, failed to give that faith and credit to the judgment of the Circuit Court of the United States to which it was entitled. It is well settled that the judgments and decrees of a Circuit Court of the United States are to be accorded in the State courts the same effect as would be accorded to the judgments and decrees of a state tribunal of equal authority. It is within the jurisdiction of this court to consider and determine that question, that is, whether such effect was given in any particular case, whenever properly presented. But in determining that question this court must, in the first instance, consider whether the Federal court had jurisdiction to render the judgment or decree to which, it is contended, due effect was not given, for, as a matter of course, the jurisdiction of every court is open to inquiry when its judgments and decrees are produced in the court of a State, and it is there sought to give them effect.

Looking at the judgment of the Circuit Court of the United States, we are satisfied that the ruling of the Court of Appeals was correct. That judgment purports to be against the insurance company, but that company, at the time, had no legal

existence. It had been dissolved and its franchises, rights and privileges declared forfeited by a decree of the Supreme Court of New York, in a proceeding brought by the attorney general of the State, in the name of the people, and a receiver appointed of the effects of the corporation. The judgment was therefore no more valid against a non-existing corporation than it would have been if rendered for a like amount against a dead man. The receiver was not substituted in the place of the dissolved corporation; no process or citation was issued by that court to bring him before it, nor any proceeding taken for that purpose. Nor would such a proceeding have had any effect, for, the corporation having expired, the suit itself had abated. It ceased to be a pending suit; and if it were otherwise, the receiver could not take charge of any proceeding in a foreign jurisdiction by commencing an action, or defending an existing action, without the express authority of the court, whose officer he was, so as to bind any property or effects in his hands as receiver. *Booth* v. *Clark*, 17 How. 322; *Reynolds* v. *Stockton*, 140 U. S. 254.

The only measures he took, by the authority of that court, were to employ counsel to argue a pending case in the Supreme Court of the United States, brought there to review a judgment rendered in the Circuit Court of the United States for the Western District of Tennessee against the corporation. When appointed receiver he found that case pending in the Supreme Court upon writ of error to review that judgment against the corporation, and also that the company had mortgaged a portion of its property and assigned a mortgage which it held of other property, together amounting to twenty one thousand dollars, to indemnify the sureties on a supersedeas bond given on suing out the writ of error. The judgment of reversal was rendered, not upon any substitution of the receiver, but upon the record as it stood in that court. By the reversal the incumbrances upon the property of the corporation were removed. The *remittitur* being sent to the court below, the judgment against the corporation was set aside as it stood on the records of that court. The case was then in the position of an ordinary action against a defunct

corporation, and the connection of the receiver with it there ended. He did not make himself a party to the record from the fact that he may have sent the *remittitur* from the Supreme Court of the United States to the Circuit Court and had it filed there. He could not have become a party, or in any way have bound the corporation in the foreign jurisdiction, without the express authority of the court which appointed him. Nor did his employment of counsel, by such authority, to argue the case in the Supreme Court of the United States, operate to make him a party, or substitute him in the case as a representative of the corporation. The counsel was permitted to appear in that court because of the incumbrances upon property in its hands created by the mortgages given by the insurance company before its dissolution as security to the sureties on the bond. His relation to the property in his hands, in trust for the creditors of the corporation, rendered it his duty to call the fact of such incumbrances to the attention of the court and ask permission to employ counsel to argue the case, and thus, if possible, to free the property from the charges; but when that was accomplished, and the *remittitur* was sent to the court below, his connection with the case ended. What was done here is no more than what is frequently allowed to persons who, as trustees, may be affected in discharging their duties by a decision of questions involved in cases to which they are not parties. He was allowed to present, through counsel, objections to the judgment under consideration. Had the original judgment of the Circuit Court of the United States been affirmed, instead of being reversed, it having been rendered when the insurance company was in existence, it would have stood as a valid claim against the assets of that company after its dissolution. He did not, in any respect, bind himself as receiver, or bind the assets in his hands, because, after the judgment was set aside in subsequent proceedings, the claimants recovered another judgment. He was not bound by the second judgment, nor precluded from showing it was invalid because rendered against a corporation which had, at the time, no existence, or capacity to be sued, and did not

possess any property against which the judgment could be enforced.

In the condition in which the case in the Circuit Court of the United States was left after the reversal of its judgment, it had no jurisdiction to proceed with the action beyond entering the order under the mandate of this court. The subsequent trial and judgment were but proceedings against a corporation which had no existence, and vitality could not be given by them to the artificial body which had become extinct.

Judgment affirmed.

SAGE *v.* LOUISIANA BOARD OF LIQUIDATION.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 21. Argued and submitted March 4, 1892. — Decided April 18, 1892.

A judgment of a state court upon the question whether bonds of the State were sold by the governor of the State within the authority vested in him by the statute of the State under which they were issued, involves no Federal question.

THE case is stated in the opinion.

Mr. B. J. Sage, in person, and *Mr. Charles W. Hornor*, for plaintiff in error.

Mr. Walter H. Rogers, Attorney General of the State of Louisiana, submitted on his brief.

MR. JUSTICE FIELD delivered the opinion of the court.

This was a suit against the board of liquidation of the State of Louisiana to compel it to fund certain bonds of the State held by the plaintiff, of August 1, 1864, and to exchange them for its consolidated bonds as provided in the act of the legislature known as No. 3, of 1874, at the rate of sixty per cent of their valuation. The petition of the plaintiff was filed in April, 1881, in the Civil District Court of the parish of New

Orleans, and set forth that he held, as assignee of the agent of Mrs. J. D. Wells, and others, five bonds of the State, of one thousand dollars each, with coupons attached dated August 1, 1864, payable twenty-five years after date, with six per cent interest, payable semi-annually; that these bonds were issued by the State at that date under the law of February 8, 1864, and other laws, and were properly endorsed and assigned to the plaintiff, or the holders thereof; that they were legal and valid obligations of the State, were issued in strict conformity to law and not in violation of the constitution of the State or of the United States, and were issued and transferred for a valuable consideration, and were entitled to be funded as such valid obligations; that the plaintiff desired and was entitled to have them funded under act No. 3, of 1874, known as the Funding Act, and to have them exchanged for consolidated bonds of the State, as provided in that act, at the rate of sixty per cent of their valuation; and that he had presented the bonds for such funding and exchange to the board of liquidation, making an amicable demand of the board therefor, but that it had refused to fund them and make the exchange.

The petition further set forth that the bonds were issued by the regular state government of Louisiana in due course of administration and performance of governmental business, in paying for property needed to facilitate and aid civil operations, and that the transaction had no connection with contemporaneous military affairs and was in nowise touched or tainted with any confederate cause, consideration or motive; and that they were issued in proper form and by proper officers, according to law, sealed with the seal and secured by the faith of the State. The plaintiff therefore prayed that the board of liquidation might be cited, and that it be decreed that the bonds were legal and constitutional obligations of the State of Louisiana; that they were issued in conformity with law and not in violation of state or Federal constitution, and were given to the original holders for a valuable consideration, and were entitled to be funded and exchanged in conformity with the act No. 3, of 1874; and also for all orders, judgments and decrees that justice might require in the premises.

To the petition the board of liquidation appeared and answered by a general denial of its allegations. It also made special denial that the bonds were valid obligations of the State, and alleged that the parties who signed and issued them were not the authorized agents of the State; that the bonds were not issued for a valuable consideration; and that they were issued in violation of the Constitution of the United States.

The statute No. 3, of 1874, referred to in the petition, enacted that the board of liquidation, which was created by it, should exchange the consolidated bonds of the State, for which the act also made provision, for all valid outstanding bonds of the State, at the rate of sixty dollars for one hundred dollars; and a subsequent amendatory act, known as No. 11, of 1875, required a favorable decision of the Supreme Court of the State upon all bonds of questionable and doubtful obligation, as to their legality and validity, as a condition of their fundability, and also required the parties seeking to have them funded to affirm that they were issued in strict conformity to the law and for a valuable consideration, and that they were constitutional. Upon the issues formed, the testimony of several witnesses was taken, explaining the circumstances under which the bonds were disposed of, from which it appeared, among other things, that they were exchanged for sugar procured by the State. The party to whom the bonds were delivered and from whom the sugar was obtained testified to that effect, and the private secretary of the governor at that time and the state quartermaster, who were fully acquainted with the transaction, corroborated his testimony.

In February, 1888, the case was heard by the District Court of the parish, which rejected the demand of the plaintiff and ordered judgment for the defendant, which was accordingly entered. The case was taken to the Supreme Court of the State, and there the judgment was affirmed. In giving its decision that court said that the general and special denials of the answer fully put in issue the validity of the bonds and the right of the holder to have them funded, as representing a valid debt of the State; that the second section of the act under

which the bonds were issued imperatively required that they should be sold by the governor for the benefit of the State, or exchanged for treasury notes, state or confederate; that it was plain that the governor, as the chief executive officer of the State, had no power whatever to deal with those bonds or to dispose of them, except in the precise manner and for the distinct purpose pointed out by the law; and that any act of his in contravention of its provisions in that regard would be void, and could not confer on any person or holder of the bonds a right to recover them or to enforce their liquidation or payment. This proposition, said the court, it did not understand to be controverted by the plaintiff, but to be virtually admitted as correct by his contention that the bonds were sold by the governor in compliance with the terms of the act. It then holds that the exchange of the bonds for sugar was not a compliance with the act which authorized only a sale of the bonds for treasury notes, state or confederate. It would also appear that the plaintiff invoked the legal presumption that the officer charged by the law with the sale of the bonds discharged his duty, and that therefore the bonds were sold and not exchanged, and, confirmatory of this presumption, he cited an entry in the receipt ledger of the state auditor's office, in which the transaction is alluded to as a purchase. But the court said as against the admission of the plaintiff himself that the bonds were exchanged, and the positive testimony of witnesses to the same effect, that presumption could not prevail, which was not a conclusive presumption, but one that prevailed only till the contrary appeared. The Supreme Court of the State therefore affirmed the judgment of the lower court; and to review that judgment the case is brought here on writ of error. 37 La. Ann. 412.

