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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1892

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.

GEORGE SHIRAS, Jr., Associate Justice.[1]

WILLIAM HENRY HARRISON MILLER, Attorney General.

CHARLES HENRY ALDRICH, Solicitor General.

JAMES HALL McKENNEY, Clerk.

JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Shiras was appointed in the place of Mr. Justice Bradley, deceased. His commission is dated July 26, 1892. On the 10th day of October, 1892, the oath of office was administered to him in open court, and he immediately took his seat upon the bench.

Corrections.

In volume 145, page 370, line 4 from the bottom, "Brown" should read "Brewer." The word "money" on line 23 of page 623 of the same volume was, after the publication of the volume, corrected in the original, on file, so as to read "services." Holders of the original edition of the volume are requested to make these corrections.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1892.

McPHERSON *v.* BLACKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 1170. Argued Oct. 11, 1892. — Decided Oct. 17, 1892.

The validity of a state law providing for the appointment of electors of President and Vice President having been drawn in question before the highest tribunal of a State, as repugnant to the laws and Constitution of the United States, and that court having decided in favor of its validity, this court has jurisdiction to review the judgment under Rev. Stat. § 709.

Under the second clause of Article II of the Constitution, the legislatures of the several States have exclusive power to direct the manner in which the electors of President and Vice President shall be appointed.

Such appointment may be made by the legislatures directly, or by popular vote in districts, or by general ticket, as may be provided by the legislature.

If the terms of the clause left the question of power in doubt, contemporaneous and continuous subsequent practical construction has determined the question as above stated.

The second clause of Article II of the Constitution was not amended by the Fourteenth and Fifteenth Amendments, and they do not limit the power of appointment to the particular manner pursued at the time of the adoption of these amendments, or secure to every male inhabitant of a State, being a citizen of the United States, the right from the time of his majority to vote for presidential electors.

A state law fixing a date for the meeting of electors, differing from that prescribed by the act of Congress, is not thereby wholly invalidated; but the date may be rejected and the law stand.

Statement of the Case.

WILLIAM McPherson, Jr., Jay A. Hubbell, J. Henry Carstens, Charles E. Hiscock, Otto Ihling, Philip T. Colgrove, Conrad G. Swensburg, Henry A. Haigh, James H. White, Fred. Slocum, Justus S. Stearns, John Millen, Julius T. Hannah, and J. H. Comstock filed their petition and affidavits in the Supreme Court of the State of Michigan, on May 2, 1892, as nominees for presidential electors, against Robert R. Blacker, Secretary of State of Michigan, praying that the court declare the act of the legislature, approved May 1, 1891, (Act No. 50 of the Public Acts of Michigan of 1891), entitled "An act to provide for the election of electors of President and Vice President of the United States, and to repeal all other acts and parts of acts in conflict herewith," void and of no effect, and that a writ of mandamus be directed to be issued to the said Secretary of State, commanding him to cause to be delivered to the sheriff of each county in the State, between the first of July and the first of September, 1892, "a notice in writing that at the next general election in this State, to be held on Tuesday, the 8th day of November, 1892, there will be chosen (among other officers to be named in said notice) as many electors of President and Vice President of the United States as this State may be entitled to elect Senators and Representatives in the Congress."

The statute of Michigan, (Howell's Ann. Stats. of Michigan, 133, c. 9,) provided: "The secretary of state shall, between the first day of July and the first day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State, a notice in writing, that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, viz.: A governor, lieutenant governor, secretary of state, state treasurer, auditor general, attorney general, superintendent of public instruction, commissioner of the state land office, members of the state board of education, electors of President and Vice President of the United States, and a representative in Congress for the district to which each of such counties shall belong."

A rule to show cause having been issued, the respondent, as

secretary of state, answered the petition, and denied that he had refused to give the notice thus required, but he said, "That it has always been the custom in the office of the secretary of state, in giving notices under said section 147, to state in the notice the number of electors that should be printed on the ticket in each voting-precinct in each county in this State, and following such custom with reference to such notice, it is the intention of this respondent in giving notice under section 147 to state in said notice that there will be elected one presidential elector at large, and one district presidential elector, and two alternate presidential electors, one for the elector at large and one for the district presidential elector, in each voting-precinct, so that the election may be held under and in accordance with the provisions of act No. 50 of the Public Acts of the State of Michigan of 1891."

By an amended answer the respondent claimed the same benefit as if he had demurred.

Relators relied in their petition upon various grounds as invalidating act No. 50 of the Public Acts of Michigan of 1891, and among them, that the act was void because in conflict with clause two of section one of Article II of the Constitution of the United States, and with the Fourteenth Amendment to that instrument, and also in some of its provisions in conflict with the act of Congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice President, and to provide for and regulate the counting of the votes for President and Vice President, and the decision of questions arising thereon." The Supreme Court of Michigan unanimously held that none of the objections urged against the validity of the act were tenable; that it did not conflict with clause two of section one of Article II of the Constitution or with the Fourteenth Amendment thereof; and that the law was only inoperative so far as in conflict with the law of Congress in a matter in reference to which Congress had the right to legislate. The opinion of the court will be found reported, in advance of the official series, in 52 Northwestern Rep. 469.

Judgment was given, June 17, 1892, denying the writ of

mandamus, whereupon a writ of error was allowed to this court.

The October term, 1892, commenced on Monday, October 10, and on Tuesday, October 11, the first day upon which the application could be made, a motion to advance the case was submitted by counsel, granted at once in view of the exigency disclosed upon the face of the papers, and the cause heard that day. The attention of the court having been called to other provisions of the election laws of Michigan than those supposed to be immediately involved, (Act No. 190, Public Acts, Michigan, 1891, pp. 258, 263), the Chief Justice, on Monday, October 17, announced the conclusions of the court, and directed the entry of judgment affirming the judgment of the Supreme Court of Michigan, and ordering the mandate to issue at once, it being stated that this was done because immediate action under the state statutes was apparently required and might be affected by delay, but it was added that the court would thereafter file an opinion stating fully the grounds of the decision.

Act No. 50 of the Public Acts of 1891 of Michigan is as follows:

"An act to provide for the election of electors of President and Vice President of the United States, and to repeal all other acts and parts of acts in conflict herewith.

"SECTION 1. *The People of the State of Michigan enact*, That at the general election next preceding the choice of President and Vice President of the United States, there shall be elected as many electors of President and Vice President as this State may be entitled to elect of Senators and Representatives in Congress in the following manner, that is to say: There shall be elected by the electors of the districts hereinafter defined one elector of President and Vice President of the United States in each district who shall be known and designated on the ballot, respectively, as eastern district elector of President and Vice President of the United States at large, and western district elector of President and Vice President of the United States at large; there shall also be elected in like manner two alternate electors of President and

Vice President, who shall be known and designated on the ballot, as eastern district alternate elector of President and Vice President of the United States at large, and western district alternate elector of President and Vice President of the United States at large, for which purpose the first, second, sixth, seventh, eighth and tenth congressional districts shall compose one district to be known as the eastern electoral district, and the third, fourth, fifth, ninth, eleventh and twelfth congressional districts shall compose the other district, to be known as the western electoral district; there shall also be elected by the electors in each congressional district into which the State is or shall be divided, one elector of President and Vice President, and one alternate elector of President and Vice President, the ballots for which shall designate the number of the congressional district and the persons to be voted for therein, as district elector and alternate district elector of President and Vice President of the United States respectively.

"SEC. 2. The counting, canvassing and certifying of the votes cast for said electors at large, and their alternates and said district electors and their alternates, shall be done, as near as may be, in the same manner as is now provided by law for the election of electors of President and Vice President of the United States.

"SEC. 3. The Secretary of State shall prepare three lists of the names of the electors and the alternate electors, procure thereto the signature of the governor, affix the seal of the State to the same, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following said general election. In case of death, disability, refusal to act or neglect to attend, by the hour of twelve o'clock at noon of said day, of either of said electors at large, the duties of the office shall be performed by the alternate electors at large, that is to say: The eastern district alternate elector at large shall supply the place of the eastern district elector at large, and the western district alternate elector at large shall supply the place of the western district elector at large. In like case, the alternate congressional

district elector shall supply the place of the congressional district elector. In case two or more persons have an equal and the highest number of votes for any office created by this act as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office, and it shall be the duty of the governor to convene the legislature in special session for such purpose immediately upon such determination by said board of state canvassers.

"SEC. 4. The said electors of President and Vice President shall convene in the senate chamber at the capital of the State at the hour of twelve o'clock at noon, on the first Wednesday of December immediately following their election, and shall proceed to perform the duties of such electors as required by the Constitution and the laws of the United States. The alternate electors shall also be in attendance, but shall take no part in the proceedings except as herein provided.

"SEC. 5. Each of said electors and alternate electors shall receive the sum of five dollars for each day's attendance at the meetings of the electors as above provided, and five cents per mile for the actual and necessary distance travelled each way in going to and returning from said place of meeting, the same to be paid by the state treasurer upon the allowance of the board of state auditors.

"SEC. 6. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." Approved May 1, 1891.

Section 211 of Howell's Annotated Statutes of Michigan (vol. 1, c. 9. p. 145) reads:

"For the purpose of canvassing and ascertaining the votes given for electors of President and Vice President of the United States, the board of state canvassers shall meet on the Wednesday next after the third Monday of November, or on such other day before that time as the secretary of state shall appoint; and the powers, duties, and proceedings of said board, and of the secretary of state, in sending for, examining, ascertaining, determining, certifying and recording the votes and results of the election of such electors, shall be in all respects, as near as may be, as hereinbefore provided in

relation to sending for, examining, ascertaining, determining, certifying and recording the votes and results of the election of State officers."

Section 240 of Howell's Statutes, in force prior to May 1, 1891, provided: "At the general election next preceding the choice of President and Vice President of the United States, there shall be elected by general ticket as many electors of President and Vice President, as this State may be entitled to elect of Senators and Representatives in Congress."

The following are sections of Article VIII of the Constitution of Michigan:

"SEC. 4. The secretary of state, state treasurer, and commissioner of the state land office shall constitute a board of State auditors, to examine and adjust all claims against the State, not otherwise provided for by general law. They shall constitute a board of state canvassers, to determine the result of all elections for governor, lieutenant-governor, and state officers, and of such other officers as shall by law be referred to them.

"SEC. 5. In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said persons to fill such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected." (1 Howell's Ann. Stats. Mich. 57.)

Reference was also made in argument to the act of Congress of February 3, 1887, to fix the day for the meeting of the electors of President and Vice-President, and to provide for and regulate the counting of the votes. 24 Stat. 373, c. 90.

Mr. Henry M. Duffield, *Mr. Fisher A. Baker*, and *Mr. Attorney General* for plaintiffs in error.

The English colonies in America were distinct and separate communities, each of which had a government or political organization of its own. There was no such thing as a general organization or union, and no power to form one, although

some of the colonies acted together in the common defence, as against the Indians, and in the wars between England and France, which resulted, a few years before the Revolution, in establishing the dominion of the English over Canada and the Northwest. 1 Curtis' Const. Hist. U. S. 1–4; Lodge's Hist. Eng. Col. in Am. 351–352, 367–370; Scott's Development of Const. Liberty in English Colonies, 36.

Such being the nature of the colonial governments and the character of their existence, it was inevitable that they should treat each other as equals when they came to act together in resisting the encroachments of the English government, and achieving their own independence. The rule of voting by States, established at the outset, was continued by the Articles of Confederation, and was carried into the rules of the convention which framed the Constitution. 1 Elliot's Deb. 164. The Constitution itself made the separate and individual approval of nine of the States necessary, in order to its adoption at all, and made it possible for the new government to go into operation with four States left out, and each in the enjoyment of a separate independence.

Strenuous efforts were made in a number of the States to defeat a ratification of the Constitution, but it does not appear that the provisions for the election of the President and Vice President excited any particular animosity or were the subject of any serious controversy. Hamilton's statements in regard to these provisions, in the sixty-eighth number of the Federalist, seem to have reflected the general judgment, as they did, undoubtedly, his own opinion and that of Madison. From them it is evident that legislative appointments were not at that time contemplated; but the shortness of time allowed by Congress explains why that mode was adopted in some States at the first election.

This brief statement of the condition of things prior to and at the time of the adoption of the Constitution brings us to the consideration of the questions in discussion here; which are: (1) Does the Michigan statute contravene and is it repugnant to Art. II, sec. 1, clause 2, of the Constitution of the United States? (2) Does it contravene and was it repugnant

to the Fourteenth Amendment to the Constitution of the United States? (3) Is it in contradiction of and opposition to the act of Congress of February 3, 1887?

I. The Michigan statute is in conflict with Art. II, sec. 1, clause 2, of the Constitution of the United States, which provides that, "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

In legal effect it commands the State to "appoint" the electors, and delegates to the legislature the power to "direct" the manner of their appointment; thus imposing one duty on the State and another on the legislature. We contend that the words "the State," as thus used, mean the artificial being, the legal entity, the body politic, which is the sovereign State.

Immediately preceding the present use of the word in the Constitution it had been repeatedly employed to designate the State in its sovereign capacity. Art. I, sec. 10, clause 1: "No State shall enter into any treaty, alliance or confederation," etc. Clause 2: "No State shall, without the consent of the United States, lay any imposts or duties," etc.; again: "And the net produce of all duties and imposts laid by any State," etc. Clause 3: "No State shall, without the consent of Congress, lay any duty of tonnage." Similar uses of the term in other parts of the Constitution suggest themselves, as Art. III, sec. 2, that "the judicial power shall extend to controversies between two or more States, . . . between a State and the citizens of another State, . . . between a State or the citizens thereof and foreign States, citizens or subjects." Art. IV, sec. 3: "New States may be admitted into this Union."

Whenever the Constitution confers any power on or reserves any right to the people of the States or to any state functionaries, it is careful to so declare explicitly, as in the case of Art. I, sec. 2, for choosing representatives in Congress by the "people of the several States;" Art. I, sec. 3: choosing United States Senators "by the legislature" of the State.

Art. IV, sec. 2: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Art. V: "On the application of the legislatures of two-thirds of the several States, Congress shall call a convention for proposing amendments to the Constitution." Finally, the Tenth Amendment provides "that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved respectively to the States or the people."

Strong support of this contention that the State must appoint its presidential electors is found in the third and immediately succeeding clause of the same section, afterwards superseded by the Twelfth Amendment, which provided that when the election of President is cast upon the House of Representatives "the votes shall be taken by States, the representative from each State having one vote," etc.

Nor are judicial interpretations lacking to sustain our contention. See *Hepburn* v. *Ellzey*, 2 Cranch, 445; *Penhallow* v. *Doane*, 3 Dall. 54; *Ware* v. *Hylton*, 3 Dall. 199, 225; *Buckner* v. *Finley*, 2 Pet. 586; and *Texas* v. *White*, 7 Wall. 700, where the court says, (p. 721,) "A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of definite boundaries and organized under the government's sanction and limited by a written constitution and established by the consent of the governed. It is the union of such States under a common Constitution which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and States which compose it, one people and one country."

What the Constitution intends by the term "State" is the sovereign State, a legal although an artificial being, a great political corporation with imperial prerogatives and powers, the great State; the State that in the minds of many of the men of the convention which framed the Constitution was greater almost than the United States; the State of whose proper sovereignty they would not give up one jot or tittle; a State which has a great seal; which has a seat of govern-

ment; which has a system of courts to decide any controversy concerning an appointment; which has a military and civil power which can record its decree; and which from its high plane of sovereignty can command respect for its choice, and if its choice is not respected can command obedience to its will.

It is said that this clause of the Constitution provides that this appointment shall be made "in such manner as the legislature may direct," and it is claimed that these words are so plenary as to permit the legislature to take this great power from the sovereign State, and, cutting it up, divide it among fourteen disjointed fractions of the territory of the State, each of which shall choose one elector of President and Vice President of the United States. It is sufficient answer to this to say, that under the form of prescribing the manner in which the State shall appoint, the power is not conferred upon the legislature to deprive the State of all appointing power.

The Supreme Court of the State of Michigan, "admitting that if the question were to be determined solely by reference to the language employed, there would be much force in the contention that the State must act as a unit, and that no lesser body could be delegated to perform any portion of the duty vested in the State body corporate, and that it might possibly be held that the words 'in such manner as the legislature thereof may direct' confer only the limited power of directing how the State, acting as an entirety, shall make its appointment," held that the case was a proper one in which to have resort to contemporaneous construction, and reached the conclusion that such contemporaneous construction settled the legality of district electors.

We submit, with great deference, that that learned court was in error in this respect: (*a*) because the language of the Constitution is so plain, clear and determinate that it requires no interpretation; and (*b*) because there has, in fact, been no such interpretation.

(*a*) The rule as to interpretation is thus stated by Mr. Justice Story: "Where its words are plain, clear and determinate they require no interpretation, and it should therefore

be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, scope and design, of the instrument. Contemporary construction is properly resorted to to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those by whom it was given, is the credit to which it is entitled. It can never abrogate the text, it can never fritter away its obvious sense, it can never narrow down its true limitations, it can never enlarge its natural boundaries." Now, in this case, as has already been said, the language is clear, and no interpretation is necessary.

(*b*) But even if it were otherwise, there has been no such continuous action as to amount to an interpretation. The mere fact that among the variant methods of appointing presidential electors, which came into practice a few years after the adoption of the Constitution, a few of the States did for a time choose electors by districts, is not evidence of any such contemporaneous construction as should conclude the court from giving the true and plain exposition of the text. On the contrary, the fact, which is historical, that all the States which had originally adopted a district system soon abandoned it, and that as early as 1834 presidential electors in every State in the Union were appointed by the State, being chosen either by the popular vote or by the legislature, is evidence that the real contemporaneous construction of this provision was adverse to the district plan.