The case does not present any Federal question for our consideration. The only question before the court below, and which was decided negatively, was whether the bonds were sold by the governor of the State, within the authority vested in him by the law under which they were issued, by being exchanged for sugar, and were therefore valid obligations of the State which could be funded under its statute. There is,

in the consideration and determination of this question, no resort to any Federal law; it is purely a question of the construction of a state statute and of the power which was conferred by it upon her agents — nothing more nor less. The governor, acting in their disposal, was limited by the language of the statute. He could sell the bonds or exchange them for treasury notes, state or confederate; he could not dispose of them in any other way.

There being no Federal question involved,

The writ of error must be dismissed.

ADAMS *v.* LOUISIANA BOARD OF LIQUIDATION.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 187. Argued and submitted March 4, 1892. — Decided April 18, 1892.

The judgment of a state court in a suit to compel the funding of state bonds, that a former adverse judgment upon bonds of the same series could be pleaded as an estoppel, presents no Federal question.

THE case is stated in the opinion.

Mr. B. J. Sage and *Mr. Charles W. Hornor* for plaintiff in error.

Mr. Walter H. Rogers, Attorney General of the State of Louisiana, submitted on his brief.

MR. JUSTICE FIELD delivered the opinion of the court.

This, like No. 21, was a suit against the board of liquidation of the State of Louisiana to compel it to fund four bonds of the State, held by the plaintiffs, and to exchange them for its consolidated bonds, as provided in the act of the legislature known as No. 3, of 1874, at the rate of sixty per cent of their valuation.

The board of liquidation appeared to the suit and interposed the plea of *res adjudicata*, based upon the judgment in the suit No. 21, brought by B. J. Sage against the board, that is, that the question involved in this case — the fundability of the bonds — was conclusively determined in the negative in that case, and that the plaintiffs here are thereby estopped from its assertion; and also set up as a defence that the bonds were not fundable because they were not issued in conformity to the statute of the State, which required that they should be sold at par for confederate or state treasury notes, whereas here they were exchanged for sugar. The District Court of the parish of East Baton Rouge, in which this suit was commenced, sustained both defences and gave judgment for the defendant. That judgment, on appeal, was affirmed by the Supreme Court of the State, the latter court placing its decision chiefly upon the ground that the fundability of the bonds of the series was by the law No. 11, of 1875, to be determined in a single suit by the holder of such securities, and those in this suit were held by Sage when he commenced his suit. To review this latter judgment the case is brought to this court.

The four bonds in this suit are a part of the same series of one hundred and eighty-four bonds issued at the same time as the five bonds which were considered in the suit of *B. J. Sage* v. *Board of Liquidation of Louisiana*, *ante*, 647, that suit being brought by him to obtain a like funding of those bonds, and their exchange. The validity of the bonds was there the subject of consideration, and it was adjudged that they were not valid obligations of the State. Bonds exchanged for merchandise were considered not to have been issued in strict conformity to law, as required by the terms of the supplementary funding act of Louisiana, known as No. 11, of 1875, and therefore were not fundable.

The bonds in this case were transferred by Sage to the plaintiffs while his own suit was pending, but were left in his own hands for collection. The court was of opinion that the judgment as to certain of the bonds of one series determined the character of the other bonds of the same series, and, without deciding in terms the plea of *res adjudicata* interposed by

the State, based upon the judgment in the Sage case, held that the fundability of the bonds in this suit was settled by the decision in that case, which is practically applying that doctrine. The transcript of the judgment presented to us, which contains the proceedings of the court below, does not present any Federal question which authorizes us to review the decision of the state court. Whether or not the adjudication upon the first bonds of the same series could be pleaded as an estoppel to the proceeding for the fundability of other bonds of the same series, is not a Federal question. Nor does the ruling of the court upon the validity of the bonds present any question under Federal law, but solely a question upon the construction of a statute of the State, and whether an exchange of the bonds for merchandise was a sale within its meaning. The writ of error must therefore be

Dismissed.

ROBERTS *v.* LEWIS.

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

No. 285. Argued April 12, 1892. — Decided April 25, 1892.

Under Rev. Stat. § 914, and according to the Code of Civil Procedure of the State of Nebraska, if the petition, in an action at law in the Circuit Court of the United States held within that State, alleges the requisite citizenship of the parties, and the answer denies each and every allegation in the petition, such citizenship is put in issue, and, if no proof or finding thereof appears of record, the judgment must be reversed for want of jurisdiction.

In this action, brought June 11, 1887, by Lewis against Roberts in the Circuit Court of the United States for the District of Nebraska, the petition was as follows:

"Comes now the said plaintiff and shows and represents unto this honorable court that he is a resident of the city of Milwaukee in the State of Wisconsin, and a citizen of the said State of Wisconsin, and that the defendant is a resident of the

city of Lincoln in the State of Nebraska, and a citizen of the said State of Nebraska, and that the matters and things herein in controversy exceed the sum and value of two thousand dollars, exclusive of interest and costs.

"2d. The plaintiff further complains of the defendant, for that plaintiff has a legal estate in and is entitled to the immediate possession of the following described property, to wit: lots number one, two, three, four, five and six, all in block number forty-one, in Dawson's addition to South Lincoln, in Lancaster County, Nebraska, and that said defendant has ever since the 11th day of April, 1887, unlawfully kept and still keeps the plaintiff out of possession thereof.

"Wherefore the plaintiff prays that he may have judgment for the delivery of the possession of said premises to him, and for the costs of this action."

The defendant filed the following amended answer:

"1. The above named defendant, for an amended answer to the plaintiff's petition, says that for more than ten years prior to the commencement of this action he had been and still is in the open, adverse possession of the premises in controversy.

"2. Defendant, further answering, denies each and every allegation in said petition contained."

The parties stipulated in writing that the value of the premises in controversy exceeded $5000; and the case was tried by a jury, who, by direction of the court, returned a special verdict, finding the following facts:

Jacob Dawson died seized in fee of the premises, leaving a widow and five children; and by his last will, dated May 10, 1869, and duly admitted to probate in Lancaster County, Nebraska, made the following devise and bequest: "To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, rights and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, shall go to my surviving children, share and share

alike." On December 14, 1879, Editha J. Dawson married Henry M. Pickering. The premises were conveyed on March 15, 1870, by warranty deed by Editha J. Dawson to one England, and by him on December 15, 1871, to the defendant, who has ever since been in the peaceful occupation and control of the same. The premises were conveyed on September 15, 1879, by warranty deed by Jacob Dawson's children to Wheeler and Burr, by them on April 27, 1880, to Ezekiel Giles, and by him in May, 1887, to the plaintiff.

The jury found that, if the court should be of opinion that under the will Editha J. Dawson took only an estate determinable upon her marriage, then the plaintiff at the commencement of the action was seized in fee of the premises, and entitled to the immediate possession thereof, and should recover of the defendant nominal damages; but if the court should be of opinion that under the will Editha J. Dawson took an estate absolutely in fee, then they found for the defendant.

The Circuit Court gave judgment for the plaintiff upon the special verdict; and the defendant sued out this writ of error.

Mr. John H. Ames (with whom was *Mr. N. S. Harwood* on the brief) for plaintiff in error.

Mr. L. C. Burr (with whom was *Mr. J. M. Woolworth* on the brief) for defendant in error.

Counsel discussed fully the other questions of law involved in the case, but to the point as to jurisdiction only said in their brief that, no plea to it having been interposed, it was not necessary for the jury to find the citizenship of the parties.

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

The principal question argued in this case is upon the true construction of the devise of Jacob Dawson to his wife, in view of the conflicting decisions of this court and of the Su-

preme Court of Nebraska. *Giles* v. *Little*, 104 U. S. 291; *Little* v. *Giles*, 25 Nebraska, 313. See also *Little* v. *Giles*, 118 U. S. 596; *Giles* v. *Little*, 134 U. S. 645.

But a preliminary question to be decided is whether the Circuit Court of the United States appears upon this record to have had any jurisdiction of the case.

The petition or declaration alleges in due form that the plaintiff is a citizen of the State of Wisconsin, and the defendant is a citizen of the State of Nebraska; and further alleges that the plaintiff has a legal estate in and is entitled to the immediate possession of certain lots in Lancaster County in the State of Nebraska, and the defendant has kept and still keeps the plaintiff out of possession thereof; wherefore the plaintiff prays for judgment for delivery of possession of the premises to him. The answer sets up two defences: 1st. Open and adverse possession of the premises by the defendant for ten years; 2d. A general denial of each and every allegation in the petition. The special verdict finds facts bearing on the merits of the case, but nothing as to the citizenship of the parties.

Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff, and must appear of record: and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of jurisdiction in the Circuit Court. *Brown* v. *Keene*, 8 Pet. 112; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237.

Doubtless, so long as the rules of pleading in the courts of the United States remained as at common law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by plea in abatement, and was admitted by pleading to the merits of the action. *Sheppard* v. *Graves*, 14 How. 505.

But since 1872, when Congress assimilated the rules of pleading, practice and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several States, all defences are

open to a defendant in the Circuit Court of the United States, under any form of plea, answer or demurrer, which would have been open to him under like pleading in the courts of the State within which the Circuit Court is held. Act of June 1, 1872, c. 255, § 5; 17 Stat. 197; Rev. Stat. § 914; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72; *Glenn* v. *Sumner*, 132 U. S. 152; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 39, 40.

By the Nebraska Code of Civil Procedure, § 62, every civil action is commenced by petition; and by § 92, the petition must contain "the name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant," "a statement of the facts constituting the cause of action," and "a demand of the relief to which the party supposes himself entitled." By § 94, the defendant may demur to the petition for certain matters appearing on its face, among which are "that the court has no jurisdiction of the person of the defendant, or the subject of the action," and "that the petition does not state facts sufficient to constitute a cause of action;" and by § 95, the demurrer must specify the grounds of objection, or else be regarded as limited to the latter ground only. By § 96, "when any of the defects enumerated in § 94 do not appear upon the face of the petition, the objection may be taken by answer;" and in every case, by § 99, the answer must contain "a general or specific denial of each material allegation of the petition controverted by the defendant," and "a statement of any new matter constituting a defence."

Under this code, as under the code of New York, upon which it was modelled, the answer takes the place of all pleas at common law, whether general or special, in abatement or to the merits; and a positive denial in the answer of "each and every allegation in the petition" puts in issue every material allegation therein, as fully as if it had been specifically and separately denied. *Sweet* v. *Tuttle*, 14 N. Y. 465; *Gardner* v. *Clark*, 21 N. Y. 399; *Donovan* v. *Fowler*, 17 Nebraska, 247; *Hassett* v. *Curtis*, 20 Nebraska, 162; Maxwell's Practice (4th ed.) 127, 128; Bliss on Code Pleading (2d ed.) § 345.

And by the express terms of §§ 94, 96, above cited, an objection that the court has no jurisdiction, either of the person of the defendant or of the subject of the action, may be taken by demurrer, if it appears on the face of the petition, and by answer, if it does not so appear.

The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding upon this essential point, on which the jurisdiction of the Circuit Court depended, the judgment must be reversed, with costs, for want of jurisdiction in the Circuit Court, and the case remanded to that court, which may, in its discretion, either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence of the citizenship of the parties. *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237.

Judgment reversed, and case remanded to the Circuit Court for further proceedings in accordance with the opinion of this court.

KENDALL *v.* SAN JUAN SILVER MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 294. Submitted April 13, 1892. — Decided April 25, 1892.

Intrusion upon and location of a mining claim within the territory set apart by the treaty proclaimed November 4, 1868, for the exclusive use and occupancy of the confederated bands of Ute Indians, was forbidden thereby, and was inoperative to confer any rights upon the plaintiffs. Location of the same premises by others after extinguishment of the Indian title, and prior to relocation of the former prohibited claim, gave the right of possession.

The failure of the plaintiffs to record their location after extinguishment of such Indian title within the period prescribed by the laws of Colorado,

Statement of the Case.

and until long after the premises had been properly located by others, forbids their claim of priority based upon a wrongful entry during the existence of the Indian Reservation.

Noonan v. *Caledonia Mining Co.*, 121 U. S. 393, cited and distinguished.

THIS action was brought in a District Court of Colorado to recover possession of a tract of mineral land, a part of what was known as the "Bear Lode." The plaintiffs claimed under a location made September 3, 1872. The land so located was at that time within the territory reserved for the use and occupancy of the Ute Indians. The Indian title was extinguished in March, 1874, and the defendant claimed under a location made August 29, 1874. The case was submitted on the pleadings and the following stipulation.

"The following stipulation is agreed upon by and between the parties, and testimony relating to the matters herein referred to is waived and may be dispensed with upon the hearing and trial.

"I. It is admitted that the 'Bear' lode was located Sept. 3rd, 1872, and was duly recorded as stated in the complaint. It is admitted by the defendant that all the averments in paragraph II of the complaint are true, excepting the averment that the Bear Lode mining claim was at the date of its location 'a part of the public domain of the United States and unoccupied & unclaimed by any person and was open to entry as mineral lands;' and excepting, further, that if the locators of the Bear lode were entitled to make any such location whatever of said premises or any part thereof they were not entitled on Sept. 3rd, 1872, or any time prior to June 15th, 1874, to locate a claim exceeding fifty (50) feet in width, and defendant therefore denies that plaintiffs are entitled to more than 50 feet in width, if they are entitled to anything.

"It is further admitted that an additional certificate of location was filed, as stated in paragraph 5 of the complaint.

"It is also admitted that the plaintiffs are the proper persons to maintain this suit, and proof of chain of title and production of conveyances and records is dispensed with.

"It is further admitted that the allegations contained in paragraph 9 of plaintiffs' complaint are true.

Argument for Plaintiffs in Error.

"II. It is further admitted that on the 29th day of August, A.D. 1874, A. H. Kallenberg, W. H. Wallace and J. G. Jackson located the 'Titusville' lode, and plaintiffs admit that all the matters and things stated in paragraph 1 of second defence and answer are true, excepting the statement that said 'premises *was* then (Aug. 29th, 1874) a part and parcel of the unoccupied and unappropriated public domain of the United States,' which last averment plaintiffs do not admit.

"It is further admitted that since the respective locations of said 'Bear' and 'Titusville' lodes each of the claimants and their grantors have duly done and performed the annual assessment work, and neither party shall be required to introduce testimony relating to the annual expenditures required by law.

"It is further agreed that the defendant named is the proper party defendant in this action, and that no proof of its chain of title to the 'Titusville' lode or the production of conveyances or records showing such title shall be required."

Judgment for the defendant, which was affirmed by the Supreme Court of the State. To the latter judgment this writ of error was sued out.

Mr. E. T. Wells, *Mr. R. T. McNeal* and *Mr. John G. Taylor* for plaintiffs in error.

The only question to be determined by this court is the one presented by the stipulation of counsel filed in the District Court, *i.e.* where citizens, having located or attempted to locate a mining claim on an Indian reservation, and in that connection performed all the acts requisite to a legal appropriation of the ground were the same unoccupied public domain, do their continued possession after the Indian title is extinguished, and their maintenance and adoption of such prior location validate the same as against others seeking to appropriate the premises? If the answer be in the affirmative, the plaintiffs in error are entitled to hold the ground in controversy against the defendants in error. They made the Bear location when it is conceded by every one that the ground was not open to entry or

occupation; still they posted the discovery notice as the law required, they marked the boundary of the claim by putting substantial posts and land marks at each corner, and in the centre of the side lines as the law required; they performed the annual expenditures as the law required, and filed the location certificate with the clerk and recorder of the county in which the claim was situated as the law required.

In June, 1874, when this land was ceded to the government, and by it thrown open to exploration, use and enjoyment by its citizens, these plaintiffs were in possession of the same, working upon it and developing it and enjoying its fruits, maintaining and adopting the boundaries they had previously established in every particular, occupying it with all the *indicia* intact to evidence a mining location. They subsequently filed the certificate required in case of an original location. This was sufficient to entitle them to hold this ground as against the defendants. The fact of their remaining in possession, and maintaining and operating this claim, and thereby adopting all that had been done, was just as efficacious as making a new location. The defendants knew just as well as any one could know that the plaintiffs were there in the enjoyment of this property, and they have sought by straining a technicality to defeat the rights of plaintiffs in this regard. But it is not worth while to pursue any lengthy discussion of this question, as this court has already passed upon it. *Noonan* v. *Caledonia Mining Co.*, 121 U. S. 393.

The facts and circumstances in the case at bar are on all fours with that case, and it is respectfully submitted that error is manifest in the ruling below.

Mr. A. T. Britton and *Mr. A. B. Browne* for defendant in error.

Mr. Justice Field delivered the opinion of the court.

The defendant, a corporation organized and existing under the laws of Colorado, in October, 1880, applied to the proper land office in that State for a mineral patent for a lode claim

known as the Titusville lode, in San Juan County, which was fifteen hundred feet in length by three hundred feet in width. Within the time prescribed by statute, and during the month, the appellants here, Kendall and others, filed in the same land office an adverse claim for a portion of the premises, of which the defendant desired to obtain a patent, asserting a prior and superior right to the same, as part of a lode known as Bear lode, which they had discovered on the 3d of September, 1872, and upon which they had sunk a discovery shaft, and performed the several acts required to perfect a mineral location under the laws of the United States and the local rules and customs of miners. Within thirty days thereafter they brought the present action under section 2326 of the Revised Statutes, to determine as between the parties, the right of possession to the disputed premises, the issue of a patent for the same being dependent upon such determination. In their complaint they allege the performance of the labor required and all other acts necessary to preserve the lode from forfeiture. That lode, as originally located, extended fifteen hundred feet in length and one hundred feet on each side of the centre of the vein. In October, 1878, the locators filed an additional certificate of location in the local land office, claiming one hundred and fifty feet on each side of the centre. And they aver that the Titusville lode, claimed by the defendant corporation, is a junior location and includes in length twelve hundred feet of the surface ground of the Bear lode, and in width covers more than the south half of the surface ground for the twelve hundred feet.

The defendant in its answer denies that the ground in controversy comprised part of the unappropriated public domain of the United States, and that it was open to location on the 3d day of September, 1872, as set forth by the plaintiffs, and alleges that at that date the ground embraced a portion of a certain tract of land which, by treaty between the United States and certain confederated bands of the Ute Indians in Colorado, concluded March 2, 1868, and proclaimed on the 6th of November of the same year, had been reserved for the use and occupancy of the Indians, and that the Indian title to the

tract was not extinguished until March, 1874. 15 Stat. 619. The answer also alleges that the Titusville lode claim was located on the 29th day of August, 1874; that all acts were done necessary to constitute a valid location of the premises; and that the legal title to the lode, and the right to its possession, had by various conveyances from the original locators become vested in the defendant; and it prays judgment therefor.