In[1] the election of 1788, ten States participated. In five, the appointments were made by the legislatures. In two,

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[1] In the briefs of counsel this subject is treated much at length, with full references to authorities. A brief summary is thought to be sufficient to make the general line of argument clear.

the electors were elected by the people on a general ticket. In two, the State was divided into congressional districts, in each of which two candidates for elector were chosen, from which the legislature elected one as an elector. In Virginia alone, were the electors elected separately in each district.

Fifteen States took part in the election of 1792. In nine the electors were chosen by the legislature. In three, they were elected by the people on a general ticket. In Virginia, as before, the electors were elected in separate districts, and Massachusetts and North Carolina adopted schemes partaking in part of the nature of an election by the people in districts, and in part of the nature of an election by the legislature.

In the election of 1796 sixteen States took part. In nine, the electors were appointed by the legislature. Two adhered to a popular election on a general ticket. Three adhered to the district system. Massachusetts adhered to its own system and Tennessee delegated the power to citizens named by the legislature.

In 1800 party strife ran high, and some changes were made and others attempted with a view to affect the general result. Massachusetts and Virginia gave up the district system and adopted that of electing by the legislature. Pennsylvania adopted a modified form of the latter system.

The action of the two populous States of Virginia and Massachusetts in abandoning the district method in the election of 1800, but for opposite political or party reasons, settled the fate of that method, and it was only a question of time when it would entirely disappear. The system of electing by general ticket was definitely adopted by North Carolina in 1812, Kentucky and Massachusetts in 1824, Indiana and Illinois in 1828, New York, Delaware, Tennessee, and Maine in 1832; and by Maryland in 1838. Since the presidential election of 1832, the district method has not been used by any State in the union.

This is an abandonment for sixty years; and when the reasons which led the States to this course are considered, it is certainly a most important and significant fact. The method of having the electors appointed by the concurrent or joint

vote of the two houses of the legislature of a State, was also abandoned as a part of the same evolution, and with nearly the same unanimity. South Carolina, with a legislature always fresh from the people, continued the practice until 1860. All the other States had abandoned the system by 1828, except Delaware, and it was abandoned there before 1832. During the reconstruction period, before all the Southern States had been re-admitted to Congress and the Union, Florida used the legislative method for a single election, that of 1868, the legislature and state officers having been elected in May, and no other state election being provided for until 1870. Colorado was admitted to the Union August 1, 1876, and a legislature and state officers were elected on the first Tuesday of October. To save the expense and trouble of another election, the legislature made the appointments for that year. The legislative appointments in Florida and Colorado were, therefore, provisional or temporary; and that method was resorted to because of the exceptional conditions, and not for the purpose of overcoming or overriding the political sentiments or preferences of a majority of the people in those States.

The district system of choosing electors was not obnoxious to the Constitution in its original object and purpose, for the reason that if that object and purpose had been attainable and had been actually accomplished, any division in the votes of the electors of a State, would have been the result of an exercise by each elector of his individual judgment and discretion, and not the result of the political will or partisan voice of the district by which he was chosen; but it is obnoxious to that plan as it was practically and ultimately developed, and as it has now for sixty years actually existed. The legislation establishing it in the early history of the nation took place in times of partisan excitement, and should have no more weight with a court as a construction of the Constitution than the law that we are discussing should have weight; for the legislation then was prompted by and born of the very same spirit of which this law is born, a mad desire for temporary power. There is no rule of constitutional interpretation, or of judicial duty, which requires the court, in determining the constitu-

tional validity of the district system, to adhere to the obsolete original design of the Constitution, and to disregard the plan of the electoral college as it actually exists, after a century of practical experience and development.

In the late Mr. Justice Miller's Lectures on the Constitution of the United States, p. 149, is the following: "As originally adopted, and as it now exists, it was supposed that the body of electors interposed between the state legislatures and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a President selected by immediate popular suffrage on the one side, and the opposite evil of an election by the direct vote of the States in their legislative bodies on the other, would both be avoided. A very short experience, however, demonstrated that these electors, whether chosen by the legislatures of the States, as they were originally, or by the popular suffrage of each State, as they have come to be now, or by limited districts in each State, as was at one time the prevailing system, are always but the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature or the more popular suffrage by which the legislature itself was elected. So that it has come to pass that this curious machinery is only a mode of casting the vote to which a State is entitled in the election of President in favor of that candidate who is the favorite of the majority of the people entitled to vote for the more popular branch of the state legislature in each State."

And in *In re Green*, 134 U. S. 377, 379, this court said, speaking through Mr. Justice Gray:

"The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of

the States when acting as electors of representatives in Congress. Constitution, art. 1, sects. 2, 3.

"In accord with the provisions of the Constitution Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed, and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them. Rev. Stat. §§ 131–143; Acts of February 3, 1887, c. 90, 24 Stat. 373; October 19, 1888, c. 1216, 25 Stat. 613.

"Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors; but has left these matters to the control of the States."

II. The Michigan Statute is in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

The electoral system, as it actually exists, having been recognized by those amendments, the general ticket method for choosing presidential electors was thereby made the permanent and only constitutional method of appointment.

At the time of the adoption of those amendments in every State of the Union the male inhabitants thereof twenty-one years of age, and citizens of the United States, by express provision of law, possessed and exercised the right of voting at an election for the electors of President and Vice President of the United States, and the right of voting for all the electors of President and Vice President of the United States to which the State was entitled.

That this was a right and a privilege no one will deny; that it cannot be abridged by state legislation must be conceded.

The only question that remains is: does Act No. 50 of the Public Acts of 1891 deprive any citizen of the United States of twenty-one years of age, who is an inhabitant of Michigan, of his right to vote for electors of President and Vice President of the United States, or does it in any manner abridge this right?

Under the prior law every citizen of the United States who was a male inhabitant of Michigan and twenty-one years of age had the right to vote for as many electors of President and Vice President as the State was entitled to elect of Senators and Representatives in Congress. At the coming election in Michigan that would be fourteen. Under Act No. 50 no such citizen has the right to vote for more than two such electors. In other words, his right under the Fourteenth Amendment, if it is applicable, is to vote for fourteen electors of President and Vice President, while under Act No. 50 that right is so abridged that he can vote for but two. It is too plain for argument that if the amendment applies there is an abridgment, if not a denial, of this right.

I am not unmindful that this reasoning will render necessary the striking out of Article II, section 1, clause 2, of the Constitution, the words "in such manner as the legislature thereof may direct." Such, I believe, to be the effect of the amendment.

The electors of President and Vice President, under the amendment, must be chosen by the votes of the qualified citizens at an election for that purpose. There cannot be any other construction of the words "the right to vote at an election for the choice of electors of President and Vice President of the United States."

It cannot be said that if the voter votes for members of a legislature which chooses the electors, this will satisfy the amendment. The amendment gives him by its express terms the right to vote for "members of the legislature" and "electors of President and Vice President."

This right to vote for electors — not for one elector, not for as many as the legislature may name, but for all — this right which is specifically named, cannot be taken away by any subsequent act of a state legislature.

III. The Michigan statute is in conflict with the act of Congress of February 3, 1887, 24 Stat. 373, c. 90. This will be seen by placing the two in parallel columns.

Act of Congress.	*Act No.* 50.
SEC. 1. Electors of each State to meet *on the second Monday in January* following their appointment.	SEC. 4. Electors shall convene . . . on *the first Wednesday in December* immediately following their election.
SEC. 3 makes it the duty of the *Executive* of each State to communicate under the seal of the State to the Secretary of State of the United States a certificate of the ascertainment of the electors appointed setting forth their names, the canvass, and the number of *votes for each person for whose appointment any or all votes have been given or cast;* also *to deliver to the electors* of such State the same certificate in triplicate under the seal of the State. . . . Such certificate to the electors shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for the transmitting by such electors to the seat of government the lists of all persons voted for as President and of all persons voted for as Vice President.	SEC. 3 makes it the duty of the *secretary of state* to prepare three lists of the names of the electors and alternate electors, procure thereto the signature of the governor, affix the seal of the State thereto, and deliver such certificates thus signed and sealed to one of the electors on or before the first Wednesday of December next following the election.
	NOTE. — That no provision is made in the state act for sending any certificate to the Secretary of State of the United States or any other United States officials and no provision for making any statement of the number of votes given for any and all persons for whose appointment any votes were cast.

We understand it to be conceded that, in so far as it conflicts with the act of Congress, the state statute is void. We

contend that such a conflict in legislation invalidates the whole act. When an act of a state legislature, purporting to carry out a duty imposed on the State by the Constitution of the United States, directs certain officers of the State to do certain things, which the act of Congress passed in pursuance of the Constitution of the United States, commands other state officers to do and to perform in a different manner, the whole of the state law is illegal and void. The vice of the state law is that it is in hostility to the act of Congress. There is no presumption that the state law was passed in ignorance of the United States law. The legislature are presumed to know the laws of the United States governing state action.

Mr. A. A. Ellis, Attorney General of the State of Michigan, (with whom was *Mr. John W. Champlin* on the brief,) and *Mr. Otto Kirchner*, for defendant in error, said, on the question of jurisdiction:

I. The decision of the Supreme Court of the State of Michigan, refusing the mandamus prayed for, is not reviewable by this court, because: (*a*) The case does not fall within the 25th section of the Judiciary Act, Rev. Stat. § 709; and (*b*) The subject matter of this controversy is not of judicial cognizance.

(*a*) Under Rev. Stat. § 709 this court may review the final judgment or decree in any suit by the highest court of a State in the following cases only: (1) Where is drawn in question the validity of a statute of or an authority exercised under the United States, and the decision is against its validity; or (2) Where is drawn in question the validity of a statute of or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or (3) Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

Ryan v. *Thomas*, 4 Wall. 603; *Caperton* v. *Ballard*, 14 Wall. 238; *Simmerman* v. *Nebraska*, 116 U. S. 54.

The validity of the law in question is in no way involved in the application for the mandamus. There is nothing inconsistent between it and the statute under which the respondent, secretary of state, is required to act. It cannot, therefore, be claimed that the validity of a statute of the State of Michigan on the ground of its being repugnant to the Constitution, treaty or laws of the United States, is drawn in question in the mandamus proceeding. The case, therefore, is not within the second subdivision of § 25 of the Judiciary Act.

Neither can it be claimed that any right, privilege or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and that the decision of the Supreme Court of Michigan was against any such title, right, privilege or immunity. The case, therefore, is not within the last clause of § 25 of the Judiciary Act.

It cannot be contended that it is under the first subdivision of the section.

The duty of the secretary of state to give the statutory notice of the election was a public duty. But conceding, for the sake of argument, that a candidate for office at the next general election has a right under the statute to insist that notice of the election shall be given, and to enforce such right by mandamus; the right, if any, rests entirely upon the statute of the State of Michigan, and is in no way affected by the Constitution, or treaty, or statute, or commission held or authority exercised under the United States.

It is true that the Supreme Court of Michigan in passing upon the relators' right to the mandamus prayed for decided that the law did not conflict with any provision of the Federal Constitution, and that it was void only so far as it conflicted with the Act of Congress. But the expression by the state court of an opinion upon a Federal question does not give this court jurisdiction of the case unless it appears that it was necessary to pass upon the Federal question in order to decide the case; and if a decision might have been reached by the

state court without passing upon the Federal question this court will not take cognizance of the cause. *Railroad Co.* v. *Rock*, 4 Wall. 177; *Lawler* v. *Walker*, 14 How. 149; *De Saussure* v. *Gaillard*, 127 U. S. 216.

There are other grounds upon which the decision of the court refusing the mandamus might have been placed without touching any Federal question. A mandamus is not a writ of right in Michigan even when it is asked against a public officer to compel him to discharge a public duty. In all cases it is granted or refused in the sound discretion of the court. *People* v. *Regents of the University of Michigan*, 4 Michigan, 98; *Mabley* v. *Superior Court Judge of Detroit*, 41 Michigan, 31; *Hale* v. *Risley*, 69 Michigan, 596.

(*b*) The subject-matter of this controversy is not of judicial cognizance. Judicial power is, in its nature, necessarily exclusive. It does not trench upon the domain of any other department of the government. It will not allow any other department of the government to trench upon its domain. A matter is of judicial cognizance when the courts have power to dispose of it finally. Miller on the Constitution, 314; *Hayburn's Case*, 2 Dall. 408, 409, note; *United States* v. *Ferreira*, 13 How. 40; *United States* v. *Yale Todd*, 13 How. 52, note; *In re Cooper*, 143 U. S. 472.

Applying the principles of these decisions to the case at bar, we say that this controversy is not judicial, because whatever decision this court, or any other court, may make as to the validity of the state law, is subject to review by political officers and agencies. See *Royce* v. *Goodwin*, 22 Michigan, 496, and *Sutherland* v. *The Governor*, 29 Michigan, 320.

The legal status of the situation may be stated thus:

1. The canvass and final determination as to who is elected to the office of elector rests with the board of state canvassers in the first instance. This decision is not subject to review or control by any court within the State of Michigan.

2. If the decision of the board of canvassers as to who is elected to the office of presidential elector is contested, the final decision of the controversy rests in the next place with the legislature of the State in joint convention. It cannot be

contended that the action of the legislature is subject to judicial review or control.

3. It then rests with the governor of the State, whose duty it is to certify the action of the state board of canvassers. He may have to decide between contending boards. The action of the governor, as we have already shown, is not subject to judicial review or control.

4. And, finally, the whole matter rests with both houses of the Congress of the United States.

It is manifest, therefore, that whatever decision the court may render in this case is not final, but is subject to review by the political agencies already referred to.

The object of this proceeding is not to determine whether the notice prayed for in the petition should be given, but to obtain a decision upon the validity of the State law. That decision is, as we have already seen, subject to review, and subject to be utterly disregarded by the various political agencies referred to.

II. This court is bound by the decision of the Supreme Court of Michigan as to all matters sought to be raised by the petition, except the question as to whether the state statute contravenes the Fourteenth Amendment to the Constitution.

The only conflict between the state statute and the act of Congress relates to the time of the meeting of the electors and the certification of their appointment. Wherever the state law and the act of Congress conflict, the latter of course controls. The Supreme Court of Michigan held that what remained of the state law was a valid expression of the legislative will within constitutional limitations. The validity of so much of the state statute as does not conflict with the act of Congress, barring the Federal question already referred to, is, we submit, a question of local law upon which the determination of the local tribunal is conclusive.

Mr. Chief Justice Fuller, after stating the case as above reported, delivered the opinion of the court.[1]

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[1] The judgment of affirmance was entered as above stated October 17, 1892, and the mandate issued at once. The opinion was delivered and filed November 7, 1892.

Opinion of the Court.

The Supreme Court of Michigan held in effect that if the act in question were invalid, the proper remedy had been sought. In other words, if the court had been of opinion that the act was void, the writ of mandamus would have been awarded.

And, having ruled all objections to the validity of the act urged as arising under the state constitution and laws adversely to the plaintiffs in error, the court was compelled to, and did, consider and dispose of the contention that the act was invalid because repugnant to the Constitution and laws of the United States.

We are not authorized to revise the conclusions of the state court on these matters of local law, and those conclusions being accepted, it follows that the decision of the Federal questions is to be regarded as necessary to the determination of the cause. *DeSaussure* v. *Gaillard*, 127 U. S. 216.

Inasmuch as under section 709 of the Revised Statutes of the United States, we have jurisdiction by writ of error to re-examine and reverse or affirm the final judgment in any suit in the highest court of a State in which a decision could be had, where the validity of a statute of the State is drawn in question on the ground that it is repugnant to the Constitution and laws of the United States and the decision is in favor of its validity, we perceive no reason for holding that this writ was improvidently brought.

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress.

But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained.

Boyd v. *Thayer*, 143 U. S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. *Hartman* v. *Greenhow*, 102 U. S. 672.

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitively disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.

The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.

On behalf of plaintiffs in error it is contended that the act is void because in conflict with (1) clause two of section one of Article II of the Constitution of the United States; (2) the Fourteenth and Fifteenth Amendments to the Constitution; and (3) the act of Congress of February 3, 1887.

The second clause of section one of Article II of the Constitution is in these words: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

The manner of the appointment of electors directed by the act of Michigan is the election of an elector and an alternate elector in each of the twelve Congressional districts into which the State of Michigan is divided, and of an elector and an alternate elector at large in each of two districts defined by the act. It is insisted that it was not competent for the legislature to direct this manner of appointment because the State is to appoint as a body politic and corporate, and so must act as a unit and cannot delegate the authority to subdivisions created for the purpose; and it is argued that the appoint-

ment of electors by districts is not an appointment by the State, because all its citizens otherwise qualified are not permitted to vote for all the presidential electors.

"A State in the ordinary sense of the Constitution," said Chief Justice Chase, *Texas* v. *White*, 7 Wall. 700, 721, "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed. The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several States and the citizens of each State. What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

If the legislature possesses plenary authority to direct the manner of appointment, and might itself exercise the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the State in its entirety because ar-

rived at by districts, for the act is the act of political agencies duly authorized to speak for the State, and the combined result is the expression of the voice of the State, a result reached by direction of the legislature, to whom the whole subject is committed.

By the first paragraph of section two, Article I, it is provided: "The House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature;" and by the third paragraph "when vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Section four reads: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators."

Although it is thus declared that the people of the several States shall choose the members of Congress, (language which induced the State of New York to insert a salvo as to the power to divide into districts, in its resolutions of ratification,) the state legislatures, prior to 1842, in prescribing the times, places and manner of holding elections for representatives, had usually apportioned the State into districts, and assigned to each a representative; and by act of Congress of June 25, 1842, 5 Stat. 491, c. 47, (carried forward as § 23 of the Revised Statutes), it was provided that where a State was entitled to more than one representative, the election should be by districts. It has never been doubted that representatives in Congress thus chosen represented the entire people of the State acting in their sovereign capacity.

By original clause three of section one of Article II, and by the Twelfth Amendment which superseded that clause, in case of a failure in the election of President by the people, the House of Representatives is to choose the President; and "the vote shall be taken by States, the representation from

each State having one vote." The State acts as a unit and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in Congress elected by districts.

The State also acts individually through its electoral college, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force, and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled. *Stuart* v. *Laird*, 1 Cranch, 299, 309.

It has been said that the word "appoint" is not the most appropriate word to describe the result of a popular election. Perhaps not; but it is sufficiently comprehensive to cover that mode, and was manifestly used as conveying the broadest power of determination. It was used in Article V of the Articles of Confederation, which provided that "delegates shall be annually appointed in such manner as the legislature

of each State shall direct;" and in the resolution of Congress of February 21, 1787, which declared it expedient that "a convention of delegates who shall have been appointed by the several States," should be held. The appointment of delegates was, in fact, made by the legislatures directly, but that involved no denial of authority to direct some other mode. The Constitutional Convention, by resolution of September 17, 1787, expressed the opinion that the Congress should fix a day "on which electors should be appointed by the States which shall have ratified the same," etc., and that "after such publication, the electors should be appointed, and the Senators and Representatives elected."

The Journal of the Convention discloses that propositions that the President should be elected by "the citizens of the United States," or by the "people," or "by electors to be chosen by the people of the several States," instead of by the Congress, were voted down, (Jour. Con. 286, 288; 1 Elliot's Deb. 208, 262,) as was the proposition that the President should be "chosen by electors appointed for that purpose by the legislatures of the States," though at one time adopted. Jour. Con. 190; 1 Elliot's Deb. 208, 211, 217. And a motion to postpone the consideration of the choice "by the national legislature," in order to take up a resolution providing for electors to be elected by the qualified voters in districts, was negatived in Committee of the Whole. Jour. Con. 92; 1 Elliot's Deb. 156. Gerry proposed that the choice should be made by the State executives; Hamilton, that the election be by electors chosen by electors chosen by the people; James Wilson and Gouverneur Morris were strongly in favor of popular vote; Ellsworth and Luther Martin preferred the choice by electors elected by the legislatures; and Roger Sherman, appointment by Congress. The final result seems to have reconciled contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed.

Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do,

that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable.

At the first presidential election the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey and South Carolina. Pennsylvania, by act of October 4, 1788, Acts Penn. 1787–1788, p. 513, provided for the election of electors on a general ticket. Virginia, by act of November 17, 1788, was divided into twelve separate districts and an elector elected in each district, while for the election of Congressmen the State was divided into ten other districts. Laws Va. Oct. Sess. 1788, pp. 1, 2; 12 Henning's Stat. 648. In Massachusetts the general court, by resolve of November 17, 1788, divided the State into districts for the election of Representatives in Congress, and provided for their election December 18, 1788, and that at the same time the qualified inhabitants of each district should give their votes for two persons as candidates for an elector of President and Vice President of the United States, and, from the two persons in each district having the greatest number of votes, the two houses of the general court by joint ballot should elect one as elector, and in the same way should elect two electors at large. Mass. Resolves, 1788, p. 53. In Maryland,

under act of December 22, 1788, electors were elected on general ticket, five being residents of the Western Shore and three of the Eastern Shore. Laws Md. 1788, Nov. Sess. c. 10. In New Hampshire an act was passed November 12, 1788, Laws N. H. 1789, p. 167, providing for the election of five electors by majority popular vote, and in case of no choice that the legislature should appoint out of so many of the candidates as equalled double the number of electors elected. There being no choice the appointment was made by the legislature. The senate would not agree to a joint ballot, and the house was compelled, that the vote of the State might not be lost, to concur in the electors chosen by the senate. The State of New York lost its vote through a similar contest. The assembly was willing to elect by joint ballot of the two branches or to divide the electors with the senate, but the senate would assent to nothing short of a complete negative upon the action of the assembly, and the time for election passed without an appointment. North Carolina and Rhode Island had not then ratified the Constitution.

Fifteen States participated in the second presidential election, in nine of which electors were chosen by the legislatures. Maryland, (Laws Md. 1790, c. 16, [2 Kelty]; Laws 1791, c. 62, [2 Kelty],) New Hampshire, (Laws N. H. 1792, 398, 401,) and Pennsylvania (Laws Penn. 1792, p. 240,) elected their electors on a general ticket, and Virginia by districts. Laws Va. 1792, p. 87, [13 Henning, 536]. In Massachusetts the general court by resolution of June 30, 1792, divided the State into four districts, in each of two of which five electors were elected, and in each of the other two three electors. Mass. Resolves, June, 1792, p. 25. Under the apportionment of April 13, 1792, North Carolina was entitled to ten members of the House of Representatives. The legislature was not in session and did not meet until November 15, while under the act of Congress of March 1, 1792, (1 Stat. 239, c. 8,) the electors were to assemble on December 5. The legislature passed an act dividing the State into four districts, and directing the members of the legislature residing in each district to meet on the 25th of November and choose three electors. 2 Iredell N.

Car. Laws, 1715 to 1800, c. 15 of 1792. At the same session an act was passed dividing the State into districts for the election of electors in 1796, and every four years thereafter. Id. c. 16.

Sixteen States took part in the third presidential election, Tennessee having been admitted June 1, 1796. In nine States the electors were appointed by the legislatures, and in Pennsylvania and New Hampshire by popular vote for a general ticket. Virginia, North Carolina, and Maryland elected by districts. The Maryland law of December 24, 1795, was entitled "An act to alter the mode of electing electors," and provided for dividing the State into ten districts, each of which districts should "elect and appoint one person, being a resident of the said district, as an elector." Laws Md. 1795, c. 73, [2 Kelty]. Massachusetts adhered to the district system, electing one elector in each Congressional district by a majority vote. It was provided that if no one had a majority, the legislature should make the appointment on joint ballot, and the legislature also appointed two electors at large in the same manner. Mass. Resolves, June, 1796, p. 12. In Tennessee an act was passed August 8, 1796, which provided for the election of three electors, "one in the district of Washington, one in the district of Hamilton, and one in the district of Mero," and, "that the said electors may be elected with as little trouble to the citizens as possible," certain persons of the counties of Washington, Sullivan, Green, and Hawkins were named in the act and appointed electors to elect an elector for the district of Washington; certain other persons of the counties of Knox, Jefferson, Sevier, and Blount were by name appointed to elect an elector for the district of Hamilton; and certain others of the counties of Davidson, Sumner, and Tennessee to elect an elector for the district of Mero. Laws Tenn. 1794, 1803, p. 109; Acts 2d Sess. 1st Gen. Assembly Tenn. c. 4. Electors were chosen by the persons thus designated.

In the fourth presidential election, Virginia, under the advice of Mr. Jefferson, adopted the general ticket, at least "until some uniform mode of choosing a President and Vice-President of the United States shall be prescribed by an amend-

ment to the Constitution." Laws Va. 1799, 1800, p. 3. Massachusetts passed a resolution providing that the electors of that State should be appointed by joint ballot of the senate and house. Mass. Resolves, June, 1800, p. 13. Pennsylvania appointed by the legislature, and upon a contest between the senate and house, the latter was forced to yield to the senate in agreeing to an arrangement which resulted in dividing the vote of the electors. 26 Niles' Reg. 17. Six States, however, chose electors by popular vote, Rhode Island supplying the place of Pennsylvania, which had theretofore followed that course. Tennessee, by act of October 26, 1799, designated persons by name to choose its three electors as under the act of 1796. Laws Tenn. 1794–1803, p. 211; Acts 2d Sess. 2d Gen. Ass. Tenn. c. 46.

Without pursuing the subject further, it is sufficient to observe that, while most of the States adopted the general ticket system, the district method obtained in Kentucky until 1824; in Tennessee and Maryland until 1832; in Indiana in 1824 and 1828; in Illinois in 1820 and 1824; and in Maine in 1820, 1824 and 1828. Massachusetts used the general ticket system, in 1804, (Mass. Resolves, June, 1804, p. 19,) chose electors by joint ballot of the legislature in 1808 and in 1816, (Mass. Resolves, 1808, pp. 205, 207, 209; 1816, p. 233;) used the district system again in 1812 and in 1820, (Mass. Resolves, 1812, p. 94; 1820, p. 245;) and returned to the general ticket system in 1824, (Mass. Resolves, 1824, p. 40.) In New York the electors were elected in 1828 by districts, the district electors choosing the electors at large. N. Y. Rev. Stat. 1827, Part I, Title vi, c. 6. The appointment of electors by the legislature, instead of by popular vote, was made use of by North Carolina, Vermont and New Jersey in 1812.

In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the States excepting South Carolina, where the legislature chose them up to and including 1860. Journals 1860, Senate pp. 12, 13; House, 11,

15, 17. And this was the mode adopted by Florida in 1868, (Laws 1868, p. 166,) and by Colorado in 1876, as prescribed by § 19 of the schedule to the constitution of the State, which was admitted into the Union August 1, 1876. Gen. Laws Colorado, 1877, pp. 79, 990.

Mr. Justice Story, in considering the subject in his Commentaries on the Constitution, and writing nearly fifty years after the adoption of that instrument, after stating that "in some States the legislatures have directly chosen the electors by themselves; in others, they have been chosen by the people by a general ticket throughout the whole State; and in others, by the people by electoral districts, fixed by the legislature, a certain number of electors being apportioned to each district," adds: "No question has ever arisen as to the constitutionality of either mode, except that by a direct choice by the legislature. But this, though often doubted by able and ingenious minds, (3 Elliot's Deb. 100, 101,) has been firmly established in practice ever since the adoption of the Constitution, and does not now seem to admit of controversy, even if a suitable tribunal existed to adjudicate upon it." And he remarks that "it has been thought desirable by many statesmen to have the Constitution amended so as to provide for a uniform mode of choice by the people." Story Const. 1st Ed. § 1466.

Such an amendment was urged at the time of the adoption of the Twelfth Amendment, the suggestion being that all electors should be chosen by popular vote, the States to be divided for that purpose into districts. It was brought up again in Congress in December, 1813, but the resolution for submitting the amendment failed to be carried. The amendment was renewed in the House of Representatives in Decem-

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[1] See Stanwood on Presidential Elections, (3d ed.,) and Appleton's Presidential Counts, *passim;* 2 Lalor's Encyclo. Pol. Science, 68; 4 Hild. Hist. U. S., (Rev. Ed.,) 39, 382, 689; 5 Id. 389, 531; 1 Schouler's Hist. U. S. 72, 334; 2 Id. 184; 3 Id. 313, 439; 2 Adams' Hist. U. S. 201; 4 Id. 285; 6 Id. 409, 413; 9 Id. 139; 1 McMaster's Hist. People U. S. 525; 2 Id. 85, 509; 3 Id. 188, 189, 194, 317; 2 Scharf's Hist. Md. 547; 2 Bradford's Mass. 335; Life of Plumer, 104; 3 Niles' Register, 160; 5 Id. 372; 9 Id. 319, 349; 10 Id. 45, 177, 409; 11 Id. 296.

ber, 1816, and a provision for the division of the States into single districts for the choice of electors received a majority vote, but not two-thirds. Like amendments were offered in the Senate by Messrs. Sanford of New York, Dickerson of New Jersey and Macon of North Carolina. December 11, 1823, Senator Benton introduced an amendment providing that each legislature should divide its State into electoral districts, and that the voters of each district "should vote, in their own proper persons," for President and Vice-President, but it was not acted upon. December 16, and December 24, 1823, amendments were introduced in the Senate by Messrs. Dickerson of New Jersey and Van Buren of New York, requiring the choice of electors to be by districts; but these and others failed of adoption, although there was favorable action in that direction by the Senate in 1818, 1819 and 1822. December 22, 1823, an amendment was introduced in the House by Mr. McDuffie of South Carolina, providing that electors should be chosen by districts assigned by the legislatures, but action was not taken.[1] The subject was again brought forward in 1835, 1844, and subsequently, but need not be further dwelt upon, except that it may be added that, on the 28th of May, 1874, a report was made by Senator Morton, chairman of the Senate Committee on Privileges and Elections, recommending an amendment dividing the States into electoral districts, and that the majority of the popular vote of each district should give the candidate one presidential vote, but this also failed to obtain action. In this report it was said: "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States; and it is, no doubt, competent for the legislature to authorize the governor, or the

[1] 1 Benton's Thirty Years View, 37; 5 Bent. Cong. Deb. 110, 677; 7 Id. 472–74, 600; 3 Niles' Reg. 240, 334; 11 Id. 258, 274, 293, 349; Annals Cong., (1812–13,) 847.

Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated." Senate Rep. 1st Sess. 43 Cong. No. 395.

From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Even in the heated controversy of 1876–1877 the electoral vote of Colorado cast by electors chosen by the legislature passed unchallenged; and our attention has not been drawn to any previous attempt to submit to the courts the determination of the constitutionality of state action.

In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States. They are, as remarked by Mr. Justice Gray in *In re Green*, 134 U. S. 377, 379, "no more officers or agents of the United States than are the members of the state legislatures when acting as electors of Federal senators, or the people of the States when acting as the electors of representatives in Congress." Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that Congressional and Federal influence might be excluded.

The question before us is not one of policy but of power, and

while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed. The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way. The construction to which we have referred has prevailed too long and been too uniform to justify us in interpreting the language of the Constitution as conveying any other meaning than that heretofore ascribed, and it must be treated as decisive.

It is argued that the district mode of choosing electors, while not obnoxious to constitutional objection, if the operation of the electoral system had conformed to its original object and purpose, had become so in view of the practical working of that system. Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that, whether chosen by the legislatures or by popular suffrage on general ticket or in districts, they were so chosen simply to register the will of the appointing power in respect of a particular candidate. In relation, then, to the independence of the electors the original expectation may be said to have been frustrated. Miller on Const. Law, 149; Rawle on Const. 55; Story Const. § 1473; The Federalist, No. 68. But we can perceive no reason for holding that the power confided to the States by the Constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created. Still less can we recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made.

Nor are we able to discover any conflict between this act and the Fourteenth and Fifteenth Amendments to the Constitution. The Fourteenth Amendment provides:

"SECTION 1. 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

The first section of the Fifteenth Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

In *The Slaughter-house Cases*, 16 Wall. 36, this court held that the first clause of the Fourteenth Amendment was primarily intended to confer citizenship on the negro race; and, secondly, to give definitions of citizenship of the United States, and citizenship of the States, and it recognized the distinction between citizenship of a State and citizenship of the United States by those definitions; that the privileges and immunities of citizens of the States embrace generally those fundamental civil rights for the security and establishment of which organ-

ized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the State governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause of the Fourteenth Amendment.

We decided in *Minor* v. *Happersett*, 21 Wall. 162, that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and that that amendment does not add to these privileges and immunities, but simply furnishes an additional guaranty for the protection of such as the citizen already has; that at the time of the adoption of that amendment, suffrage was not coextensive with the citizenship of the State; nor was it at the time of the adoption of the Constitution; and that neither the Constitution nor the Fourteenth Amendment made all citizens voters.

The Fifteenth Amendment exempted citizens of the United States from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. 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. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Reese*, 92 U. S. 214.

If because it happened, at the time of the adoption of the Fourteenth Amendment, that those who exercised the elective franchise in the State of Michigan were entitled to vote for all the presidential electors, this right was rendered permanent by that amendment, then the second clause of Article II has been so amended that the States can no longer appoint in such manner as the legislatures thereof may direct; and yet no such result is indicated by the language used nor are the amendments necessarily inconsistent with that clause. The first

section of the Fourteenth Amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the State having attained majority, and being a citizen of the United States, then the basis of representation to which each State is entitled in the Congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of the right to vote for representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the State. There is no color for the contention that under the amendments every male inhabitant of the State being a citizen of the United States has from the time of his majority a right to vote for presidential electors.

The object of the Fourteenth Amendment in respect of citizenship was to preserve equality of rights and to prevent discrimination as between citizens, but not to radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. *In re Kemmler*, 136 U. S. 436.

The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. *Pembina Company* v. *Pennsylvania*, 125 U. S. 181, 188.

In *Hayes* v. *Missouri*, 120 U. S. 68, 71, Mr. Justice Field, speaking for the court, said: "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some

and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 237."

If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made. Unless the authority vested in the legislatures by the second clause of section 1 of Article II has been divested and the State has lost its power of appointment, except in one manner, the position taken on behalf of relators is untenable, and it is apparent that neither of these amendments can be given such effect.

The third clause of section 1 of Article II of the Constitution is: "The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

Under the act of Congress of March 1, 1792, 1 Stat. 239, c. 8, it was provided that the electors should meet and give their votes on the first Wednesday in December at such place in each State as should be directed by the legislature thereof, and by act of Congress of January 23, 1845, 5 Stat. 721, c. 2, that the electors should be appointed in each State on the Tuesday next after the first Monday in the month of November in the year in which they were to be appointed; provided that each State might by law provide for the filling of any vacancies in its college of electors when such college meets to give its electoral vote; and provided that when any State shall have held an election for the purpose of choosing electors and has failed to make a choice on the day prescribed, then the electors may be appointed on a subsequent day in such manner as the State may by law provide. These provisions were carried forward into sections 131, 133, 134, and 135 of the Revised Statutes. Rev. Stat. Title III, c. 1, p. 22.

By the act of Congress of February 3, 1887, entitled "An act to fix the day for the meeting of the electors of President and Vice President," etc., 24 Stat. 373, c. 90, it was provided that the electors of each State should meet and give their

votes on the second Monday in January next following their appointment. The state law in question here fixes the first Wednesday of December as the day for the meeting of the electors, as originally designated by Congress. In this respect it is in conflict with the act of Congress, and must necessarily give way. But this part of the act is not so inseparably connected in substance with the other parts as to work the destruction of the whole act. Striking out the day for the meeting, which had already been otherwise determined by the act of Congress, the act remains complete in itself, and capable of being carried out in accordance with the legislative intent. The state law yields only to the extent of the collision. Cooley Const. Lim. *178; *Commonwealth* v. *Kimball*, 24 Pick. 359; *Houston* v. *Moore*, 5 Wheat. 1, 49. The construction to this effect by the state court is of persuasive force, if not of controlling weight.