By the terms of the treaty mentioned, a tract of country, which included the mining property in question, was set apart for the absolute and undisturbed use and occupation of the Indians therein named, and for such other friendly tribes or individual Indians as, from time to time, they might be willing, with the consent of the United States, to admit among them. And the United States agreed that no persons except those designated, and such officers, agents and employés of the government as might be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to "pass over, settle upon or reside in the territory described," except as therein otherwise provided. 15 Stat. 619, 620. The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of the land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs. Whatever rights to mining land they subsequently possessed upon the original Indian tract were founded upon a new location made more than two years after the withdrawal of the reservation, and after the Titusville lode had been located by the defendant. Had the plaintiffs, immediately after the withdrawal of the reservation, relocated their Bear lode, their position would have been that of original locators. They would then have been within the rule in *Noonan*

v. *Caledonia Mining Co.*, 121 U. S. 393. That rule was this: that where a party was in possession of a mining claim on the withdrawal of a reservation caused by a treaty with the Indians, with the requisite discovery, with surface boundaries sufficiently marked, with a notice of location posted, and with a disclosed vein of ore, he could, by adopting what had been done and causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day. But such was not the case here. The reservation by the treaty was withdrawn in March, 1874; the Titusville lode was located on the 29th day of August, 1874, and the Bear lode of the plaintiffs was not relocated until two years afterwards.

Whatever rights, therefore, the plaintiffs had, subsequently to the withdrawal of the reservation, in the premises claimed by the defendant, arose from its disclaimer. By that disclaimer the company relinquished to the plaintiffs such portion of their Bear lode, with surface width of fifty feet, as came in conflict with the premises claimed by it under the Titusville location, and upon its motion in the trial court, judgment was entered, pursuant to such disclaimer, for the plaintiffs for the amount disclaimed, and for the defendant for the residue.

The plaintiffs now seek, by their writ of error, to recover the residue of the Titusville lode, insisting that, under the decision in *Noonan* v. *Caledonia Mining Co.*, they have a right to all the premises which were covered by their illegal location during the pendency of the Indian treaty. But such is not the proper construction of that decision. There was in that case no new location by different parties, after the removal of the reservation, to interfere with the old location then renewed and with a proper record.

There is another view of this case, which leads to the same conclusion. Section 2324 of the Revised Statutes makes the manner of locating mining claims and recording them subject to the laws of the State or Territory, and the regulations of each mining district, when they are not in conflict with the laws of the United States. The act of Colorado, of February 13, 1874, requires the discoverer of a lode, within three months

from the date of discovery, to record his claim in the office of the recorder of the county in which the lode is situated, by a location certificate.

It also provides that a location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of the location, the number of linear feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void.

The reservation of the premises in controversy by force of the Indian treaty was extinguished April 29, 1874. On that date the premises in controversy were open to location, and within three months afterwards the duty rested upon the plaintiffs to record the certificate of the location of their lode, if they desired to preserve any right in it. No such record of their location was made within that time. No record was made or desired by them until an additional certificate of location was filed by them, claiming 150 feet on each side of the centre of their vein, which was not done until October, 1878. As they failed to comply with the law in making a record of the location certificate of their lode, it does not lie with them to insist that their wrongful entry upon the premises during the existence of the Indian reservation operated in their favor against parties who went upon the premises after they had become a part of the public domain, and made a proper location certificate and record thereof, and complied in other particulars with the requirements of the law.

Judgment affirmed.

GREGORY *v.* BOSTON SAFE DEPOSIT AND TRUST COMPANY.

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

No. 292. Argued April 12, 13, 1892. — Decided April 25, 1892.

Money, the proceeds of a note, was deposited to the credit of a suit in equity in a Circuit Court, in a Safe Deposit Company. G. brought another

suit in equity in the same court, against the company and P. to obtain a decree declaring him to be entitled to the money. The Circuit Court dismissed the bill on the ground that the question ought to be adjudicated in the first named suit, but did not decree that the dismissal was without prejudice to the right of G. to make his claim in that suit. This court, on appeal by G., modified the decree to that effect, but gave the costs of this court to the appellees.

THE court stated the case as follows:

In an action at law, brought in the court below, in the name of Charles F. Jones against William C. N. Swift, judgment was rendered against the latter upon a promissory note dated April 20, 1883. That judgment was satisfied by the payment into court, pursuant to an agreement between the parties, of the amount, principal and interest, due upon it — $24,926.90. Subsequently, January 10, 1887, that sum was transferred to the credit of the suit in equity in the same court of *Charles A. Gregory* v. *Frederick A. Pike et al.*, No. 2170, "to remain subject to the order of the court in that cause." On the 26th day of March, 1887, the clerk deposited $24,000 of the above sum in the Boston Safe Deposit and Trust Company, to be held by it subject to the order of the court. The balance was deposited with the Merchants' National Bank of Boston.

The present suit was brought August 6, 1887, by Gregory and Jones against the above corporations and Mary H. Pike, executrix of Frederick A. Pike, to obtain a decree declaring Gregory to be entitled to the above funds as the proceeds of the note on which the judgment against Swift was rendered. The bill makes no reference to the fact that the fund in dispute was subject to the order of the court in equity suit No. 2170.

This cause having been heard upon the pleadings and proofs, the bill of complaint was dismissed, with costs to be duly taxed. The Circuit Judge in an opinion disclosing the nature of the suit, and the facts established by the evidence, held that the decision of the question whether Mrs. Pike, as executrix, had a lien on the Swift notes or their proceeds, to the extent of $25,000, "belongs to equity suit No. 2170, where all per-

Argument for Appellants.

sons claiming an interest in these notes are made parties. The moneys in the possession of the defendants, the Boston Safe Deposit and Trust Company and the Merchants' National Bank, referred to in the bill of complaint herein, are held by them subject to the orders of this court in said equity suit No. 2170, and no order relating to said moneys can properly be made in this suit, which does not include as parties some of the persons who are parties in said equity suit No. 2170. The bill in this case should be dismissed, with costs." 36 Fed. Rep. 408, 414.

Mr. F. A. Brooks for appellants.

The decree of absolute dismissal, if allowed to stand as against Gregory, has cut off forever his claim to the fund in court; and if allowed to stand as against Jones, it has done the same thing as to him. Although Jones's claim could not be considered by the court in passing upon the suit in equity, yet it has been cut off or barred by the decree of dismissal entered in this cause.

The court below, therefore, while proposing to reserve its decision of this case, or to turn over the parties therein to some other cause for adjudication of their claim, has in fact adjudicated adversely to both of them in this cause, and left nothing for them or either of them to litigate in any other cause. This may have been an oversight, and probably was so, but the effect is nevertheless fatal to the plaintiffs, even if not so intended.

This order was, we submit, extra-judicial, and therefore invalid and void. The money paid into court by Swift as the defendant and judgment debtor in the action at law of *Jones* v. *Swift* had been paid by him voluntarily after judgment and before execution, and not under or by force of the legal process of the court, and consequently the court gained thereby no power or control whatever over said fund, except as trustee or depositary thereof for the benefit of the real or beneficial plaintiff in the action at law.

In passing the order of January 10, 1887, the court below

assumed an unwarrantable authority over the fund so paid into and received by the court, as constructive trustee for the benefit of the plaintiff Jones or persons represented by him.

Mr. John Lowell and *Mr. Thomas H. Talbot* for Mary H. Pike, one of the appellees.

Mr. Justice Harlan delivered the opinion of the court.

We are of opinion that the questions attempted to be raised by the present suit should have been presented, and can be effectively determined only in equity cause No. 2170. And such we understand to have been the opinion of the Circuit Judge. But the decree below is, in form, one upon the merits, and might perhaps be pleaded in bar of any claim that Gregory, or Gregory and Jones, might assert in suit No. 2170 to the funds in question. Without passing upon any of the questions raised by the pleadings in this case, we hold that the decree should have been without prejudice to any right he or they may have to make such claim in that suit, if they be so advised.

It is, therefore, ordered and adjudged that the decree below be, and the same is hereby, so modified, that the dismissal of the bill of complaint is without prejudice to any claim the plaintiffs or either of them may rightfully assert in equity suit No. 2170, in the court below, to the proceeds of the judgment against Swift. The costs of this court are adjudged to the appellees.

UNDERWOOD *v.* METROPOLITAN NATIONAL BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 270. Argued and submitted April 4, 1892. — Decided April 25, 1892.

M. gave to a bank a mortgage on land owned by him to secure paper which the bank might discount. Among the paper so discounted was a note made by J., which M. had discounted, and which J. paid to the bank. The note had been given for a certificate of deposit which J. afterwards endorsed, and subsequently paid. J. claimed subrogation under the mortgage to the rights of the bank as respected the certificate of deposit: *Held*, that the claim could not be allowed; that the payment of the note to the bank by J. discharged the mortgage, so far as it was a security for the note; and that the certificate of deposit was not secured by the mortgage.

THE case is stated in the opinion.

Mr. James F. Mister (with whom was *Mr. Wallace Pratt* on the brief) for appellants.

Mr. C. O. Tichenor, for appellees, submitted on his brief.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

The Mastin Bank, a Missouri corporation, located at Kansas City, Missouri, became insolvent, and made an assignment, August 3, 1878, of all its property and assets, to one Kersey Coates, in trust for the benefit of all its creditors. The firm of John J. Mastin & Co., doing business at Kansas City, was composed of John J. Mastin and Thomas H. Mastin, the former of whom was cashier of the bank and the latter its assistant cashier. Both of them were stockholders in, and directors of, the bank.