We do not think this result affected by the provision in act No. 50 in relation to a tie vote. Under the constitution of the State of Michigan, in case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention chooses one of these persons to fill the office. This rule is recognized in this act, which also makes it the duty of the governor in such case to convene the legislature in special session for the purpose of its application, immediately upon the determination by the board of state canvassers.

We entirely agree with the Supreme Court of Michigan that it cannot be held as matter of law that the legislature would not have provided for being convened in special session but for the provision relating to the time of the meeting of the electors contained in the act; and are of opinion that that date may be rejected and the act be held to remain otherwise complete and valid.

And as the State is fully empowered to fill any vacancy which may occur in its electoral college, when it meets to give its electoral vote, we find nothing in the mode provided for anticipating such an exigency which operates to invalidate the law.

We repeat that the main question arising for consideration is one of power and not of policy, and we are unable to arrive at any other conclusion than that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the Constitution of the United States for want of power in its enactment.

The judgment of the Supreme Court of Michigan must be

Affirmed.

VAN WINKLE *v.* CROWELL.

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

No. 23. Argued and submitted, March 30, 1892. — Decided October 31, 1892.

By a contract in writing V. agreed to make for B. certain cotton-seed oil-mill machinery, at a fixed price. It was made and shipped to B. and not paid for. B. put it into use and afterwards executed to L. a mortgage covering it. V. then brought a suit in detinue against C. a bailee of L. for the property. L. was made a co-defendant. After the mortgage was given, B. executed to V. notes for what was due to V. for the purchase money of the machinery, which stated that the express condition of the delivery of the machinery was that the title to it did not pass from V. until the purchase-money was paid in full. *Held* that the terms of the written contract could not be varied by parol evidence.

The condition of the title to the machinery at and before the giving of the mortgage was a conclusion of law to be drawn from the undisputed facts of the case.

It was proper to direct the jury to find for the defendant.

This was an action of detinue brought November 8, 1886, in the Circuit Court of Bullock County, Alabama, by E. Van Winkle and W. W. Boyd, copartners as E. Van Winkle & Co., against Canty Crowell, to recover certain machinery belonging to and constituting a cotton-seed oil mill.

The plaintiffs being citizens of Georgia and the defendant a citizen of Alabama, the suit was removed by the latter into the Circuit Court of the United States for the Middle District of Alabama. After its removal, and in November, 1887, the latter court allowed Emanuel Lehman, Meyer Lehman, Joseph Goeter, and John W. Durr, composing the firm of Lehman,

Durr & Co., and Ignatius Pollak, doing business under the firm name of Pollak & Co., all citizens of New York and Alabama, to make themselves parties defendant to the suit, and they filed pleas. The pleas were to the effect that Crowell did not unlawfully detain the property sued for, as alleged in the complaint; and that it was not, at the time of the commencement of the suit, and had not since been, and was not, at the time of putting in the pleas, the property of the plaintiffs, but of the defendants pleading. The case was tried before a jury, which rendered a verdict for the defendants; and there was a judgment for them, with costs. The plaintiffs brought the case here by a writ of error.

The controversy was in fact one between the plaintiffs on one part, and Lehman, Durr & Co. and Pollak & Co. on the other part. Lehman, Durr & Co. claimed the property under a mortgage executed to them, December 4, 1885, by Samuel S. Belser and Langdon C. Parker, and their wives, to secure a debt of $30,000, with interest, and covering one and three-fourths acres of land in Bullock County, on which was an oil mill, together with the machinery therein, other land in Montgomery County, and certain other personal property. Pollak & Co. claimed under a mortgage executed to them January 2, 1886, to secure a debt of $15,000, and covering land in Montgomery County, the oil-mill land in Bullock County, the improvements thereon and appurtenances belonging thereto, and other personal property. At the time suit was brought against Crowell, the property in question was in his possession as bailee of the mortgagees. The property had been manufactured by the plaintiffs for Belser and Parker under a written contract signed by the latter, and accepted by the former, in the terms set forth in the margin.[1] At the date of the paper,

[1] L. C. Parker. E. B. Gray. S. S. Belser.

Parker, Gray and Belser, dealers in general merchandise.

MITCHELL'S STATION, ALA., *March* 28, 1885.

Messrs. E. Van Winkle & Co., Atlanta, Ga.

GENTS: You will please ship to us, at Mitchell's Station, Ala., the following oil-mill machinery, to wit, for which we agree to pay you the sum of twelve thousand five hundred dollars ($12,500):

one of the plaintiffs visited Belser and Parker, and himself wrote the paper, which Belser and Parker signed and delivered to him. No other agreement was made than the one contained in that paper.

By that contract, the plaintiffs obliged themselves (1) to ship to Belser and Parker the machinery named therein; (2) to pay the freight thereon to Mitchell's Station, the place to which it was to be shipped; and (3) to furnish the mechanics to erect the machinery there. Belser and Parker, by the terms of the contract, agreed (1) to furnish all rough labor and the board of the men engaged in the work, and (2) to pay $12,500 for the machinery, namely, $3000 on the receipt of the bill of lading, $4750 on November 1, 1885, and $4750 on March 1, 1886, with interest at eight per cent from the date of starting the mill.

There was a great deal of delay in shipping the machinery, and much complaint on the part of Belser and Parker. The building in which the machinery was placed was erected by Belser

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One set of oil-mill machinery complete, with capacity to work thirty tons of cotton-seed per day, as follows:

4 hydraulic presses.

4 steam-heaters.

2 hullers.

4 linters, feeders, and condensers.

All line and centre shafting, all steam and oil pipes, all pulleys, hangers &c.; one hydraulic pump of six plungers, one oil pump, one cake breaker & cake grinding mill, one sett of crushing rollers, one sett of separating machinery, all elevators and conveyers, three seventy-saw gins, with feeders and condensers; two cotton presses, all shafting for gins and presses, all pulleys complete, all belting but main belt for oil mill, belting for gin-house not included — this to mean, in fact, all machinery and appurtenances necessary to operate an oil mill and gin-house of above-described capacity. It is agreed that you are to lay down the mach'y at Mitchell's Sta. and pay all freight and furnish the mechanics to erect the same; we to furnish all rough labor and board of men. We agree to pay you for machinery as follows:

$3000.00 on receipt of bill of lading.

$4750.00 (four thousand seven hundred and fifty dollars) on the first day of November ensuing, and like amount, $4750.00, first day of March ensuing, with interest at 8 per cent from date of starting mill.

Yours respect'y, etc., etc., BELSER & PARKER.

and Parker after the contract for the machinery was made. It was constructed for the purpose of being used as a cotton-seed oil mill; and the machinery furnished was such as was essential for only such a mill. The machinery was manufactured by the plaintiffs at Atlanta, Georgia, and at various times was placed by them on railroad cars at Atlanta, consigned to Belser and Parker at Mitchell's Station, Alabama. During the progress of the work, Belser and Parker paid to the plaintiffs $2500 on their drafts drawn according to the contract, and also paid out for freight and other expenses, which the plaintiffs had agreed to pay, sums amounting to $500. The machinery was in place so that the mill could be operated prior to December 1, 1885; and Belser and Parker commenced operating it in November, 1885. There was some evidence that after December 10, 1885, the plaintiffs supplied some additional machinery, but the evidence did not identify it. The land on which the building stood in which the machinery was placed belonged to Belser and Parker.

On December 4, 1885, the date of the mortgage to Lehman, Durr & Co., Belser and Parker were indebted to that firm in debts which were then due. They obtained from Lehman, Durr & Co. an extension of those debts and also further advances, making a total indebtedness of $30,000, for which the mortgage was given. It was recorded in the proper office on the 3d of February, 1886, within three months after its execution. On the 2d of January, 1886, the date of the mortgage to Pollak & Co., Belser and Parker owed to Pollak & Co. debts which were past due; and an agreement was then made for their extension, and new advances were made, the whole amounting to $15,000. The mortgage was duly recorded on February 4, 1886.

On the 11th of December, 1885, one of the plaintiffs visited Belser and Parker, and with one of the latter inspected the mill. It was agreed between them that certain additional machinery should be provided, and other portions changed, but what portions does not appear; and that the balance due for the machinery should be settled by three notes, dated December 11, 1885, and signed by Belser and Parker, one for

$1500, with interest at eight per cent per annum, due February 1, 1886; a second of like tenor for $3500, due March 1, 1886; and a third for $4633.52, due December 1, 1886. The first one of the three notes read as in the margin,[1] and the others corresponded *mutatis mutandis*.

Mr. W. A. Gunter and *Mr. John D. Roquemore*, for plaintiffs in error, submitted on their brief.

The property sued for was personal. There was evidence tending to show that it had no such attachment to the land as to make it a part of the realty, which, of course, on the unqualified direction given to the jury to find for the defendants, must be taken as true in favor of the plaintiffs in error.

But, independently of this, the rule is that personal property does not become realty even in favor of mortgagees or purchasers, if the agreements between the vendor of the personalty and the owner of the land preserves as between them, its character as personalty, as was the case in this instance. *Ford* v. *Cobb*, 20 N. Y. 344; *Russell* v. *Richards*, 1 Fairf. 10 Maine, 429; S. C. 25 Am. Dec. 254; *Tifft* v. *Horton*, 53 N. Y. 377; *Sisson* v. *Hibbard*, 75 N. Y. 542; *Globe Marble Co.* v. *Quinn*, 76 N. Y. 23; *Foster* v. *Mabe*, 4 Alabama, 402; S. C. 37 Am. Dec. 749; *Harris* v. *Powers*, 57 Alabama, 139.

The written order given by Belser & Parker was a mere proposition; it did not contain the contract on the part of

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[1] $1500.00 PIKE ROAD, ALA., Dec. 11th, 1885.

On or before the first day of February, 1886, we promise to pay to E. Van Winkle & Co. or order fifteen hundred and 00-100 dollars, for value received, with interest from date until paid at the rate of eight per cent per annum, and also all costs of collection. The benefit of any and all homestead or exemption laws is waived as to this note. The above is for purchase-money of one cotton-seed oil-mill machinery built at Mitchell's Station, Ala., which E. Van Winkle & Co. have this day agreed to sell to Messrs. Belser & Parker, of Pike Road, Ala.; and it is the express condition of the delivering of the said property that the title to the same does not pass from E. Van Winkle & Co. until the purchase-money and interest is paid in full.

In testimony whereof have hereunto set hands and seal.

Payable at BELSER & PARKER. [SEAL.]

Van Winkle & Co., and as there was no writing showing it, parol evidence was the only source of information open.

But even if the order expressed the whole arrangement and contract, it is plain that it would be competent to prove by parol, when the machinery was accepted by the purchasers as their property, and that it had the conditions stipulated for in the contract, and likewise to explain the character of the possession prior to acceptance by the vendees.

No specific machinery was bought so as to pass the property, but it was all to be manufactured, and was to be a complete set, and to possess the capacity of working thirty tons of cotton seed per day. These "conditions" necessarily operated to retain the property in the vendors until the vendees accepted the machinery, with the vendors' consent, as their property.

Notwithstanding the machinery may have been exactly conformable to the stipulations of the contract, it would not, under such agreement, belong to the vendees until there was a meeting of the minds of the vendors and vendees on the point of tender by one and acceptance by the other. And this, notwithstanding the possession of the machinery may, prior thereto, have been with the vendees. *Cleveland Rolling Mill* v. *Rhodes*, 121 U. S. 255.

There was an unqualified right therefore, on the part of the plaintiffs in error, to show by parol when there was an actual acceptance of the property in the goods by the vendees, and to explain the character and purpose of their prior possession. And the court evidently committed an error in denying this right.

The mortgage to Lehman, Durr & Co. being made on the 4th December, 1885, prior to the passing of the property in the machinery to Belser & Parker, which took place on the 11th December, 1885, gave no right against the plaintiffs in error, and was no defence to their action.

The mortgage to Pollak & Co., in January, 1886, after Belser & Parker had acquired the conditional title, dependent upon the payment of the purchase-money to the plaintiffs in error, gave them only the title of Belser & Parker. There is no such thing as a *bona fide* purchase of personal property, so

as to defeat the legal title. *Fairbanks* v. *Eureka Co.*, 67 Alabama, 109; *Sumner* v. *Woods*, 67 Alabama, 139; *Harkness* v. *Russell*, 118 U. S. 663; *Telegraph Co.* v. *Davenport*, 97 U. S. 369, 372; *Fosdick* v. *Schall*, 99 U. S. 235.

Mr. H. C. Tompkins for defendants in error.

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

The plaintiffs rely for a recovery of the property on title claimed under the three notes. All of the machinery except a few pieces, which were not pointed out by the evidence, had been received and was in use by Belser and Parker prior to December 1, 1885; and no work of construction was done after the latter date on the mill or the machinery. Testimony was given by E. Van Winkle, one of the plaintiffs, that they did not turn over the machinery to Belser and Parker (otherwise than by shipping it and permitting Belser and Parker to operate it) until upon the settlement made after such inspection in December, 1885; and that Belser and Parker, prior to that time, did not accept the machinery as a compliance with the contract, and then only accepted it conditionally upon the plaintiffs' supplying and changing certain parts of the machinery. That testimony was admitted against the objection of the defendants, and then on their motion was excluded; and to the latter action of the court the plaintiffs excepted.

The same witness testified that the machinery was manufactured under a guarantee, and that the plaintiffs permitted its operation by Belser and Parker in order that it might be fully tested. That testimony was objected to when offered, but was admitted, and was then excluded on motion of the defendants; to which action of the court the plaintiffs excepted.

It was also testified that, under the terms of the contract for the machinery, the plaintiffs were to erect it, but the testimony, on motion of the defendants, was excluded on the ground that the written contract was the evidence of what

the plaintiffs agreed to do. To that ruling of the court the plaintiffs excepted.

All that testimony, we think, was properly excluded. E. Van Winkle testified that he made no contract with Belser and Parker except the one contained in the written order from them which he accepted. That contract contained no guarantee, except the implied guarantee that the machinery should be reasonably fit for the uses for which it was sold. It contained an express direction to the plaintiffs to ship the machinery to Belser and Parker at Mitchell's Station, Alabama, and an express provision that the plaintiffs were to furnish a specified part of the force necessary to erect the machinery. The plaintiffs were never in possession of the mill.

The condition of the title to the machinery, on and prior to December 4, 1885, was a conclusion of law, to be drawn from the undisputed facts of the case; and the witness could not testify to such legal conclusion. The contract contained no stipulation that Belser and Parker were to be allowed to test the machinery before accepting it. Moreover, any provisions in regard to erecting or testing the machinery would have been for the benefit of Belser and Parker, and could have been waived by them. They had a right to accept it without testing it, and even before its erection; and the plaintiffs had no right to insist that it should not be accepted until after those things had been done. Whenever Belser and Parker did any act which showed that they had waived those things and accepted the machinery, the title to it vested at once in them; and, as to innocent purchasers, such as the mortgagees were, the title could not be revested in the plaintiffs. Belser and Parker manifested their acceptance of the machinery by giving the mortgages, after having used and operated it.

By the terms of the contract, one of the payments was to be made by Belser and Parker on their receipt from the plaintiffs of the bill of lading; and under that provision, the title passed to Belser and Parker as soon as they received the machinery, if not before. By the transfer of the property by Belser and Parker, by the mortgages, after they had received it, the title

vested in the mortgagees. The latter were *bona fide* purchasers for value. By the statute of Alabama, three months were allowed for the recording of the mortgages. Code of Alabama of 1876, § 2166. The title to the machinery was in Belser and Parker when the mortgages were executed. The notes given December 11, 1885, conferred no title which related back to a prior date. The most favorable construction that could be given to them would be that they constituted a mortgage executed on December 11, 1885; and prior to that date the mortgage to Lehman, Durr & Co. had been given. If the plaintiffs could recover at all in this suit, it must be against all of the defendants. They could not recover against Crowell, because he held as bailee of all the other defendants. If the title of Lehman, Durr & Co. was better than that of the plaintiffs, Crowell did not detain the property wrongfully; and the gist of the action was that he wrongfully detained it at the time the suit was brought.

If the notes of December 11, 1885, vested any title in the plaintiffs, those notes were never recorded, and there is no evidence that Pollak & Co. had any notice of the claim of the plaintiffs under those notes, at the time Pollak & Co. took their mortgage. Therefore, that mortgage divested whatever title the plaintiffs may have had, as against Pollak & Co. Under § 2170 of the Code of Alabama of 1876, it was necessary that the plaintiffs, so far as concerned any title claimed by them under the notes of December 11, 1885, should have recorded the notes as a conveyance of personal property.

Moreover, it is shown that, prior to the commencement of the present suit, the plaintiffs, in May, 1886, filed a mechanics' lien as respected the machinery made under the contract of March 28, 1885, admitting a credit for the $2500 and the $500, and claiming a lien under said contract and under the three notes of December 11, 1885; that in July, 1886, they commenced a suit in a court of the State of Alabama to enforce that lien; and that that suit was dismissed by the plaintiffs without a trial on the merits, before the trial of the present suit was had. The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of

December 11, 1885, were taken. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to Belser and Parker as unconditional. In *Lehman* v. *Van Winkle*, 8 Southern Reporter, 870, the Supreme Court of Alabama held that by the suit to enforce the lien, Van Winkle & Co. made an election to treat the title to the property as in Belser and Parker, and that that election could not be affected by a subsequent attempt to obtain the property by an action of detinue. The proceedings to enforce the lien were pending when the present suit was brought, in November, 1886.

On the whole case, we are of opinion that the trial court acted correctly in instructing the jury to find for the defendants, if they believed the evidence. Even if the plaintiffs were entitled to recover for any articles furnished to Belser and Parker after December 4, 1885, the burden was upon them to identify the articles which Belser and Parker received after that date; but no evidence of such identification was introduced.

The plaintiffs asked the court to give to the jury eight several charges, which are set forth in the margin,[1] "but the

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[1] *Charges asked by the plaintiffs and refused.*

1. That if the evidence shows that the complainants were the manufacturers of the machinery in question, that would constitute them the owners until by some complete act of sale the title passed to some other person. And there is no complete act of sale until there has been, between the buyer and the seller, a full agreement of their minds, on the part of the vendor to part with his ownership of the property, and of the vendee (or buyer) to accept and receive the property as a full compliance on the part of the seller with his agreement. When this agreement of the minds of the buyer and the seller takes place in any given instance is a question of intention to be determined by a consideration of the situation and surroundings of the parties and the subject matter of the contract and the stipulations to be observed and performed by the parties with respect thereto. The burden of showing satisfactorily that the title has passed from the original owner to a buyer, rests upon the buyer, if he affirms that a sale has taken place; and when the contract is for articles to be manufactured, or for articles in existence at the date of the contract, with or about which the seller, under the terms of the contract, was to do something to put them in such condition as he could insist upon an acceptance by the buyer, or

court severally refused to give each of said charges, and to each such refusal the plaintiffs duly excepted. Each of said

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as is commonly said, in a deliverable state, the property does not pass from the vendor to the vendee unless it is shown satisfactorily that there was a specific intent of the parties that it should do so contrary to the ordinary course of business. The presumption is against such intent under such circumstances and must be shown by the party asserting it.

2. In a case of doubt the construction which the parties themselves have put upon a contract is of great assistance in arriving at its true meaning. If the contract in this instance was for the purchase of certain cotton-seed oil-mill machinery as a complete mill, which was to be transported to a given place and to be put up by the vendor, or for the putting up of which he was to do anything, such as furnishing mechanics, etc., and which machinery was to be of a given capacity, the presumption of law would be that the property would not pass from the vendor until the latter had completed the mill as a whole, and the vendee had unconditionally accepted it as a fulfilment of the contract; and such acceptance must be notified to the vendor. The doing of secret or fraudulent acts by the vendee in transactions with third persons which might estop him from saying he was not the owner as against the person with whom he dealt would have no operation whatever against the vendor; and in this case the making of the mortgage by Belser and Parker to Lehman, Durr & Co. cannot be regarded as of any force as evidence to show the necessary agreement of the minds of E. Van Winkle & Co. and Belser and Parker as to the relinquishment of the right of property by one and the full acceptance of the property by the other as a compliance with the contract; and until such mutual agreement of the minds of the vendor and vendee is shown the property would remain with the vendor, notwithstanding the buyer should in the meantime execute mortgages or make absolute sales of the property. In such case the vendee cannot alone elect to regard the property as passing, and certainly not by any secret or perhaps fraudulent act. The vendor must also agree to the relinquishment of his right of property, which right may be of importance to the vendor to secure the performance of contemporaneous acts to be done by the buyer, such as making payments falling due before the contract has been fully completed.

3. In the present instance, no right of property passed to the vendee (Belser & Parker) at the time of making the contract. The contract itself contemplated certain things to be done by both the buyer and the seller before any property could pass under the contract to the buyer, and the law is (unless a specific intent is shown to the contrary by the party alleging it) that the property will not in such cases pass until each party has done all that the contract requires to be done before the property is in that condition in which it may be tendered as a full compliance with the contract, and there must be such a tender or delivery of the property to the buyer and such full acceptance by the buyer, and such acceptance and

charges was separately asked and separately refused and each refusal separately excepted to by the plaintiffs." We think the court properly refused to give those charges. The questions involved in them have been substantially considered in what has been hereinbefore said, and it is not necessary to make any further remarks upon them.

Judgment affirmed.

MR. JUSTICE SHIRAS was not a member of the court when this case was argued, and took no part in its decision.

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tender cannot in either case be by secret acts. The law contemplates notice to each party and the mutual assent of their minds to the act of relinquishment of the property by the vendor and its acquirement by the buyer.

4. The payment of instalments prior to or during the progress of the acts to be done by either or both of the parties before the property is in a deliverable state under the contract is not inconsistent with the retention of the property in the vendor.

5. When machinery is to be put up on the premises of the buyer and is to be of a certain quality or capacity under the terms of the contract, the possession and use of the machinery by the buyer, with the consent of the seller, for the purpose of testing its quality or capacity prior to the full acceptance of the machinery as a compliance with the contract and the relinquishment of the vendor's right of the property, is not inconsistent with the property being with the vendor, notwithstanding such possession. Neither party would be estopped by such a possession.

6. That the jury are to determine under all the evidence whose property the machinery in question was, by mutual understanding of Besler and Parker & E. Van Winkle & Co. up to the 11th of Dec., 1885, and if they find that up to that time there was no mutual agreement or understanding between them whereby it vested in Belser and Parker, or that they (Belser and Parker) refused to accept it as a fulfilment of the contract up to that time and only accepted it at that time and then gave the plaintiffs the notes in evidence, the plaintiffs' right is superior to that of Lehman, Durr & Co., and to that of any of the defendants.

7. That the plaintiffs are entitled to recover such property as was furnished after the 11th of Dec., 1885.

8. That it is a question of intention of the parties as to when the property in the machinery passed to Belser and Parker, and the jury are the judges as to when they both intended that it should pass, and if they believe that they did not so mutually intend that it should pass until the settlement and adjustment on the 11th of Dec., 1885, the plaintiffs' rights are superior to those of Lehman, Durr and Co. and to those of any of the defendants.

CINCINNATI SAFE AND LOCK COMPANY *v.* GRAND RAPIDS SAFETY DEPOSIT COMPANY.

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

No. 872. Submitted October 17, 1892. — Decided October 31, 1892.

The judgment in the court below in this case was rendered April 25, 1891. On the 19th of June, 1891, an entry was made of record that the court "allows a writ of error to the Supreme Court of the United States, with stay of execution, upon the filing of a supersedeas bond." Such bond was filed and approved June 20, 1891. The jurisdiction of this court in cases dependent upon diverse citizenship was taken away March 3, 1891, except as to pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. In this case the petition for the writ and the assignment of errors were filed in the court below July 3, 1891, and the writ bore test on that day. On motion to dismiss for want of jurisdiction, *Held*, that the writ was not sued out or taken before July 1, 1891, and that it must be dismissed.

THIS was a motion to dismiss for want of jurisdiction, as the jurisdiction of the court below depended solely upon the diverse citizenship of the parties, and the writ of error was not sued out until July 3, 1891. By the act of March 3, 1891, (26 Stat. 826, c. 517,) establishing the Circuit Courts of Appeals, the jurisdiction of the court, in cases dependent upon diverse citizenship, was taken away; but by the joint resolution of March 3, 1891, (26 Stat. 1115,) the jurisdiction was preserved as to pending cases, and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. The language of the joint resolution of March 3, 1891, (26 Stat. 1115,) is as follows: "And be it further resolved: That nothing in said act shall be held or construed in any wise to impair the jurisdiction of the Supreme Court or any Circuit Court of the United States in any case now pending before it, 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."

The plaintiffs in error, in reply to the motion said that that part of the record which had been printed showed that an entry was made on the 19th of June, 1891, allowing the bill of exceptions presented by the plaintiffs in error, and also the writ of error to this court with stay of execution upon the filing of a supersedeas bond, and that a supersedeas bond was filed on the 20th day of June, 1891, which was duly approved. They contended, on the authority of *Draper* v. *Davis*, 102 U. S. 370, that the allowance of the writ of error and the filing of the supersedeas bond transferred the jurisdiction of the suit to this court.

Mr. Charles B. Wilby and *Mr. Gustavus H. Wald* for the motion.

Mr. John F. Follett and *Mr. T. H. Kelley*, opposing.

The Chief Justice: Judgment was rendered in this case by the Circuit Court of the United States for the Southern District of Ohio on April 25, 1891. An entry was made of record, June 19, 1891, that the court "allows a writ of error to the Supreme Court of the United States, with stay of execution, upon the filing of a supersedeas bond," as described, and such a bond was filed and approved June 20, 1891. A petition for the allowance of the writ of error and an assignment of errors were filed in the clerk's office of the Circuit Court, July 3, 1891, and the writ of error bears test and was filed in that office on that day, and a citation to the adverse party signed and served.

The motion to dismiss must be sustained upon the authority of *Wauton* v. *De Wolf*, 142 U. S. 138; *Brooks* v. *Norris*, 11 How. 204; *Credit Co.* v. *Arkansas Central Railway Co.*, 128 U. S. 258, and cases cited.

Writ of error dismissed.

HUBBARD *v.* SOBY.

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

No. 1094. Submitted October 17, 1892. — Decided October 31, 1892.

This court has no jurisdiction over a writ of error sued out June 11, 1892, from a judgment rendered by a Circuit Court of the United States against a collector of customs in a suit brought to recover back an alleged excess of duties paid upon an importation of goods made prior to the going into effect of the act of Congress of June 10, 1890, "to simplify the laws in relation to the collection of the revenues," 26 Stat. 131, c. 407.

MOTION TO DISMISS. The motion, entitled in the cause, was as follows:

"Charles Soby, defendant in the cause above entitled, moves the court to dismiss the writ of error therein, for want of jurisdiction in this court to hear and determine the same.

"This is a suit between two citizens of Connecticut, brought October 9, 1890, in the Circuit Court of the United States for the district of Connecticut by said Charles Soby against said Charles C. Hubbard, to recover an alleged excess of duties upon imports exacted by said Hubbard, in his capacity of collector of customs of the port of Hartford, from said Charles Soby; the jurisdiction of said Circuit Court being entirely dependent upon the federal question thus arising under the customs-revenue laws of the United States. The Circuit Court found the exaction to be illegal, and gave judgment for the plaintiff below, defendant in error here, on the 27th day of February, 1892. Thereupon, on the 11th day of June, 1892, the present plaintiff in error sued out the writ of error which brings the proceedings here.

"Inasmuch as, under the sixth section of the act of March 3, 1891, 26 Stat. c. 517, pp. 826, 828, no writ of error to this Court lies to such final judgment of said Circuit Court, the said defendant in error now moves that said writ be dismissed with costs."

Argument against the Motion.

The material part of the sixth section of the act of March 3, 1891, "to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States," is as follows:

"The Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or writ of error final decision in the district court and the existing 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 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," etc.

Mr. Lewis E. Stanton and *Mr. Edwin B. Smith* for the motion.

Mr. Assistant Attorney General Maury opposing.

It would be an abuse of the patience of the court to cite the cases in which it has been held that the mere fact that the subject-matter of a prior special law falls within the language of a subsequent general law does not warrant the conclusion that the two laws are in collision, and that the earlier is repealed by the later.

The language of the act of March 3, 1891, is, it may be conceded, broad enough to embrace the case at bar; but the question that arises in this case, and that arose in the many cases in which the above-mentioned principle of construction has been applied, is whether the legislative intent is coextensive with the generality of the language of the statute, for it is the intent, and not necessarily the literal sense of the words, that must prevail.

It will be remembered that the Customs Administrative act of June 10, 1890, 26 Stat. 131, c. 407, established an entirely new

procedure for the review of the acts of collectors of customs in assessing duties on importations. But as that act did not go into effect until August 1, 1890, except as to the provision for the appointment of nine general appraisers, it was necessary to make provision for rights that had accrued and proceedings that had been commenced under the old laws prior to August 1, 1890, and, accordingly, it was provided as an exception to the repealing section 29, as follows: "But the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced, in any civil cause before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offences committed, and all penalties or forfeitures or liabilities incurred, prior to the passage of this act, under any statute embraced in or changed, modified, or repealed by this act, may be prosecuted or punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings or to the prosecution of offences, or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this act, shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed." It would seem clear that the right of the importer, Soby, to contest the collector's final liquidation of duty in July, 1890, was a right that accrued under the old law, and if a right that had accrued under the old law, then it was a right which the saving clause says "shall continue and may be enforced in the same manner as if said repeal or modifications had not been made."

The saving clause of the act of 1890 declares that no suit or proceedings under the former law in any civil cause shall be affected by the act. If, then, the importer's appeal to the

Argument against the Motion.

Secretary of the Treasury of July 22, 1890, was not a suit, it would seem to have been a proceeding in a civil cause; and if the proceeding by way of appeal to the Secretary was not to be affected, we may reasonably conclude that Congress meant that the remedy thus initiated was to be undisturbed in all its after stages.

Section 6 of the act of March 3, 1891, conferring on Circuit Courts of Appeals jurisdiction in revenue cases, cannot be construed as a repeal of the provisions of the saving clause in the act of 1890.

The case of *Ex parte Crow Dog*, 109 U. S., 556, 570, is a direct authority against the argument supporting the theory that the saving clause of the act of 1890 is affected by the act of March 3, 1891. Mr. Justice Matthews, in his masterly opinion in that case, adopts the law laid down by Chief Justice Bovill in *Thorpe* v. *Adams*, L. R. 6 C. P. 135, and Vice-Chancellor Wood in *Fitzgerald* v. *Champenys*, 30 L. J., N. S. Eq. 782; 2 Johns. & Hem. 31, 54.

"The general principle to be applied," said the Chief Justice, "to the construction of acts of Parliament is, that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together."

"And the reason is," said the vice-chancellor, "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." And, said Mr. Justice Matthews, in the case of Crow Dog, "the rule is, *generalia specialibus non derogant*."

If our view is correct, the case of *Lau Ow Bew*, 144 U. S. 47, 56, 57, has no relevancy whatever to this discussion, because the court in that case confined itself entirely to the effect of the Courts of Appeals act on conflicting anterior legislation of a general character. There was nothing in that case to call the attention of the court to anterior *special* legislation.

Syllabus.

THE CHIEF JUSTICE: This was a suit brought October 9, 1890, in the Circuit Court of the United States for the District of Connecticut to recover an alleged excess of duties upon imports exacted by plaintiff in error in his capacity of collector of customs of the port of Hartford, prior to the going into effect of the act of Congress of June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues," 26 Stat. 131. Judgment was given for defendant in error, February 27, 1892, and on June 11, 1892, the pending writ of error was sued out. The motion to dismiss the writ must be sustained upon the authority of *Lau Ow Bew* v. *United States*, 144 U. S. 47; *McLish* v. *Roff*, 141 U. S. 661.

Writ of error dismissed.

EARNSHAW *v.* UNITED STATES.

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

No. 4. Argued October 17, 1892. — Decided November 7, 1892.

A reappraisement of imported merchandise under the provisions of Rev. Stat. § 2930, when properly conducted, is binding.

When the facts are undisputed in an action to recover back money paid to a collector of customs on such reappraisement, the reasonableness of the notice to the importer of the time and place appointed for the reappraisement is a question of law for the court.

Appraisers appointed under the provisions of Rev. Stat. § 2930 to reappraise imported goods constitute a quasi-judicial tribunal, whose action within its discretion, when that discretion is not abused, is final.

An importer appealed from an appraisement of goods imported into New York, in 1882. A day in June, 1883, was fixed for hearing the appeal. The Government, not being then ready, asked for an adjournment, which was granted without fixing a day, and the importer was informed that he would be notified when the case would be heard. March 19, 1884, notice was sent by letter to him at his residence in Philadelphia, that the appraisement would take place in New York, on the following day. His clerk replied by letter that the importer was absent, in Cuba, not to return before the beginning of May then next, and asked a postponement till that time. The appraisers replied by telegram that the case was ad-

Statement of the Case.

journed until March 25. On the latter day the case was taken up and disposed of, in the absence of the importer or of any person representing him. *Held*,

(1) That the notices of the meetings in March were sufficient;

(2) That, in view of the neglect of the importer to make any provision for the case being taken up in his absence, and of his clerk to appear and ask for a further postponement of the hearing, the court could not say that the appraisers acted unreasonably in proceeding *ex parte*, and in imposing the additional duties without awaiting his return.

THIS cause was first argued on the 3d and 4th of November, 1890. On the 10th of that month it was ordered to be reargued. The reargument took place October 17, 1892. The case then made was stated by the court as follows:

This was an action by the United States against Earnshaw in the District Court for duties upon eleven consignments of iron ore imported by him into the port of New York in 1882. At the entry of the different consignments their values were declared, and to each of these values the appraiser made an addition.

From this appraisement Earnshaw appealed and demanded a reappraisement, and a day was fixed for the hearing in June, 1883. Earnshaw, as well as the general appraiser and the merchant appraiser, attended upon that day, and the government asked for a postponement. The proceeding was adjourned, but the day was not named, and Earnshaw was told that he would be notified.

Upon March 19, 1884, nine months after the adjournment, the defendant, who lived in Philadelphia, was notified by letter from the general appraiser that the appraisement would take place at his office in New York at noon on March 20. At that time, however, defendant was in Cuba, and his brother, who was also his clerk, wrote the general appraiser in his name that he was out of the country, and would not be back before the beginning of May, and asked a postponement of the hearing until that time. The appraiser telegraphed in reply: "Your cases adjourned to Tuesday, March 25th, 12 M." On March 31st, in the absence of Earnshaw, and with no one acting for him, the reappraisement was made, and for the

difference between the amount he had paid and the amount thus ascertained this action was brought.

Upon the trial the defendant, having read the statute authorizing the demand for a reappraisement, read the following regulation of the Treasury Department, to show that he was entitled to notice to be present at the reappraisement that he might tender evidence:

"ART. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and appraise the same according to law. Rev. Stat. 2930. . . . The appraiser at large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the appraisement. . . . The importer or his agent will be allowed to be present, and to offer such explanations and statements as may be pertinent to the case."