The Mastin Bank discounted with the Metropolitan National Bank, of the city of New York, from time to time, and when the Mastin Bank failed it was liable for its endorsements

on paper so discounted by the Metropolitan Bank to the amount of over $200,000. The firm of John J. Mastin & Co. endorsed for the accommodation of the Mastin Bank all of the paper so discounted by the Metropolitan Bank. To secure such endorsements the two Mastins and their wives, on June 7, 1878, executed a mortgage to the Metropolitan Bank, covering lands owned by them in Jackson County, Missouri, and in the city of Kansas, in said county, and in Johnson County and Nemaha County, Kansas, "to have and to hold the said described real estate, with all the rights, privileges, and appurtenances thereto belonging, unto the said Metropolitan National Bank of New York, its assigns and successors forever, and upon this express condition: Whereas the Mastin Bank of Kansas City, Missouri, is indebted to the said Metropolitan National Bank as endorser on various notes, drafts, and bills which the said Mastin Bank has sold to said Metropolitan National Bank: Now, therefore, if the said Mastin Bank, its assigns or successors, shall pay or cause to be paid all notes, drafts, and bills so sold to the said Metropolitan National Bank, and shall pay or cause to be paid all notes, drafts, and bills which the said bank may hereafter sell and endorse to the said Metropolitan National Bank, then this conveyance shall be void; otherwise in full force and virtue at law." In 1879 the Metropolitan Bank brought a suit in equity in the Circuit Court of the United States for the Western District of Missouri to foreclose that mortgage as to the lands lying in that district against the Mastins and other persons. The Mastins did not question the validity of the mortgage.

Among the promissory notes so discounted by the Metropolitan Bank were two made by the firm of Johnson & Crawford, composed of Augustus H. Johnson and Robert F. Crawford, one of such notes being for $10,000, dated July 18, 1878, payable thirty days after date, at the Metropolitan Bank, to the order of Quinlan, Montgomery & Co., and endorsed by the last-named firm, by John J. Mastin & Co., and by the Mastin Bank, due August 20, 1878; and the other being for $11,185, due September 19, 1878, about which no question arises in this case.

The firm of Johnson & Crawford bought a quantity of cattle from one G. Baer, and to enable that firm to do so, it procured from the Mastin Bank the money for which the note for $11,185, above mentioned, was given. The $10,000 note above mentioned was given to the Mastin Bank for a certificate of deposit, which the bank issued to Baer, in the following terms:

"No. 4945.

"KANSAS, Mo., *July* 18, 1878.

"G. Baer has deposited in the Mastin Bank, Kansas City, Mo., ten thousand dollars, payable in c'y to the order of himself on return of this certificate, properly endorsed, thirty days after date, payable in New York exchange.

"$10,000.00. Aug. 20. JOHN J. MASTIN, *Cashier.*

"Countersigned: W. H. WINANTS, *Tel.*"

That certificate of deposit was taken by Baer in part payment for the cattle; but shortly after he received it, he became uneasy as to the condition of the bank, and on his application the firms of Johnson & Crawford and Quinlan, Montgomery & Co., endorsed the certificate. Before it became payable, the bank failed. Johnson & Crawford paid the amount of the certificate to Baer, and also paid the $11,185 note, at maturity, to the Metropolitan Bank, but did not pay the $10,000 note to that bank, because they had paid to Baer the amount of the certificate. The Metropolitan Bank brought suit against Johnson & Crawford on the $10,000 note. The assignee, Coates, paid to the Metropolitan Bank, out of the assets of the Mastin Bank, dividends on the notes of Johnson & Crawford, amounting to $4122.08. The Baer certificate was allowed by the assignee, who paid to Johnson & Crawford all the dividends upon it, except the last one, which he did not pay to them because he had paid dividends upon the notes to the Metropolitan Bank.

In October, 1880, Johnson having died and Jesse N. Johnson having become his administrator, one F. L. Underwood, on behalf of the firm of Johnson & Crawford, with the money of Johnson and Quinlan, paid to the Metropolitan Bank the

balance of $7603.50 due on the $10,000 note. After doing this, Underwood gave to Johnson and Quinlan a paper writing as follows:

"KANSAS CITY, Mo., *Octo.* 22*nd*, 1880.

"I have this day bought with the money of A. W. Johnson and C. C. Quinlan a claim based on note of Johnson & Crawford for $10,000, endorsed by Quinlan, Montgomery & Co. & J. J. & T. H. Mastin, on which certain payments have been made by the dividends of the Mastin Bank. This claim is in suit against Mastins in the hands of Karnes & Ess, and said Johnson & Quinlan are entitled to the said claim and all dividends made upon it, and this shall operate as an assignment of said claim. F. L. UNDERWOOD."

Quinlan testifies that he furnished a part of the money, which he charged to Crawford; and Crawford testifies that he repaid such money to Quinlan.

When Underwood paid the $7603.50 to the Metropolitan Bank, an agreement, dated October 20, 1880, was signed by the bank, as party of the first part, and by him as party of the second part, containing the provisions set forth in the margin.[1]

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[1] First. That the said party of the first part, as endorsee from the Mastin Bank of Kansas City, Missouri, is the owner and holder of a certain promissory note executed by Johnson & Crawford to Quinlan, Montgomery & Co., and by said Quinlan, Montgomery & Co. endorsed, and upon which said note there is a balance due of principal and interest, at this date, of $7603.50, and for which suit is now pending in the Circuit Court of the United States at Kansas City.

Second. On said note John J. Mastin and Thomas H. Mastin are also endorsers, and to secure the payment of the same, with other liabilities, said Mastins executed to said party of the first part a mortgage on certain real estate in Missouri and Kansas, and to foreclose said mortgage suits are now pending, one in the Circuit Court of the United States at Kansas City, Missouri, and one in the Circuit Court of the United States at Topeka, Kansas.

Third. For and in consideration of the sum of $7603.50 paid to said party of the first part by said party of the second part, and the payment of all costs in said suit thereon, said note so executed by said Johnson & Crawford has this day been assigned and transferred, without recourse, to said party of the second part.

In pursuance of its agreement to that effect, made October 20, 1880, the Metropolitan Bank, on February 1, 1886, filed a supplemental bill in its foreclosure suit, adding as defendants said Underwood, Crawford, and Johnson, administrator, averring that they claimed to have acquired an interest in the subject matter of the suit and in the mortgaged premises, by virtue of an assignment to Underwood of one of the notes secured by the mortgage, in trust for Johnson & Crawford, and praying that the three new defendants might answer, setting forth their interest in the mortgaged premises or the proceeds of their sale, or be barred and foreclosed.

On the 18th of February, 1886, Underwood, Johnson,

Fourth. It is also further agreed, as a part of said assignment and transfer, that the said party of the second part shall release, and hereby releases, all claim or interest in so much of said mortgage as covers the real estate therein described and lying in the State of Kansas; but as to the land lying in the State of Missouri, and covered by said mortgage, the said party of the second part shall retain his interest therein, in consideration of the release of the Kansas lands, as aforesaid; and the said party of the first part stipulates and agrees that, in said foreclosure proceedings in Missouri, it will file a supplemental bill, showing this assignment of said note, and to which said party of the second part agrees to enter his appearance and make proper answer or plea thereto, so that the same may be determined as a part of said foreclosure, and so that said party of the second part may obtain such orders as he may deem necessary and proper to obtain a *pro rata* division of the proceeds arising from the decree of foreclosure.

Fifth. In all matters pertaining to said mortgage, whether by foreclosure or otherwise, it is agreed, by and between the parties hereto, that the same shall be managed exclusively by said party of the first part, without any interference or hindrance by said party of the second part: Provided, however, that nothing shall be done to impair or affect the right of said party of the second part to receive his *pro rata* share of whatever sum may be realized by the foreclosure, or otherwise, from the Missouri lands.

Sixth. It is also further agreed, by and between the parties hereto, that, except as to the Kansas lands so released as hereinbefore recited, said party of the second part shall be entitled to receive on said note a *pro rata* share on any other security held by said party of the first part for this and other indebtedness of said John J. Mastin and Thomas H. Mastin.

Executed in duplicate the day and year aforesaid.

THE METROPOLITAN NATIONAL BANK OF NEW YORK,
BY KARNES & ESS, *Att'ys.*
F. L. UNDERWOOD.

administrator, and Crawford filed their answer to the bill of the Metropolitan Bank, setting up the agreement of October 20, 1880, and claiming that thereby Underwood had been subrogated to the rights of the Metropolitan Bank as to the mortgaged property in Missouri; that Crawford and Johnson alone, as between them and Quinlan, Montgomery & Co., had become entitled to the benefit of said agreement; and that it was made with the concurrence, sanction and approval of the mortgagors, the Mastins.

The answer then gives the history of the Baer certificate of deposit and of the $10,000 note, and alleges that Johnson & Crawford and Quinlan, Montgomery & Co. paid the certificate of deposit; that the consideration of the $10,000 note, as between Johnson & Crawford on the one side, and the Mastin Bank and the Mastins on the other, failed; that the Mastin Bank received $10,000 from the Metropolitan Bank by the discounting of the note; that at the time of the agreement of October 20, 1880, payments had been made upon the note by dividends from Coates, the assignee, on said note and on the certificate of deposit, leaving due to the Metropolitan Bank on the note $7640.63 at the time the agreement was made; and that afterwards, on September 22, 1884, Coates paid a further dividend of 20 per cent to the Mastins, being $2000, on the certificate of deposit, which dividend, but for the said agreement, belonged to Johnson & Crawford, and to which the Mastins had otherwise no claim.

The prayer of the answer, as a cross-bill, asked (1) that the new defendants be subrogated to the right of the Metropolitan Bank under the mortgage; (2) that in case the payment of the said balance of $7640.63 to the said bank should not be held as binding on the Mastins, the defendants should be repaid that amount, and interest, by the bank; and (3) that they should be repaid the amount, with interest, of all the dividends received by the Mastins on the certificate of deposit.