The defendant relied solely upon the want of proper notice of the reappraisement, and asked the court to instruct the jury as follows:

1. If the defendant attended on the day appointed for the appraisement by the merchant appraiser and, the United States not being ready to go on and the hearing postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

2. If the United States failed to move in the matter after the adjournment from June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to enable him to return and attend at the appraisement.

3. If the United States insisted on proceeding with the reappraisement in the absence of the defendant, under the circumstances, as shown by the testimony, the reappraisement is not a valid merchant's appraisement.

Argument for Plaintiff in Error.

The judge declined to instruct as requested, and charged the jury that such notice was given to the defendant as is contemplated by the regulations of the Department and the rules of law governing reappraisements, that the reappraisement was valid, and that the plaintiff was entitled to recover a verdict for the amount of the claim, $1611.20, with interest. This was the amount claimed over and above the amount paid, and for this amount the jury returned a verdict, upon which judgment was entered accordingly. 30 Fed. Rep. 672.

The Circuit Court affirmed this judgment upon a writ of error, whereupon the defendant sued out a writ of error from this court.

Mr. R. C. McMurtrie for plaintiff in error.

At the former argument a member of the court inquired if the importer had given any evidence to show that the reappraisement was incorrect in amount. The reply was that none was tendered, because evidence of that character was not admissible. The authorities are distinct — the appraisement is conclusive if it is legal. Error in fact or mistakes cannot be inquired into. Act of August 30, 1842, 5 Stat. c. 270, § 17, p. 564; *Rankin* v. *Hoyt*, 4 How. 327, 335; *Bartlett* v. *Kean*, 16 How. 263; *Sampson* v. *Peaslee*, 20 How. 571, 580. In *Westray* v. *United States*, 18 Wall. 322, evidence of this character was offered and rejected because the act of the collector was conclusive, and this was affirmed. See page 329. And this was again recognized in *United States* v. *Schlesinger*, 120 U. S. 109, where the converse proposition was before the court, and where the defence was, as here, that the assessment was illegal.

The valuation is conclusive. *Hilton* v. *Merritt*, 110 U. S. 97. There is no right to go to a jury on the subject of the values. *Oelbermann* v. *Merritt*, 123 U. S. 356. But the importer can show that the appraiser had not the qualifications required by the statute. *Id.*

1. Was the importer entitled to notice? On the first trial it was ultimately admitted by the court that the importer was

entitled to notice of the reappraisement, and then it became the question in the cause whether, under the circumstances, the notice given was reasonable.

The importer had been ready and had attended at the times appointed for the hearing, but the United States was not prepared to go on nor to fix a time when they would be ready. They postponed the hearing indefinitely and for their convenience and on a promise of notice. Nine months after this, on a few days' notice, while defendant was absent temporarily from the country, they determined to go on, disregarding the application for time to permit the return of the defendant.

It is insisted by the plaintiff in error, as it was in the court below, that the real question was whether the defendant was entitled to notice ; for if this be the case the legal consequence was supposed to be that it must be a reasonable one. There is not an instance that can be produced in which notice is requisite and reasonableness of the notice is not involved.

It is important to observe that the case was an appeal from an assessment, and that the new assessors were to be governed by evidence. *Marriott* v. *Brune*, 9 How. 619, 634. The statute itself is silent on the subject of when and how this new body was to act ; but the regulations of the Treasury assume that the importer is entitled to be present, and since these regulations are in favor of the citizen, and tend to produce justice, they are entitled to great weight.

In *Rankin* v. *Hoyt*, 4 How. 327, 335, this court said: "In case the importer is dissatisfied with the valuation made by appraisers, he is allowed, . . . before paying the duty, an appeal and further hearing before another tribunal, constituted in part by persons of his own selection. These persons have been aptly denominated a species of 'legislative referees,' 2 Mason, 406; and if the importer does not choose to resort to them, he cannot, with much grace, complain afterwards that any overestimate existed." The conduct of these appraisers is inquirable into on the question of the validity of their appraisement. *Greely* v. *Burgess*, 18 How. 413, 415. In 10 How. 225, 241, *Greely* v. *Thompson*, Mr. Justice Woodbury points out

that the error lay in not adverting to the judicial character of the merchant appraiser; in fact his removal by the collector is classed with the conduct of the English Stuarts in removing judges if not sufficiently pliable.

I assume that nothing further is required to prove that the importer is entitled to notice of the reappraisement, and that the appraisers are performing a judicial function.

2. Notice of a hearing at which evidence is to be given and a fact ascertained by a tribunal, which affects the interests of the person entitled to the notice, means such notice as will enable him to protect his interests. If it does not, this absurdity is involved, that notice after the hearing is sufficient. At the first trial it was so held, but the court on consideration thought they had been mistaken in this, and that the mode and time of notice were intrusted to the caprice of the appraiser. A discretion not inquirable into is a caprice, so far as third persons are concerned.

If this ruling be correct, this is the one exceptional case in which it is so intrusted. I, at least, am not aware of another instance in which a person intrusted by law to do such a thing can assert that this discretion cannot be inquired into. The most common instance is that of a trustee, and we all know this does not mean his capricious determination. Hill on Trustees, 494, 495; *Coleman* v. *Strong*, 39 Ch. D. 443, 446; and by no one is the point better stated than by Chancellor Desaussure, *Haynesworth* v. *Cox*, Harper (Eq.) 118. The case deserves reading. An executor was given the right to elect which of two things should be given a legatee — a slave or a sum of money. Being interested in the estate, he selected a woman past child-bearing and nearly past labor. The court with some emphasis said the discretion was limited to selecting which was the more valuable for the legatee.

The authorities collected by Judge Brown, of the Southern District of New York, in a recent case, seem to render further discussion useless. *United States* v. *Doherty*, 27 Fed. Rep 730, citing 4 Inst. 41; *Rooke's Case*, 3 Rep. 100; *Rex* v. *Peters*, 1 Burrow, 568, 570; *Rose* v. *Stuyvesant*, 8 Johns. 426; *President and Trustees of Brooklyn* v. *Patchen*, 8 Wend. 47. These

citations are in accord with all the authorities. *Passmore* v. *Petit*, 4 Dall. 271; *Frey* v. *Vanlear*, 1 S. & R. 435; *United States* v. *Kirby*, 7 Wall. 486, 487; *Regina* v. *Grant*, 14 Q. B. 43; *Vestry of St. James* v. *Feary*, 24 Q. B. D. 703.

If, then, the court had the power or jurisdiction to decide that the defendant was entitled to notice of the hearing or appraisement, they had, of necessity, a power to determine whether what was given was legal notice. As they declined because their jurisdiction was not extended to that, the cause must be reversed, unless this court differs from the judge in thinking the notice was sufficient. Was this so?

3. The notice was insufficient. The cargo had been delivered, and time was quite immaterial. The Government was seeking to correct an error made by one of its officers. The defendant had attended the meeting when the United States, not being prepared, and not being able to say when they would be prepared, put off the meeting with a promise to notify; and at the end of nine months, having fixed on a day, refused to change it, though the defendant had left home to return shortly. It was not pretended that the desired delay was any disadvantage to the United States. And if they could wait, as they had done, from September, 1882, when the importation was made, to March, 1884, when the appraisement was had, there should be some reason for refusing to continue the case till May, to enable the defendant to attend.

Mr. Assistant Attorney General Maury for defendant in error.

Mr. Justice Brown delivered the opinion of the court.

It is conceded in this case that the reappraisement was binding provided it was properly conducted; Rev. Stat. § 2930; *Rankin* v. *Hoyt*, 4 How. 327, 335; *Bartlett* v. *Kane*, 16 How. 263, 272; *Sampson* v. *Peaslee*, 20 How. 571; *Hilton* v. *Merritt*, 110 U. S. 97; and the sole defence made upon the trial was that Earnshaw did not receive a reasonable notice of the time when the reappraisement was to be made.

Opinion of the Court.

The facts being undisputed, the reasonableness of the notice with respect to time was a question of law for the court, and was properly withdrawn from the consideration of the jury. *Hill* v. *Hobart*, 16 Maine, 164; *Blackwell* v. *Fosters*, 1 Met. (Ky.) 88; *Seymour* v. *McCormick*, 19 How. 96, 106; *Luckhart* v. *Ogden*, 30 California, 547, 557; *Holbrook* v. *Burt*, 22 Pick. 546; *Phœnix Ins. Co.* v. *Allen*, 11 Michigan, 501. By Revised Statutes, sections 2899 to 2902, provision is made for the appraisement of imported merchandise under regulations prescribed in the succeeding sections, and by section 2930, if the importer is dissatisfied with such appraisement he may give notice to the collector, upon the receipt of which the latter "shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; . . . and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." No provision is expressly made by statute for notice to the importer, but by Article 466 of the Treasury Regulations of 1884, "the importer will be notified of the time and place, but not of the name of the merchant selected to assist in the appraisement." The board of appraisers thus constituted is vested with powers of a quasi-judicial character, and the appraisers are bound (§ 2902) "by all reasonable ways and means in his or their power to ascertain, estimate, and appraise the true and actual market value and wholesale price . . . of the merchandise at the time of exportation," etc. No reason is perceived for excluding this board of appraisers from the benefit of the general rule applicable to such officers, that some presumption is to be indulged in favor of the propriety and legality of their action, and that with respect to their methods of procedure they are vested with a certain discretion which will be respected by the courts, except where such discretion has been manifestly abused, and the board has proceeded in a wanton disregard of justice or of the rights of the importer.

The general principle is too well settled to admit of doubt that where the action of an inferior tribunal is discretionary its decision is final. *Giles' Case*, Strange, 881; *King* v. *Proprietors*, 2 Wm. Bl. 701; *Henderson* v. *Moore*, 5 Cranch, 11; *Marine Ins. Co. of Alexandria* v. *Young*, 5 Cranch, 187; *Marine Ins. Co. of Alexandria* v. *Hodgson*, 6 Cranch, 206.

It was decided at an early day in this court that the refusal of an inferior court to continue a case cannot be assigned as error. *Woods* v. *Young*, 4 Cranch, 237. And yet there are doubtless cases to be found which hold that where, under the recognized practice, a party makes a clear case for a continuance, it is an abuse of discretion to refuse it. Thus in *Rose* v. *Stuyvesant*, 8 Johns. 426, the judgment of a justice of the peace was reversed, because he had refused an adjournment of a case on account of a child of the defendant being dangerously sick: and in *Hooker* v. *Rogers*, 6 Cowen, 577, the verdict was set aside by the appellate court upon the ground that the circuit judge refused to put off the trial of the cause upon proof that a material witness was confined to his bed by sickness, and unable to attend court. See, also, *Trustees of Brooklyn* v. *Patchen*, 8 Wend. 47; *Ogden* v. *Payne*, 5 Cow. 15. So in *Frey* v. *Vanlear*, 1 S. & R. 435, where arbitrators adjourned to a day certain and did not meet on that day, but met on a subsequent day, examined the witnesses in the absence of the opposite party, and without notice of the meeting, and made an award, it was held that their proceedings were irregular, and the judgment was reversed. The question in all these cases is whether in respect either to the notice of the trial, adjournments, allowance of pleas, the reception of testimony, or other incidental proceedings the court has or has not acted in the exercise of a sound and reasonable discretion. The subject is fully discussed in *People* v. *Superior Court of New York*, 5 Wend. 114.

The tribunal in this case was created as a part of the machinery of the government for the collection of duties upon imports, and while its proceedings partake of a semi-judicial character, it is not reasonable to expect that in notifying the importer it should proceed with the technical accuracy neces-

sary to charge a defendant with liability in a court of law. The operations of the government in the collection of its revenue ought not to be embarrassed by requiring too strict an adherence to the forms and modes of proceeding recognized in courts of law, so long as the rights of its tax-payers are not wantonly sacrificed. In this case notice was given to the defendant by letter and telegram, but as these notices were actually received at his office, he has no right to complain that they were not served personally. *Jones* v. *Marsh*, 4 T. R. 464; *Johnston* v. *Robins*, 3 Johns. 440; *Walker* v. *Sharpe*, 103 Mass. 154; *Clark* v. *Keliher*, 107 Mass. 406; *Blish* v. *Harlow*, 15 Gray, 316; Wade on Notice, § 640.

The first day fixed for the hearing was in June, 1883, when the defendant and the appraisers attended, but the government was not ready to proceed, and the hearing was adjourned indefinitely, with an understanding that the defendant should be notified of the day when the case would be again taken up. Nine months elapsed without any action, when on March 18, 1884, the general appraiser at New York addressed a letter to the defendant at Philadelphia, notifying him that the reappraisement would take place at his office on the 20th day of March, at noon. Defendant at that time was in Cuba, but the letter was received by his brother, a clerk in his office, who wrote the appraiser in Earnshaw's name that Mr. Earnshaw was out of the country and was not expected back before the beginning of May, "and I must, therefore, ask you to be kind enough to postpone the said reappraisement." In reply to this a telegram was sent to the effect that the case was adjourned to March 25th, at noon, a postponement of five days from the time originally fixed. To this telegram no attention was paid, and it appears that the reappraisement was not held until the 31st, nearly a week after the day fixed in the telegram. On the 10th of May, when the defendant returned, he received a demand for payment of the duties according to the reappraisement.

The amount of business done by the defendant does not distinctly appear, but considering that this suit is brought to collect the difference in duties upon eleven different importations

of iron ore from a single foreign port during the latter half of 1882, it is but fair to infer that it was of considerable magnitude. Defendant knew before leaving for Cuba that proceedings were pending for a reappraisement of duties upon these cargoes, and were liable to be called up in his absence. Under such circumstances the appraiser might reasonably expect that he would leave some one to represent him, or at least that his clerk would act upon his notification to appear on the 25th, and ask for a further postponement on the ground of the defendant's continued absence, if the personal presence of the latter were in fact important. Had he done so and his application been refused, a much stronger case would have been presented by the defendant. He did not do so, however, but neglected to appear or to request a further postponement, and practically allowed the hearing to take place by default. In view of the neglect of the defendant to make any provision for the case being taken up in his absence, and of his clerk to appear and ask for a further postponement of the hearing, we cannot say that the appraisers acted unreasonably in proceeding *ex parte* and imposing the additional duties without awaiting the return of the defendant. Indeed, if a court of justice should fix a day for the trial of a case, though the court were informed that a party could not be present on that day, and the attorney of the party refused to appear and demand a further postponement, we should be unwilling to say that it would constitute such an abuse of discretion as to vitiate the judgment.

There was no error in the ruling of the court below, and the judgment is, therefore,

Affirmed.

UNITED STATES *v.* PERRY.

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

No. 794. Argued October 26, 28, 1892. — Decided November 7, 1892.

Paintings upon glass, consisting of pieces of variously colored glass, cut into irregular shapes and fastened together by strips of lead, painted by artists of superior merit especially trained for the work, representing biblical subjects and characters and intended to be used as windows in a religious institution, imported in fragments to be put together in this country in the form of such windows, are subject to the duty of 45 per cent imposed by paragraph 122 of the tariff act of October 1, 1890, 26 Stat. 573, c. 1244, upon stained or painted window glass and stained or painted glass windows wholly or partly manufactured, and not specially provided for in this act; and not to the duty imposed by paragraph 677, 26 Stat. 608, c. 1244, upon paintings specially imported in good faith for the use of any society or institution established for religious purposes, and not intended for sale.

This case arose out of the importation of certain stained glass windows containing effigies of saints and other representations of biblical subjects. These windows were imported and entered November 24, 1890, as "paintings" upon glass for the use of the Convent of the Sacred Heart, located at Philadelphia, and consisted of pieces of variously colored glass cut into irregular shapes, and fastened together by strips of lead, and intended to be used for decorative purposes in churches, and when so used are placed upon the interior of the window frame, and are backed by an outer window of ordinary white glass. The outer window is necessary, as such paintings require for their proper exhibition a transmitted light. These paintings had been executed by artists of superior merit, especially trained for the work, and represented biblical subjects and characters, such as St. Agnes, St. Joseph teaching our Lord, St. Mark the Evangelist and St. Peter, and other pictorial representations of like kind, designed for religious instruction and edification. They did not come to this country in a completed state, but in fragments to be put together in the form of windows.

Upon these articles the collector of the port levied and collected a duty of 45 per cent imposed by paragraph 122 of the tariff act of October 1, 1890, 26 Stat. 573, c. 1244, upon "stained or painted window glass and stained or painted glass windows, . . . wholly or partly manufactured, and not specially provided for in this act."

Against this classification defendant duly and seasonably protested, claiming the articles were exempt from duty as "paintings . . . specially imported in good faith for the use of any society or institution . . . established for religious . . . purposes, . . . and not intended for sale," under paragraph 677. A hearing was had before the board of general appraisers, who overruled the protest and affirmed the action of the collector. Respondents thereupon filed a petition in the Circuit Court for the Southern District of New York, praying for a review of the decision of the general appraisers, as provided in section 15 of the act of June 10, 1890, 26 Stat. 138, c. 407. The Circuit Court reversed the decision of the board of appraisers, and held the paintings to be entitled to free entry. *In re Perry*, 47 Fed. Rep. 110. From this decision the United States appealed to this court.

Mr. Assistant Attorney General Maury for appellants.

Mr. W. Wickham Smith (with whom were *Mr. Charles Curie* and *Mr. D. Ives Mackie* on the brief) for appellees.

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

It is difficult to fix the proper classification of the importations in question under the act of October 1, 1890, without referring to the prior acts upon the same subject.