The Mastins on October 29, 1886, put in an answer to the pleading of Underwood, Crawford, and Johnson, treating it as a cross-bill, taking issue upon its allegations of fact and law, and setting up that, on May 18, 1886, the Metropolitan Bank

had executed and delivered to the Mastins a quit claim deed releasing unto them the premises in Jackson County, Missouri, and in the city of Kansas, covered by the mortgage, the deed being stated to be made in release of, and in satisfaction for, the mortgage, "the indebtedness secured by said mortgage having been fully paid off and discharged."

Crawford and the other plaintiffs in the answer in the nature of a cross-bill put in a replication to the answer thereto of the Mastins.

Proofs were taken, and the case was brought to a hearing in the Circuit Court before Mr. Justice Brewer, who delivered an opinion, which, though found in the record, is not reported, and entered a decree dismissing the bill of the Metropolitan Bank and the answer of Johnson, Crawford and Underwood in the nature of a cross-bill, and charging the last-named three parties and the bank with costs. From that decree Underwood, Johnson, administrator, and Crawford have appealed to this court.

The Circuit Court arrived at the conclusion that it was shown satisfactorily by the evidence that the agreement of October 20, 1880, was made with the assent of the Mastins, but it found that the $10,000 note had been paid and extinguished by the makers of it, who were primarily responsible upon it; and that, as the mortgage was given to secure discounts, when the makers of the note discounted had paid it, the mortgage, as security for such discount, was at an end. It also said, that, as the Mastin Bank had given, for the $10,000 note, instead of cash, the Baer certificate of deposit, and as that certificate was executed by the Mastin Bank alone, and was not a personal obligation of the mortgagors, and as Johnson & Crawford, at the request of Baer, had endorsed the certificate of deposit, and, before that certificate matured, the Mastin Bank failed, and Johnson & Crawford took up the certificate of deposit and held it at the time the agreement of October 20, 1880, was made, and on the ground that the practical effect of that agreement was to make the partial assignment which it contained of the mortgage operate as security for the certificate of deposit, it was claimed that Johnson & Crawford, having paid

the $10,000 note, and holding the certificate of deposit, ought to be permitted to transfer to the certificate the security of the mortgage, and that the assent of the Mastins to the arrangement made by the agreement of October 20, 1880, was equivalent to an appropriation of the mortgage as security for the certificate, and entitled Johnson & Crawford to be subrogated to the rights of the Metropolitan Bank under the mortgage. But it held that the Mastins had never said or done anything to make the mortgage a security for the certificate of deposit, and that the payment of the $10,000 note to the Metropolitan Bank by Johnson & Crawford discharged the mortgage, so far as it was a security for that note.

We concur in these views. The certificate of deposit is not mentioned in the agreement of October 20, 1880. It was an obligation of the Mastin Bank, and not of the Mastins. It was not endorsed by the Mastins; and, as said by the Circuit Court, to give to Johnson & Crawford a claim under the mortgage in respect of the certificate of deposit, would be for the court to make a contract which the parties did not make, simply on the ground that the court thinks the parties ought to have made such a contract.

The debt to the Metropolitan Bank, on account of which Johnson & Crawford claimed subrogation, was their own debt, for which they were primarily liable, as makers of the note, and on which no one else was liable except as endorser. The note was paid by them as makers, and not by a third party. They seek to be subrogated to rights under a mortgage which was given to the Metropolitan Bank by the Mastins as accommodation endorsers, to secure accommodation endorsements. The payment of the note by Johnson & Crawford made it impossible for the condition of the mortgage to be broken in regard to the note; and the anomalous claim is made, that the payment by them of a debt owed by them to the Metropolitan Bank, to secure which debt the mortgage was given, instead of satisfying the mortgage in regard to that note, operates as a breach of the condition of the mortgage, which will sustain a foreclosure. No such principle can exist in a court of equity. It would be superfluous to cite authorities on the subject.

Syllabus.

The agreement of October 20, 1880, recites that the Mastins are endorsers on the note in question, and that they executed the mortgage to secure the payment of that note, with others. The endorsement of the Baer certificate by Johnson & Crawford was made after it was delivered to Baer. They did not endorse it at the request of the Mastin Bank or of the Mastins; and, as before said, the Mastins were in no way parties to the certificate. Johnson & Crawford endorsed and paid the certificate voluntarily, and, so far as appears, without consideration. The endorsement of the $10,000 note by the Mastins, as accommodation endorsers of it for the Mastin Bank, could not, on the facts, operate as an endorsement by the Mastins of the certificate of deposit. It does not appear that the Metropolitan Bank, in executing the agreement of October 20, 1880, had ever heard of the certificate of deposit; and that agreement operated merely as a permit by the Metropolitan Bank to Johnson & Crawford to take a share of the proceeds of the sale, under the mortgage, of the property of the Mastins.

The payment to the Metropolitan Bank of the note, by Johnson & Crawford as its makers, operated to extinguish the claim and suit of that bank against them as such makers, and thus was of benefit to the Mastins as endorsers of the note; but Johnson & Crawford were in no different position after the agreement of October 20, 1880, was made, from what they were in before that time, for they paid voluntarily a debt as to which they were the primary debtors. The Mastins received nothing by reason of the agreement.

Decree affirmed.

UNITED STATES v. EATON.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 291. Submitted April 12, 1892. — Decided April 25, 1892.

A regulation made August 25, 1886, by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under § 20 of

Statement of the Case.

the act of August 2, 1886, c. 840, (24 Stat. 209,) in relation to oleomargarine, required wholesale dealers therein to keep a book, and make a monthly return, showing certain prescribed matters. A wholesale dealer in the article who fails to comply with such regulation is not liable to the penalty imposed by § 18 of the act, because he does not omit or fail to do a thing required by law in the carrying on or conducting of his business.

There are no common law offences against the United States.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence; and the statutory authority in the present case was not sufficient.

The court stated the case as follows:

This case comes to this court on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Massachusetts.

At May term, 1888, of that court, an indictment was found by the grand jury against George R. Eaton, containing two counts. The first count alleged that on the 1st of November, 1886, and on divers days thereafter up to and until the 28th of June, 1887, at Boston, in that district, and at a place of business situated therein, the defendant was engaged in the business, avocation and employment of a wholesale dealer in oleomargarine, and was subject and liable to all needful regulations made by the Commissioner of Internal Revenue of the United States, with the approval of the Secretary of the Treasury, for the carrying into effect of the act of Congress approved August 2, 1886, c. 840, (24 Stat. 209,) entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine;" that, at the times above mentioned, said regulations were well known to the defendant, and it became his duty to keep a book showing the oleomargarine received by him, and from whom the same was received, and also showing the oleomargarine disposed of by him, and to whom the same was sold or delivered, in accordance with the regulations made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on August 25, 1886; and that, at the times above mentioned, he wilfully, knowingly and unlawfully failed to keep such book showing the matters above

stated, as required by law. The second count alleged, with the other averments contained in the first count, that it became the duty of the defendant to make a monthly return to the collector of internal revenue, showing the oleomargarine received by the defendant, and from whom it was received, and also that disposed of by him and to whom it was sold or delivered, in accordance with said regulations; and that, at the times above mentioned, he wilfully, knowingly and unlawfully failed to make such monthly return to the collector of internal revenue, as required by law. The defendant filed a demurrer to the indictment, alleging that it was insufficient in law.

At the hearing in the Circuit Court on the demurrer, the following questions arose, upon which the judges by whom the court was held were divided in opinion; and those questions were stated and certified to this court: "First. Whether a wholesale dealer in oleomargarine, who knowingly and wilfully fails and omits to keep a book showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, August 25, 1886, is liable to the penalty imposed by section 18 of the act of Congress approved August 2, 1886, entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine.' 24 Stat. 209. Second. Whether a wholesale dealer in oleomargarine, who knowingly and wilfully fails and omits to make monthly returns to the collector of internal revenue, showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the said regulations, is liable to the penalty mentioned in the first question."

Mr. Assistant Attorney General Parker for plaintiff in error.

The sole question to be reviewed here is whether Congress possessed power to authorize the officers named to establish a regulation requiring wholesale dealers in oleomargarine to keep a record of their dealings therein and to report the details of such dealings as required by the regulation quoted.

The regulation involved, which was made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, pursuant to said section 20, is as follows: Wholesale dealers in oleomargarine will keep a book (Form 61) and make a monthly return on Form 217, showing the oleomargarine received by them and from whom received; also, the oleomargarine disposed of by them and to whom sold or delivered.

It will be noticed that this regulation when separated into its two propositions furnishes the two grounds of the indictment set forth in the record, and, correspondingly, the two questions which are set forth in the certificate of division.

Form 61 provided for a record of all oleomargarine received by the wholesale dealer, showing the date of its receipt, from whom it was received, the amount, the manufacturer thereof, and also the date when the same was disposed of by the wholesale dealer, to whom it was sent, the name of manufacturer and the amount. The serial numbers of the packages were to be stated in both cases.

Form 217 provided for a monthly return of the same statements and details by the wholesale dealer to the Commissioner of Internal Revenue, and a recapitulation of its contents was to be verified by the oath of the dealer.

This rule is shown by the Department regulations to have been made August 25, 1886; it was terminated by the act of October 1, 1890 (26 Stat. 567, sec. 41, p. 621).

The oleomargarine act defines butter and defines oleomargarine, and places a special tax upon manufacturers and on sellers of the last-named commodity, and requires payment of a stamp duty on the same, and provides for publicity and for supervision of the manufacture, sale and exportation thereof.

The regulation in question was duly formulated under said section 20 to provide certain necessary rules for a compliance

with the intent of and for the carrying out of the purposes of the enactment.

The regulation is shown by Treasury Document of August 25, 1886, to have been made by the Commissioner with the approval of the Secretary.

No contention appears to be made as to the needfulness of the rule, and as it was left to the Commissioner and Secretary to determine what was needful in the premises their decision was final.