By the tariff act of March 3, 1883, 22 Stat. 497, c. 121, there was imposed a duty of 45 per cent upon "porcelain and Bohemian glass, chemical glass ware, painted glass ware, stained glass, and all other manufactures of glass . . . not specially enumerated," while "paintings, in oil or water colors,"

(Id. 513,) were subject to a duty of 30 per cent; and "paintings, drawings and etchings specially imported in good faith" for religious institutions (Id. 520,) were admitted free. Under this and similar prior statutes, which did not differ materially in their language, it was uniformly held by the Treasury Department that the term "paintings" covered all works of art produced by the process of painting, irrespective of the material upon which the paint was laid; and that paintings on glass, which ranked as works of art, were dutiable as paintings, and when imported for religious institutions were entitled to admission free of duty. Like rulings were made with respect to paintings on ivory, silk, leather and copper, having their chief value as works of art. The term was also held to include wall panels painted in oil and designed for household decoration. A like view was taken by this court in *Arthur* v. *Jacoby*, 103 U. S. 677, of pictures painted by hand upon porcelain where the porcelain ground "was only used to obtain a good surface on which to paint, and was entirely obscured from view when framed or set in any manner, and formed no material part of the value of said paintings on porcelain, and did not in itself constitute an article of china ware, being manufactured simply as a ground for the painting, and not for any use independent of the paintings."

In the meantime, however, the manufacture of stained glass began to be a recognized industry in this country. Strong protests were sent to Congress against these rulings of the Department, and demands were made for the imposition of a duty upon stained glass windows as such, to save the nascent industry from being crushed out by foreign competition. Accordingly, in the act of October 1, 1890, we find a notable change in phraseology and the introduction of a new classification. By paragraph 122 a duty of 45 per cent is imposed upon "all stained or painted window glass and stained or painted glass windows, and hand, pocket or table mirrors, not exceeding" a certain size; while by paragraph 465, "paintings, in oil or water colors," are subject to a duty of only 15 per cent. The former exemption of "paintings, drawings, and etchings specially imported" for religious institutions is

continued in paragraph 677, while in paragraph 757 a similar exemption is extended to "works of art, the production of American artists residing temporarily abroad, or other works of art, including *pictorial paintings on glass*, imported expressly for . . . any incorporated religious society, . . . *except stained or painted window glass or stained or painted glass windows.*"

It is insisted by the defendants that the painted glass windows in question, having been executed by artists of superior merit, specially trained for the work, should be regarded as works of art, and still exempted from duty as "paintings," and that the provision in paragraph 122, for "stained or painted window glass and stained or painted glass windows," applies only to such articles as are the work of an artisan, the product of handicraft, and not to memorial windows which attain to the rank of works of art. Those who are familiar with the painted windows of foreign cathedrals and churches will indeed find it difficult to deny them the character of works of art; but they would nevertheless be reluctant to put them in the same category with the works of Raphael, Rembrandt, Murillo, and other great masters of the art of painting. While they are artistic in the sense of being beautiful, and requiring a high degree of artistic merit for their production, they are ordinarily classified in foreign exhibits as among the decorative and industrial rather than among the fine arts. And in the catalogues of manufacturers and dealers in stained glass, including the manufacturers of these very importations, no distinction is made between these windows and other stained or painted glass windows, which, by paragraph 757, are specially excepted from the exemption of pictorial paintings on glass.

For most practical purposes works of art may be divided into four classes:

1. The fine arts, properly so called, intended solely for ornamental purposes, and including paintings in oil and water, upon canvas, plaster, or other material, and original statuary of marble, stone or bronze. These are subject to a duty of 15 per cent.

2. Minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etchings, and the thousand and one articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite reproduction from the original.

3. Objects of art, which serve primarily an ornamental, and incidentally a useful, purpose, such as painted or stained glass windows, tapestry, paper hangings, &c.

4. Objects primarily designed for a useful purpose, but made ornamental to please the eye and gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas-fixtures, and household and table furniture.

No special favor is extended by Congress to either of these classes except the first, which is alone recognized as belonging to the domain of high art. It seems entirely clear to us that in paragraph 757, Congress intended to distinguish between "pictorial paintings on glass" which subserve a purely ornamental purpose, and stained or painted glass windows which also subserve a useful purpose, and moved doubtless by a desire to encourage the new manufacture, determined to impose a duty of 45 per cent upon the latter, while the former were admitted free. As new manufactures are developed, the tendency of each tariff act is to nicer discriminations in favor of particular industries. Thus, by acts previous to that of 1890, paintings upon glass and porcelain were distinguished and taken out of the general category of manufactures of glass and porcelain, and even of stained glass, while under that act painted and stained glass windows are distinguished and taken out of the general designation of paintings upon glass. If the question in this case rested solely upon the language of paragraph 677, doubtless these importations would be exempted as paintings imported for religious purposes; but as, by paragraph 757, pictorial paintings on glass, a more specific designation, are again exempted, and stained glass windows are excepted and taken out of this exemption, we think the intent of Congress must be gathered from the language of the latter paragraph rather than the former. *Robertson* v. *Glendenning*, 132 U. S. 158. Particularly is this so in view of the fact that, by

paragraph 122, a duty is levied upon "stained or painted window glass and stained or painted glass windows" *eo nomine.* The use for which the importations are made in each case is much the same. The fact that these articles are advertised and known to the trade as painted or stained glass windows is an additional reason for supposing that Congress intended to subject them to a duty.

The judgment of the Circuit Court must, therefore, be

Reversed, and the case remanded for further proceedings in conformity to this opinion.

UNITED STATES *v.* SCHOVERLING.

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

No. 690. Argued October 25, 1892. — Decided November 7, 1892.

In the latter part of October, 1890, the firm of S., D. & G. imported from Europe articles described in the entry as "finished gunstocks with locks and mountings," unaccompanied by barrels for the guns. The collector levied duty on them as guns, under paragraph 170, in Schedule C of the act of October 1, 1890, c. 1244, (26 Stat. 579.) The importers protested that they were dutiable as manufactures of iron, under paragraph 215 of Schedule C of the act. The general appraisers affirmed the decision of the collector. It did not appear that the gunstocks had formed part of completed guns in Europe, and the question of the importation of the barrels was not involved, although it appeared that the gun-stocks were intended to be put with barrels otherwise ordered, to form complete guns. The Circuit Court, on appeal by the importers, reversed the decision. On appeal to this court, by the United States; *Held* that the decision of the Circuit Court was correct.

The provision of § 2 of the act of January 29, 1795, (1 Stat. 411,) was not still in force.

The appeal to this court was prosecuted as against the firm, but a motion was granted to cure that defect by amendment.

THE case is stated in the opinion.

Mr. Solicitor General for appellant.

Opinion of the Court.

Mr. Albert Comstock for appellees.

Mr. Justice Blatchford delivered the opinion of the court.

On the 20th of October, 1890, the firm of Schoverling, Daly & Gales, composed of August Schoverling, Charles Daly and Joseph Gales, imported into the port of New York, from Europe, articles described in the entry as "12 finished gun-stocks, with locks and mountings." The collector assessed a duty upon them of $1.50 each, and in addition thereto, 35 per cent ad valorem, under paragraph 170 of the act of October 1, 1890, c. 1244, (26 Stat. 579,) in Schedule C of that act, entitled "Metals and Manufactures of Fire-arms:" "170. All double-barreled, sporting, breech-loading shotguns, valued at not more than six dollars each, one dollar and fifty cents each; valued at more than six dollars and not more than twelve dollars each, four dollars each; valued at more than twelve dollars each, six dollars each; and in addition thereto, on all the above, thirty-five per centum ad valorem. Single-barrel breech-loading shotguns, one dollar each and thirty-five per centum ad valorem. Revolving pistols valued at not more than one dollar and fifty cents each, forty cents each; valued at more than one dollar and fifty cents, one dollar each; and in addition thereto, on all the above pistols, thirty-five per centum ad valorem." The importers, on November 15, 1890, filed with the collector, under § 14 of the act of June 10, 1890, c. 407, (26 Stat. 137,) a notice in writing, addressed to him, objecting to the decision of the collector, and stating their reasons for so doing. That notice in writing, called a "protest," claimed that the articles were only parts of guns, and were dutiable at 45 per cent ad valorem, under paragraph 215 of Schedule C of the act of October 1, 1890, (p. 582,) which reads as follows: "215. Manufactures, articles or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, lead, copper, nickel, pewter, zinc, gold, silver, platinum, aluminum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem." The protest stated that the articles in

question were simply parts or accompaniments intended for use in the manufacture of guns or muskets, were not guns or muskets, and could not be classed as such completed commodities.

Under § 14 of the act of June 10, 1890, the collector, on the 16th of December, 1890, transmitted to the three general appraisers on duty at the port of New York the invoice, entry, and protest. The assistant appraiser had reported to the appraiser, November 28, 1890, that the articles in question were "gunstocks, with mountings complete, ready for attachment to the barrels, which arrived by another shipment," and that "the gunstocks and barrels, when attached, make double-barreled breech-loading shotguns, complete." The collector, in his communication to the general appraisers, referred to the foregoing report of the assistant appraiser, and stated that the merchandise was returned by the appraiser upon the invoice as "breech-loading shotguns," invoiced at a value not over $6 each, and that he had assessed duty on them, under paragraph 170, at the rate of 35 per cent ad valorem and $1.50 each.

The board of general appraisers took the testimony of Mr. Daly, one of the importing firm, on December 19, 1890, and it is set forth in the margin.[1] In its report to the collector,

[1] Protest in the matter of importation of certain gunstocks by Messrs. Schoverling, Daly & Gales. Statement of Mr. Daly. Examined by Gen. App. SOMERVILLE: Q. You are a member of the firm of Schoverling, Daly & Gales? A. Yes, sir. Q. Where are you doing business? A. In New York. Q. This importation, as I understand you, consists of this item marked 225 here, finished gunstocks, with locks and mountings? A. That is it. Q. Shotguns? A. They are parts of shotguns; parts of breech-loading shotguns. Q. When did you make this order for this importation? A. I telegraphed for it a short time before this invoice. Q. How many of these are there here? A. Twelve of these finished gunstocks. Q. Did you at the same time order the other parts of these guns to be sent? A. I did not. That is all we received. We never received the barrels. Q. You made no order for the barrels? A. No, sir. (Reference made in the special report of the appraiser to protests of Schoverling, Daly & Gales against the assessment of duty at the rate of 35 per cent, etc.) Q. What we want to know is whether the barrels of these guns have arrived by another shipment, within your knowledge? A. As a member of the firm of Schoverling, Daly & Gales, I do not know it, because we have never received any invoice. Q. Never made any order? A. No, sir. Q. Have you any agreement with

signed by all three of its members, it is said that if the importation was simply one of gunstocks, without the gun-barrels required to make a complete fire-arm, and the case rested there, the articles could not be regarded as completed guns, so as to be dutiable under paragraph 170; that the testimony of Daly disclosed the facts that the firm of Schoverling, Daly & Gales had imported the gunstocks in question, and had made an agreement with another firm by which the latter were to order the barrels, with the mutual expectation that the stocks and barrels, after arriving at New York, were to be put together so as to make complete guns; that Schoverling was a member of both firms thus colluding together; that such a mode of evading the payment of duties could not be tolerated; and that the decision of the collector was affirmed.

On the 6th of January, 1891, the importers, under § 15 of the act of June 10, 1890, applied to the Circuit Court of the United States for the Southern District of New York, for a review of the questions of law and fact involved in such decision of the board of general appraisers, by filing in the office of the clerk of said court a statement of the errors of law and fact complained of, which were that the duty had been assessed on the articles at $1.50 each and 35 per cent ad valorem, while it should have been assessed under paragraph 215 at 45 per cent ad valorem, only. On the filing of the application, the Circuit Court made an order that the board of general appraisers return to the court the record and the evidence, with a certified statement of the facts involved and their decision thereon.

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any other firm that they were to order the barrels of these guns? A. Yes; we have. Q. With the expectation on your part that they were to be put together here? A. Yes, sir. Q. Have those other importations been received by the other firms? A. A good many of them, I guess, are in bond. Q. What firms did you have an understanding of this nature with? A. With A. Schoverling. Q. Is he a partner in your house? A. Yes, sir; he is a partner in the firm of Schoverling, Daly & Gales, and also runs a separate business. Mr. TICHENOR: Q. Do you think the trade generally adopted this plan? A. I think they all have received goods in the same way. We have imported those stocks with the intention of putting them with the other parts imported by these other parties.

On the 22d of January, 1891, the board of general appraisers filed in the court their return, embodying the protest of November 15, 1890, the assistant appraiser's report of November 28, 1890, the collector's communication of December 16, 1890, the testimony of Daly, and the opinion and decision of the board. The case was argued before the Circuit Court, held by Judge Lacombe, which entered an order, on March 20, 1891, reversing and setting aside the decision of the collector and that of the board of general appraisers, and adjudging that the merchandise should have been classified and assessed with duty at the rate of 45 per cent ad valorem, under paragraph 215 of the act, as "manufactures, articles, or wares, not specially enumerated or provided for in this act, composed . . . in part of iron or steel." The opinion of the Circuit Court is reported in 45 Fed. Rep. 349. It stated that there was no evidence that the articles were ever assembled or brought together with the gun-barrels on the other side; that there was no finding to that effect by the appraisers; that if there were such a finding of fact, the court would be constrained to reverse it, because there was no evidence in the record to support it; that, for all that appeared, the gunstocks might have been bought from one manufacturer and the gun-barrels from another; that the tariff act laid a duty upon "sporting, breech-loading shotguns," and laid a separate and different duty upon the parts of which such shotguns were composed, as manufactures in whole or in part of metal; that it could be fairly assumed that Congress, by that terminology, meant to allow importers who chose to do so, to bring in fragments of a combination article by different shipments, and then to employ domestic labor in putting them together; that it might have been intended to induce importers to employ to that extent the labor of this country, instead of having the article combined abroad; that, under the language of the statute, there was nothing in the shipment in question except gun stocks mounted, articles which were properly described in the act only by the phrase "manufactures composed wholly or in part of metal;" and that, therefore, they should pay that duty and no other.

Opinion of the Court.

On March 20, 1891, the Attorney General of the United States, under § 15, of the act of June 10, 1890, applied to the Circuit Court for the allowance of an appeal to this court from the decision and judgment of the Circuit Court. On the same day, the application was granted, the appeal was allowed, and it has here been heard.

We are of opinion that the judgment of the Circuit Court must be affirmed. The contention on the part of the United States is that the transaction, as conducted, was a fraud upon the statute. But the question was solely as to the gunstocks. *Sampson* v. *Peaslee*, 20 How. 571. There is not in the statute, in paragraph 170, or elsewhere, any imposition of duty on parts of breech-loading shotguns, except the provision in paragraph 215. There is no duty otherwise imposed on materials for such guns.

In the act of October 1, 1890, in paragraph 154, a duty is imposed on "axles, or parts thereof;" in paragraph 165, on "penknives or pocketknives of all kinds, or parts thereof;" in paragraph 185, on "wheels, or parts thereof," and "tires, or parts thereof;" and in paragraph 210, on chronometers "and parts thereof."

In the present case, the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on the gunstocks as a separate importation. *Merritt* v. *Welsh*, 104 U. S. 694.

In *Robertson* v. *Gerdan*, 132 U. S. 454, the statute had imposed a duty on musical instruments, and had not imposed the same duty on parts of musical instruments; and it was held that pieces of ivory for the keys of pianos or organs, to be used exclusively for such musical instruments, and made on purpose for such instruments, were not dutiable as musical instruments, but were liable to a less duty, as manufactures of ivory.

We do not think the decision in *Falk* v. *Robertson*, 137 U. S. 225, applies to the present case. It nowhere appears that these gunstocks had formed part of completed guns in Europe, nor was the question of the importation of the barrels

for the guns involved. In the present case, the dutiable classification of the gunstocks imported must be ascertained by an examination of them in the condition in which they are imported. *Worthington* v. *Robbins*, 139 U. S. 337.

Reference is made by the counsel for the United States to the provision of § 2 of the act of January 29, 1795, (1 Stat. 411,) which reads as follows: "Where any article is, by any law of the United States, made subject to the payment of duties, the parts thereof, when imported separately, shall be subject to the payment of the same rate of duties," as not having been repealed. In 1 Stat. 411, opposite the act is the word "[Obsolete.]" That provision is not embodied in the Revised Statutes, and we think it was limited to the case of duties then imposed by law, and did not apply to duties imposed by subsequent tariff acts. Tariff acts passed subsequently to the act of 1795 have provided that the duties theretofore imposed by law on imported merchandise should cease and determine. If the provision of the act of 1795 had been still in force when the tariff act of 1890 was enacted, it would have been wholly unnecessary in the latter act to impose a duty on parts of articles, as well as on the articles themselves, in cases where it was deemed proper to impose such duty upon parts.

This appeal was prosecuted as against the firm, but this defect may be cured by amendment, and the motion to that effect is granted. *Estis* v. *Trabue*, 128 U. S. 225.

Judgment affirmed.

CROSS *v.* BURKE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 1105. Argued November 1, 1892. — Decided November 14, 1892.

This court has no jurisdiction over judgments of the Supreme Court of the District of Columbia on *habeas corpus*.

The statutes on this subject reviewed.

Wales v. *Whitney*, 114 U. S. 564, qualified and explained.
This court does not consider itself bound by expressions touching its jurisdiction found in an opinion in a case in which there was no contest on that point.

William D. Cross was found guilty for the second time upon an indictment for murder in the Supreme Court of the District of Columbia holding a criminal term and sentenced to death, the time of his execution being fixed for January 22, 1892. He prosecuted an appeal to the court in general term, which, on January 12, 1892, finding no error in the record, affirmed the judgment rendered at the criminal term, and on January 21, 1892, a writ of error from this court was allowed by the Chief Justice of the Supreme Court of the District, citation was signed and served, and the time for filing the record enlarged. On the same day the execution of the sentence of death was postponed until the 10th of June, 1892, by order entered by the court in general term.