The analogies of the customs laws and of the laws relating to the collection of duties upon tobacco and spirits naturally suggested the regulation adopted under the oleomargarine law, and it seems plain that the proper and effective execution of this law would be scarcely possible without a regulation equivalent to the one now under examination.

As the word "regulation" has a technical meaning, an argument based upon definitions or upon general reasoning would be of little service.

Cases involving the exercise of executive power have, in several instances, come before the courts, and questions of the application and force of departmental regulations have, from time to time, been passed upon by the judicial branch of the government.

The scope and effect of regulations of the departments have repeatedly come under consideration in the Court of Claims. *Harvey* v. *United States*, 3 C. Cl. 38, 41; *Landram's Case*, 16 C. Cl. 74, 84, 85; *Savings Bank* v. *United States*, 16 C. Cl. 335, 347, 349; *Maddox* v. *United States*, 20 C. Cl. 193; *Symonds' Case*, 21 C. Cl. 148, 152; *Stotesburg* v. *United States*, 23 C. Cl. 285; *Romero* v. *United States*, 24 C. Cl. 331.

The Supreme Court, also, has been called upon to consider and decide upon the force and application of executive regulations in several instances. *Kendall* v. *United States*, 12 Pet. 524, 610; *United States* v. *Eliason*, 16 Pet. 291, 301; *Aldridge* v. *Williams*, 3 How. 1, 29; *Gratiot* v. *United States*, 4 How. 80, 117; *Ex parte Reed*, 100 U. S. 13, 22; *Smith* v. *Whitney*, 116 U. S. 167, 181; *United States* v. *Symonds*, 120 U. S. 46. In that case the court say, p. 49:

"The authority of the Secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of or supplementary to, but not in conflict with, the statutes, defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot* v. *United States*, 4 How. 80 and *Ex parte Reed*, 100 U. S. 13, upon which the government relies. Referring in the first case to certain army regulations, and in the other to certain navy regulations, which had been approved by Congress, the court observed that they had the force of law. See also *Smith* v. *Whitney*, 116 U. S. 181. In neither case, however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld."

The theory submitted on behalf of the plaintiff in error is:

(1) That the regulation made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury was a proper and a "needful" regulation under the oleomargarine law;

(2) That this regulation was an outgrowth of the statute and acquired and possessed the force of law;

(3) That the keeping of the records and the reporting of the details of the business, supervised under the law, became, as to the defendant, "things required by law in the carrying out or conducting of his business" (sec. 18);

(4) And that being authorized by Congress, and being formulated and promulgated pursuant to an enactment, and being subordinate to, and in furtherance of, the statute, and not in conflict with it, the regulation should, under the decisions, be sustained and the demurrer should be overruled.

Mr. P. A. Collins for defendant in error.

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

Sections 1 and 2 of the act in question define what is "butter" and what is "oleomargarine."

Section 3 imposes special taxes of certain amounts on manufacturers of oleomargarine, on wholesale dealers therein, and on retail dealers therein.

Section 4 imposes a penalty on manufacturers, wholesale dealers, and retail dealers, for carrying on those respective businesses without having paid the special tax therefor.

Section 5 provides that every manufacturer of oleomargarine shall file with the collector of internal revenue of the district in which his manufactory is located, such notices, inventories and bonds, shall keep such books, render such returns of materials and products, put up such signs, affix such number to his factory, and conduct his business under such surveillance of officers and agents, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. But that section imposes no penalty for a non-compliance with its provisions.

Section 6 contains requirements in regard to the packing of oleomargarine by manufacturers, and in regard to the packages in which sales shall be made by manufacturers, wholesale dealers and retail dealers, and imposes a penalty for the violation of its requirements.

Section 7 contains requirements as to putting a label on each package by the manufacturer, and imposes a penalty for not doing it.

Section 8 provides for collecting a tax of two cents a pound on the article from the manufacturer by coupon stamps, and applies the requirements of law as to stamps relating to tobacco and snuff.

Section 9 provides for assessing and collecting the tax which has not been paid by stamps, and declares that such tax shall be in addition to the penalties imposed by law for the sale or removal of the article without the payment of such tax.

Section 10 provides for an additional tax on imported oleomargarine, by stamps to be affixed and cancelled while it is in the custody of custom officers, and for warehousing the article; and it imposes a penalty for a violation of the section by a

customs officer, and a penalty for selling or offering for sale imported oleomargarine not put up in packages and stamped as provided by the act.

Section 11 imposes a penalty for purchasing or receiving for sale any oleomargarine not branded or stamped according to law, and § 12 a penalty for purchasing the article or receiving it for sale from a manufacturer who has not paid the special tax.

Section 13 requires the destruction of stamps on packages which have been emptied, and imposes a penalty for the failure to do so.

Section 14 provides for the appointment of chemists and microscopists, and authorizes the Commissioner of Internal Revenue to decide what articles are taxable under the act, and what substances made in imitation or semblance of butter, and intended for human consumption, contain ingredients deleterious to the public health, and also provides for appeals from the decision of the Commissioner of Internal Revenue to a board of three officers, whose decision shall be final.

Section 15 provides for the forfeiture of packages which are not stamped, and of packages intended for human consumption which contain ingredients so adjudged to be deleterious to the public health, and imposes a penalty for removing or defacing stamps, marks or brands on packages containing oleomargarine taxed as provided in the act.

Section 16 contains a provision for the export of oleomargarine to a foreign country without the payment of tax or affixing stamps, under regulations to be made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and for the branding of the exported packages; but it prescribes no penalties.

Section 17 provides that if any manufacturer of oleomargarine defrauds or attempts to defraud the United States of the tax thereon, he shall forfeit the factory, manufacturing apparatus, and all oleomargarine and raw material found in the factory and on the premises, and be fined and imprisoned as provided in that section.

Section 18 is as follows: "That if any manufacturer of oleo-

margarine, any dealer therein or any importer or exporter thereof shall knowingly or wilfully omit, neglect or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States."

Section 19 provides "that all fines, penalties and forfeitures imposed by this act may be recovered in any court of competent jurisdiction;" and section 20 "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act."

Section 21 is unimportant as regards this case.

It is stated in the brief of the Assistant Attorney General, counsel for the United States, that one of the regulations of August 25, 1886, named in the two counts of the indictment, and claimed to be applicable to the present case, was as follows: "Wholesale dealers in oleomargarine will keep a book (Form 61) and make a monthly return on Form 217, showing the oleomargarine received by them, and from whom received; also, the oleomargarine disposed of by them and to whom sold or delivered;" that that regulation covers the two counts of the indictment and the two questions certified; and that Form 61, so referred to, is a form for a record in a book, and Form 217 is one for the monthly return; and it is claimed that such regulation was properly made under § 20 of the act.

It is provided by § 41 of the act approved October 1, 1890, c. 1244, entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," 26 Stat. 567, 621, "that wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Com-

missioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and such books shall be open at all times to the inspection of any internal revenue officer or agent."

But, although the regulation above recited may have been a proper one to be made, under § 20 of the act of August 2, 1886, yet the question to be determined in this case is whether a wholesale dealer in oleomargarine, who knowingly and wilfully fails and omits to keep the book and make the monthly return prescribed in the regulation of the Commissioner of Internal Revenue, thereby fails and omits, within the meaning of § 18 of the act, to do a thing "required by law in the carrying on or conducting of his business," so as to be liable to the penalty prescribed by that section.

In this connection, it is worthy of observation that § 5 of the act requires that every manufacturer of oleomargarine shall keep such books, and render such returns of materials and products, as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; but it imposes no penalty on the manufacturer for any neglect to keep such books and render such returns, nor does it impose a duty to keep the books and render the returns on a wholesale dealer in the article, such as the defendant in this case was. The question, therefore, is whether a wholesale dealer in oleomargarine, who omits to keep the books or to render the returns prescribed by the regulation made under the authority of § 20 of the act, is liable to the penalty prescribed by § 18, as having omitted or failed to do a thing "required by law in the carrying on or conducting of his business," within the meaning of § 18.

Regulations for carrying the act into effect, to be made under the provisions of § 20, are necessary, as they are in various departments of the public service. By § 161 of the Revised Statutes, the head of each department is authorized "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and

property appertaining to it;" and, by § 251, the Secretary of the Treasury is authorized to make and issue instructions and regulations to collectors, receivers, depositaries, officers and others, and to prescribe rules and regulations, not inconsistent with law, to be used in executing and enforcing the internal revenue laws and laws relating to raising revenue from imports, or duties on imports, or to warehousing.

Section 20 of the act in question would be fully carried out by making regulations of the character of those provided for in § 161 and § 251 of the Revised Statutes, without extending the provision of § 18 so as to make a criminal offence, as a neglect to do a thing "required by law," of a neglect to do a thing required only by a regulation of the Commissioner of Internal Revenue.

It is well settled that there are no common law offences against the United States. *United States* v. *Hudson*, 7 Cranch, 32; *United States* v. *Coolidge*, 1 Wheat. 415; *United States* v. *Britton*, 108 U. S. 199, 206; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262, 263, and cases there cited.

It was said by this court in *Morrill* v. *Jones*, 106 U. S. 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Accordingly, it was held in that case, under § 2505 of the Revised Statutes, which provided that live animals specially imported for breeding purposes from beyond the seas should be admitted free of duty, upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, that he had no authority to prescribe a regulation requiring that, before admitting the animals free, the collector should be satisfied that they were of superior stock, adapted to improving the breed in the United States.

Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offence by the regulation of a department. It is a principle of criminal law that an offence which may be the subject of criminal procedure is an act committed or omitted "in violation of a

public law, either forbidding or commanding it." 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5.

It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing "required by law" in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offence punishable under § 18 of the act; particularly when the same act, in § 5, requires a manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offence for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in § 41 of the act of October 1, 1890.

Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence.

The questions certified are answered in the negative.

APPENDIX.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

ORDERED, That all parts of Rule 67 of the Rules of Practice for the Courts of Equity of the United States, as now existing, be, and the same are hereby, superseded, and the following rule is promulgated as such Rule 67:

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing: provided, That such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is con-

cluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defence, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Promulgated May 2, 1892.

INDEX.

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CORPORATION.

1. Under the statute of Missouri, authorizing execution upon a judgment against a corporation to be ordered against any of its stockholders to the extent of the unpaid balance of their stock, "upon motion in open court, after sufficient notice in writing to the persons sought to be charged," a notice served in another State upon a person alleged to be a stockholder, and who has never resided in Missouri, is insufficient to support an order charging him with personal liability. *Wilson* v. *Seligman*, 41.
2. The trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith; and it was not intended, by anything said in *Clark* v. *Bever*, 139 U. S. 96; *Fogg* v. *Blair*, 139 U. S. 118; or *Handley* v. *Stutz*, 139 U. S. 417, to overrule this principle, or qualify it in any way, but only to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands. *Camden* v. *Stuart*, 104.
3. Applying this rule to the testimony and mass of figures in this case, the court affirms the judgments of the court below against stockholders in these cases, whose subscriptions for their stock in the corporation, defendant in error in No. 643, were shown to be in part unpaid. *Ib.*

See JURISDICTION, C, 4.

COSTS.

See PRACTICE, 10;
REMOVAL OF CAUSES, 2, 4.

COURT AND JURY.

This action was brought by the defendant in error as plaintiff below against the plaintiff in error, defendant below, to recover a balance alleged to be due from him to the plaintiff below as its treasurer. The defendant below denied that any sum was due, and set up an accord and satisfaction. At the trial, after the plaintiff rested, the defendant opened his case at length, setting forth the grounds of his defence. After some evidence had been introduced including the books of account and the evidence of a witness who kept those books, a conversation took place between the court and the defendant respecting the introduction of evidence alleged by the court to be outside of the statements made in the opening. The defendant insisted that the evidence offered was within those statements. A further conversation resulted in the defendant's offering to show that all the moneys ever received by him as treasurer were duly accounted for and paid over. The court held this to be a mixed proposition of law and fact, and

CRIMINAL LAW.

ERROR.

ESTOPPEL.

EVIDENCE.

EXCEPTION.

EXECUTIVE REGULATION.

FINDINGS.

INSURANCE.

INTEREST.

See EQUITY, 4;
LOCAL LAW, 3;
MORTGAGE, 2.

INTERVENTION.

See LOCAL LAW, 4.

INTOXICATING LIQUORS.

See JURISDICTION, A, 9.

JUDGMENT.

1. A judgment for the plaintiffs was rendered in August, 1873, in a United States Court in South Carolina, in an action at law in ejectment, in which a minor was defendant, and appeared and answered by a guardian *ad litem*, and which minor became of age in December, 1885, and brought a writ of error from this court, under § 1008 of the Revised Statutes, within two years after the entry of the judgment, exclusive of the time of the disability of the minor. The case involved the title to land in South Carolina under a will made in 1819, the testator dying in 1820. In June, 1850, a suit in equity was brought in a state court of South Carolina, which set up that the title to the land, under the will, was either in the grandmother of the minor or in her sons, one of whom was the father of the minor, the grandmother and the father of the minor being parties defendant to the suit, and the bill having been taken *pro confesso* against all the defendants, and dismissed by a decree made in March, 1851, which remained unreversed, an appeal taken therefrom having been abandoned. The only title set up by the plaintiff in error was alleged to be derived through his father and his grandmother. In September, 1854, an action of trespass to try title to the land was brought in a state court of South Carolina, and which resulted in a judgment for the plaintiff therein, but to which the plaintiffs in the ejectment suit were not parties or privies. *Held*, that as the decree in the equity suit was prior to the judgment in the trespass suit, and as the plaintiffs in the ejectment suit were not parties to the trespass suit, the judgment in the last named suit was of no force or effect in favor of the plaintiff in error, as against the decree in the equity suit. *Bedon* v. *Davie*, 142.
2. When a second suit is upon the same cause of action, and between the same parties as a former suit, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though between the same parties, the judgment in the former action operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. *Nesbit* v. *Riverside Independent District*, 610.
3. A judgment against a municipal corporation in an action on coupons cut from its negotiable bonds, where the only defence set up was the invalidity of the issue of the bonds by reason of their being in excess of the amount allowed by law, is no estoppel to another action between the same parties, on the bonds themselves and other coupons cut from them, where the defence set up is such invalidity, coupled with knowl-

JURISDICTION.

A. Jurisdiction of the Supreme Court.

one who had a reasonable expectation of receiving some benefit from him during his lifetime, as required by the laws of that State, (Howell's Ann. Stat. §§ 3391, 3392,) the objection is not before this court for consideration. *Grand Trunk Railway Co.* v. *Ives*, 408.

11. A decision by the highest court of a State that a former judgment of the same court in the same case, between the same parties, upon a demurrer, was *res judicata* in that action as to the rights of the parties, presents no Federal question for the consideration of this court, and is broad enough to maintain the judgment; and this court is therefore without jurisdiction. *Northern Pacific Railroad Co.* v. *Ellis*, 458.

12. A suit was brought in the Supreme Court of New York against a railroad corporation created by an act of Congress, to recover damages for personal injuries sustained by the plaintiff, who was a laborer on the road, from the negligence of the defendant. The suit was removed by the defendant into a Circuit Court of the United States, on the ground that it arose under the act of Congress. It was tried before a jury, and resulted in a verdict and judgment for the plaintiff for $4000. The defendant took a writ of error from the Circuit Court of Appeals, which affirmed the judgment. On a writ of error taken by the defendant from this court to the Circuit Court of Appeals, a motion was made, by the plaintiff, to dismiss or affirm: *Held*, (1) Under § 6 of the act of March 3, 1891, c. 517, 26 Stat. 826, the writ would lie, because the jurisdiction of the Circuit Court was not dependent entirely on the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one State and the other a citizen of a different State, but was dependent on the fact that the corporation being created by an act of Congress, the suit arose under a law of the United States, without reference to the citizenship of the plaintiff; (2) The decision of the Circuit Court of Appeals was not final, nor in effect made final by the act of 1891, as in *Lau Ow Bew* v. *United States*, 144 U. S. 47; (3) As it did not appear by the record, that, on the trial in the Circuit Court, the defendant made any objection to the jurisdiction of that court, and the petition for removal recognized the jurisdiction, it could not be said, as a ground for the motion to dismiss, that the defendant might have taken a writ of error from this court to the Circuit Court, under § 5 of the said act of 1891, and had, by failing to do so, waived its right to a review by this court; (4) There was color for the motion to dismiss, and the judgment must be affirmed on the ground that the writ was taken for delay only; (5) The main defence was contributory negligence on the part of the plaintiff, and the court charged the jury that they had the right to take into consideration the fact that the foreman of the defendant told the plaintiff it was safe for him to cross, at the time, the bridge where the accident took place, through the plaintiff's being struck by a locomotive engine

LOCAL LAW.

1. Upon the trial of this case in the District Court in Dakota, a verdict was returned, November 24, 1888, in favor of plaintiff for $12,545.43, and judgment was rendered accordingly November 26, 1888. On November 28, 1888, the court made an order by consent extending the time for serving notice of intention to move for a new trial, for motion for new trial, and for settlement of a bill of exceptions until January 28, 1889, which time was subsequently extended by order of court for reason given, to February 28, and thence again "for cause" to March 28, 1889, upon which day the following order was entered: "The defendant having served upon plaintiff a proposed bill of exceptions herein, the time for settlement of same is hereby extended from March 28, 1889, to April 10, 1889, and the time within which to serve notice of the intention to move for new trial, and within which to move for new trial, is hereby extended to April 13th, 1889." The time was again extended to May 31, 1889, and on the 23d day of that month the following order was entered: "The date for settling the bill of exceptions proposed by the defendant herein is hereby extended to June 29, 1889. Defendant may have until ten days after the settling of said bill within which to serve notice of intention to move for a new trial, and within which to move for a new trial in said action." This was the last order of extension. On December 14, 1889, there was filed in the office of the clerk of the District Court a notice of motion for new trial, which was as follows: "Take notice that the motion for a new trial herein will be brought on for argument before the court at chambers, at Jamestown, Dakota, on September 12, 1889, at 10 o'clock A.M., or as soon thereafter as counsel can be heard." On the margin of this notice appeared this indorsement: "Hearing continued until the 21st September, 1889. Roderick Rose, Judge." The notices and motion seem to have been served September 3, 1889. The bill of exceptions was signed August 30, 1889, and filed September 3, 1889. The certificate thereto concluded thus: "Filed as a part of the records in this action this August 30th, 1889, (and within the time provided by law, as enlarged and extended by orders of the judge of this court)." On February 17, 1890, the judge further certified: "The above and foregoing certificate is hereby modified and corrected so as to conform to the facts and record in the case by striking out all that part of it in the two last lines thereof preceding my signature and after the words and figures 'August 30th, 1889.'" On November 2, 1889, the State of North Dakota was admitted into the Union. *Held*, (1) That this bill of exceptions was not settled and filed within the time allowed by law or under any order of the court; (2) That the alleged motion for a new trial not having been filed until December 14, 1889, was not made, and no notice of intention to make it was given, within the

PARTIES.

See ACTION.

PARTITION.

See REMOVAL OF CAUSES, 1.

PATENT FOR INVENTION.

POSTMASTER.

PETITION FOR REHEARING.

See PRACTICE, 9.

PRACTICE.

PROMISSORY NOTE.

PUBLIC LAND.