That writ of error was dismissed May 16, 1892, *Cross* v. *United States*, 145 U. S. 571. May 28, 1892, Cross filed his petition in the Supreme Court of the District of Columbia for a writ of *habeas corpus*, which petition was heard in the first instance by that court in general term. The application was denied June 4, 1892, and the petition dismissed, 20 Wash. Law Rep. 389. On June 8, 1892, the court in general term allowed an appeal to this court.

Mr. C. M. Smith and *Mr. Joseph Shillington* for appellant.

Mr. Solicitor General for appellee.

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

It was not denied in the Supreme Court of the District that the time and place of execution are not parts of a sentence of death unless made so by statute. *Holden* v. *Minnesota*, 137 U. S. 483, 495; *Schwab* v. *Berggren*, 143 U. S. 442, 451. But it was insisted that in the District of Columbia the time has been made a part of the sentence by section 845 of

the Revised Statutes of the District, which is in these words: "To enable any person convicted by the judgment of the court, to apply for a writ of error, in all cases when the judgment shall be death, or confinement in the penitentiary, the court shall, upon application of the party accused, postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term." And it was contended that the time fixed by such a postponement is to be regarded as a time fixed by statute, and that the power of the court to set a day for execution is thereby exhausted.

The Supreme Court of the District of Columbia, speaking by James, J., held that "the subject-matter dealt with in this provision was not the powers of the court at all; it related simply to a right of the accused in a particular instance, that is, a right to a postponement of the time of executing his sentence in case he should apply for it in order to have a review of alleged error. With the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law. The whole effect of the statute was to declare that, in case of an application for the purpose of obtaining a review on error, the day of execution should not be set so as to cut off the opportunity for review and possible reversal;" that the power of the court to set a day for execution was not exhausted by its first exertion; and that if the time for execution had passed for any cause, the court could make a new order.

We have held that this court has no jurisdiction to grant a writ of error to review the judgments of the Supreme Court of the District in criminal cases, either under the judiciary act of March 3, 1891, (26 Stat. 826, c. 517); or under the act of Congress of February 6, 1889, (25 Stat. 655, c. 113,) or any other; *In re Heath, Petitioner*, 144 U. S. 92; *Cross* v. *United States*, 145 U. S. 571. Have we jurisdiction over the judgments of that court on *habeas corpus?*

Under the fourteenth section of the judiciary act of 1789, 1 Stat. 73, c. 20, the courts of the United States and either of

the Justices of the Supreme Court, as well as the Judges of the District Courts, had power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment; but this extended in no case to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or necessary to be brought into court to testify.

By the seventh section of the act of March 2, 1833, 4 Stat. 634, c. 57, the power was extended to all cases of prisoners in jail or confinement, when committed or confined on or by any authority or law for any act done or omitted to be done in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

By the act of August 29, 1842, 5 Stat. 539, c. 257, the power was further extended to issue the writ when the prisoner, being a subject or citizen of a foreign State and domiciled therein, "shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof."

By the first section of the act of February 5, 1867, 14 Stat. 385, c. 28, it was declared that the courts of the United States and the several Justices and Judges thereof should have power "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States." And it was provided that "from the final decision of any judge, justice, or court inferior to the Circuit Court, an appeal may be taken to the Circuit Court of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States."

March 27, 1868, an act was passed, 15 Stat. 44, c. 34, to the effect that "so much of the act approved February five, eigh-

teen hundred and sixty-seven, entitled 'An act to amend "An act to establish the judicial courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine,' as authorizes an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is, hereby repealed." *Ex parte McCardle*, 6 Wall. 318; 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85.

These various provisions were carried forward into §§ 751 to 766 of the Revised Statutes.

By section 763 it was provided that an appeal to the Circuit Court might be taken from decisions on *habeas corpus*. (1) In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States. (2) In the case of the subjects or citizens of foreign States, as hereinbefore set forth. And by section 764 an appeal to the Supreme Court from the Circuit Court was provided for, but limited to "the cases described in the last clause of the preceding section."

The Revised Statutes of the United States and the Revised Statutes of the District of Columbia were approved June 22, 1874. Section 846 of the latter, which was taken from section 11 of the act of March 3, 1863, 12 Stat. 764, c. 91, is as follows: "Any final judgment, order, or decree of the Supreme Court of the District may be re-examined, 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 or decrees of the Circuit Courts of the United States." By act of Congress of March 3, 1885, 23 Stat. 437, c. 353, section 764 of the Revised Statutes was amended in effect by striking out the words, "the last clause of," so that an appeal might be taken in all the cases described in section 763.

It was to this act that Mr. Justice Miller referred in *Wales* v. *Whitney*, 114 U. S. 564, 565, as restoring "the appellate jurisdiction of this court in *habeas corpus* cases from decisions of the Circuit Courts, and that this necessarily included juris-

diction over similar judgments of the Supreme Court of the District of Columbia." But the question of jurisdiction does not appear to have been contested in *Wales* v. *Whitney*, and where this is so the court does not consider itself bound by the view expressed. *United States* v. *Sanges*, 144 U. S. 310, 317; *United States* v. *More*, 3 Cranch, 159, 172. We have pointed out in *In re Heath*, 144 U. S. 92, that to give to this local legislation, extending the appellate jurisdiction of this court to the District of Columbia, a construction which would make it include all subsequent legislation touching our jurisdiction over Circuit Courts of the United States, is quite inadmissible, (*Kendall* v. *United States*, 12 Pet. 524;) and that no reference was made in *Wales* v. *Whitney*, to the act of Congress approved on the same third of March, 1885, entitled "An act regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories," 23 Stat. 443, c. 355. The first section of this act provided "That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars;" and the second section, that the first section should not apply to any case "wherein is involved the validity of any patent or copy-right, or in which is drawn in question the validity of a treaty or statute of or 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."

The act does not apply in either section to any criminal case, *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, but is applicable to all judgments or decrees in suits at law or in equity in which there is a pecuniary matter in dispute, and it inhibits any appeal or writ of error therefrom except as stated. Clearly, the act of March 3, 1885, amending § 764 of the Revised Statutes, in respect of Circuit Courts, cannot be held to give a jurisdiction in respect of the Supreme Court of the District denied by the act of

March 3, 1885, relating to the latter court. It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding. *Farnsworth* v. *Montana*, *ubi supra*; *Ex parte Tom Tong*, 108 U. S. 556; *Kurtz* v. *Moffitt*, 115 U. S. 487. The application here was brought by petitioner to assert the civil right of personal liberty against the respondent, who is holding him in custody as a criminal, and the inquiry is into his right to liberty notwithstanding his condemnation.

In order to give this court jurisdiction under the act of March 3, 1885, last referred to, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained. *Kurtz* v. *Moffitt*, *ubi supra*. And as in this case the matter in dispute has no money value, the result is that no appeal lies.

It may also be noted that under the Judiciary Act of March 3, 1891, 26 Stat. 826, appeals from decrees of Circuit Courts on *habeas corpus* can no longer be taken directly to this court in cases like that at bar, but only in the classes mentioned in the fifth section of that act. *Lau Ow Bew* v. *United States*, 144 U. S. 47; *Horner* v. *United States*, 143 U. S. 570.

Appeal dismissed.

FOSTER *v.* MANSFIELD, COLDWATER AND LAKE MICHIGAN RAILROAD COMPANY.

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

No. 25. Argued and submitted November 2, 1892. — Decided November 14, 1892.

If a bill to set aside a foreclosure sale of a railroad under a mortgage, on the ground of fraud and collusion, be not filed until ten years after the sale, a presumption of laches arises which it is incumbent on the plaintiff to rebut.

The tendency of the courts is, in such cases, to hold the plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but should have used reasonable diligence to inform himself of all the facts; and especially is this the case where the

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subject of the fraud is a railroad, and the plaintiff is a holder of its stock and a resident of the neighborhood in which the fraud is alleged to have taken place.

No negligence is imputable in such case to a person who is ignorant of his interest in the property which is the subject of the alleged fraud; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to them, he is bound to look into such proceedings so far as to see that no action is taken to his detriment.

In such a suit to set aside a foreclosure sale of a railroad, if the plaintiff does not show at least a probability of a personal advantage to himself by its being done, it is a circumstance against him, as a court of equity is not called upon to do a vain thing.

In such a case if it appear that the parties really in interest are content that the decree stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action.

Ten years after the foreclosure and sale of a railroad, F. who was a stockholder, and resident in the vicinity, and who had, or might have had, access to all the proceedings in the foreclosure suit, filed a bill to set aside the foreclosure and sale upon the ground of collusion and fraud. The alleged acts of collusion and fraud were patent on the face of the proceedings. The property was incumbered, and it did not appear, from the pleadings, nor was there any probability from the facts stated, that any benefit would result to the plaintiff from setting aside the sale. *Held*,

(1) That F. had been guilty of laches and that the suit was brought too late;

(2) That the court would not entertain a bill to vindicate an abstract principle of justice, or to compel the defendants to buy their peace.

This was a bill in equity by a stockholder of the Mansfield, Coldwater and Lake Michigan Railroad Company to open the foreclosure of a mortgage upon its road executed to George W. Cass and Thomas A. Scott, trustees, and to vacate the order of sale and all proceedings thereunder, upon the ground of fraud and collusion, and for a receiver and injunction.

The bill purported to be filed for the benefit of the plaintiff and all other stockholders of the defendant company, and, after averring a written request to the directors and chief officers of the company to commence this suit, and the neglect and refusal of such directors so to do, set forth that the plaintiff was and had been since the transactions set forth in the bill the owner of 258 shares of the capital stock of the defendant company; that the suit was not collusive; and that, until

within a few months prior to the filing of this bill, he was ignorant of the fraud charged.

The bill further averred that in June, 1871, the Mansfield, Coldwater and Lake Michigan Railroad Company was incorporated under the laws of Michigan and Ohio, for the construction of a line of road from the city of Mansfield, in Ohio, to the town of Allegan, in Michigan, with an authorized capital stock of $4,000,000; that it began the construction of its road on such line, and, in order to obtain the money necessary for its completion and equipment, on October 1, 1871, executed a mortgage to George W. Cass and Thomas A. Scott, trustees, in the sum of $4,460,000; that on July 20, 1871, the defendant, hereinafter designated as "The Coldwater Company," entered into a contract with the Pennsylvania Company, also made a defendant to this bill, by which the latter bound itself to provide the necessary iron, etc., and to equip and operate the whole line as a first-class road. In consideration of these obligations the Coldwater Company agreed that its preferred stock should be issued to the amount of the actual expenditures made by the Pennsylvania Company in doing the work aforesaid, said stock to be entitled to dividends equal to seven per cent out of the net earnings of said road, with the further agreement to deliver to the Pennsylvania Company bonds to the amount of $20,000 per mile of track laid, and common stock to an amount $5000 greater than the whole amount of stock issued for all other purposes, said bonds and stock to be delivered to Cass and Scott, trustees, for delivery to the Pennsylvania Company, as fast as material should be delivered by said company to the value thereof, and in full as each ten miles of iron should be laid, and the track put in running condition. That afterwards, and on May 4, 1872, the Coldwater Company entered into another contract with the Pennsylvania Company, by which it delivered to the latter all of its bonds of the par value as above stated of $4,460,000, whereupon the Pennsylvania Company, by its president, the said Scott, agreed that, in consideration of the delivery of such bonds before the iron was laid, and the other conditions performed, the Pennsylvania Company bound itself to take care of and pay all

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interest coupons which might become due thereon prior to the completion of said line of railway for traffic, and that for all interest so paid and not justly chargeable thereto, under the contract of July 20, 1871, the Pennsylvania Company should be reimbursed out of the earnings of said road, after the same should be completed in sections under said contract, and begin to make earnings on the respective sections. The bill further averred that all of said bonds remained in the possession and under the control of the Pennsylvania Company from the time of their delivery as agreed until the sale of the railroad under the decree of the court; that on May 1, 1872, the Pennsylvania Company wrongfully obtained $1,500,000 of the common stock of the Coldwater Company, claiming to be entitled thereto under the contract of July 20, 1871; and that, after obtaining the same, it managed and controlled the affairs of the Coldwater Company, and thereby secured a majority of the members of its board of directors, and absolutely influenced and controlled all its corporate acts. That when it was given said capital stock it had in no way complied with its undertakings hereinbefore mentioned, nor had it earned the same, nor in any way become entitled thereto, but on the contrary had entirely failed to perform upon its part its undertaking of July 20, 1871; that it finished no portion of said road as therein provided, and in no way earned an ownership in the bonds and capital stock aforesaid. That on January 20, 1876, the said Cass and Scott, trustees, filed a bill for the foreclosure of the mortgage, averring the insolvency of the Coldwater Company, and its failure to pay the interest on its bonds; that on April 17, 1876, the defendant company filed its answer denying each material allegation of the bill, and setting up a full and complete defence; that on January 3, 1877, the Coldwater Company withdrew its appearance and answer, and on March 21, suffered an order *pro confesso* to be entered against it, in pursuance of which a decree of foreclosure and an order of sale was made, and the property was sold August 8, 1877, to Joseph Lessley in trust for the Pennsylvania Company for the sum of $500,000; that all of the proceeds of such sale were applied to the payment of the bonds held by the Pennsylvania

Company, and no portion came to the Coldwater Company, or was applied to the payment of its debts or liabilities.

The gravamen of the bill was that, at the time of the execution of the mortgage, the said Thomas A. Scott, trustee thereunder, was president of the Pennsylvania Company and its chief executive officer; that George W. Cass, co-trustee, had full knowledge of the relations of said Scott to the Pennsylvania Company, and of his aims and motives, and conspired with him in forwarding the interests of the Pennsylvania Company to the detriment of the Coldwater Company. That J. Twing Brooks, who was also made a defendant to this bill, was a director of the Coldwater Company, and was also general attorney for the Pennsylvania Company, and legal counsellor and adviser of Cass and Scott, and as their solicitor brought the suit to foreclose the mortgage, and in all of their acts these parties were moved by, and acted wholly in, the interest of the Pennsylvania Company, and in violation of their obligations to the Coldwater Company. That Reuben F. Smith, George W. Layng, and Frank Janes, who were also made defendants, were directors of the Coldwater Company, and were also, at the same time, employés of the Pennsylvania Company, and were made directors of the Coldwater Company at the instigation of Scott, for the sole purpose of carrying out the plans and schemes of the Pennsylvania Company. That Cass and Scott, as trustees, prosecuted the foreclosure suit in the interest of the Pennsylvania Company, to destroy so much of the road of the Coldwater Company as lay west of Tiffin, in Ohio, and to sink and destroy its stock; and that the interests of said trustees and said Pennsylvania Company and of the holders of said bonds were one and identical. That, by the terms of the agreement of May 4, 1872, the Pennsylvania Company was bound to pay the interest matured upon the bonds, and the subsequently accruing interest thereon, until the completion of the road, under the agreement of July 20, 1871; and that the allegations of the foreclosure bill, that the interest upon the bonds was overdue and unpaid, and that the Coldwater Company was insolvent, were untrue, and were known to be untrue by said trustees and the defendant Brooks.

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It was further averred that the existence of the contract of May 4, 1872, was, at the time of the withdrawal of the appearance and answer of the Coldwater Company, and the entering of the decree, purposely concealed from the court and from the stockholders of the company, as a part of the conspiracy and fraud. That the defence to the foreclosure suit was withdrawn in pursuance of the collusive action of the board of directors; that such withdrawal was solicited by Scott in the interest of the Pennsylvania Company, and secured by Brooks through the aid and support of Smith, Layng and Janes, employés of the Pennsylvania Company, all of whom were aided and abetted by Henry C. Lewis and Joseph Fiske, two directors of said company, also deceased, both of whom were directors of the Coldwater, Marshall and Mackinaw Railroad Company, to which company was to be given by Scott and Cass, the trustees, a large portion of the property of the Coldwater Company, to induce them to favor the withdrawal of their answer. That the withdrawal of said defence was the fraudulent act of Scott and Brooks, aided and abetted by the directors conspiring together to cheat the Coldwater Company, and to benefit the Pennsylvania Company; that, in furtherance of such fraudulent scheme, Joseph Lessley, an employé of the Pennsylvania Railroad Company, also made defendant, bid off the property, and in so doing acted only as agent or trustee of the Pennsylvania Company, which was the only real party in interest. That the Pennsylvania Company organized the Northwestern Ohio Railway Company, which is now the nominal owner of so much of the road of the Coldwater Company as lies between Tiffin and Mansfield, and that the Pennsylvania Company is operating that part of said road as the nominal lessee of the Northwestern, which the bill averred is but a branch of the Pennsylvania Company, and in their relations to the said road the two corporations are identical. That, in the operation of that part of the said road, the Pennsylvania Company has accumulated large earnings, and has derived large revenue and receipts from sales, leases and other sources from that portion of the Coldwater road between Tiffin, Ohio, and Allegan in Michigan, and that the Pennsyl-

vania Company is now operating, and will continue to operate, said road, and will dispose of and encumber its property to the irreparable injury of the Coldwater Company, unless restrained, etc. The bill further averred that until recently neither the plaintiff nor any of those whom he represents had any knowledge of the contract of May 4, 1872, by which the Pennsylvania Company was bound to pay the interest as it accrued upon the bonds, and he believes that such knowledge was purposely kept from plaintiff and the other stockholders, as well as from some of the directors of the Coldwater Company, by the Pennsylvania Company and by Scott and Brooks, for the purpose of carrying out the fraudulent scheme set forth. That at the time of the sale of such property, and the application of the proceeds of such sale to the payment of interest upon the bonds, the Pennsylvania Company was under obligation to pay such interest by the terms of its contract of May 4, 1872, and there was no liability on the part of the Coldwater Company to pay the same, all of which facts were known to the Pennsylvania Company, to Scott and Cass, trustees, and to Brooks and the other directors referred to, and that they conspired to keep such knowledge from the plaintiff and from other stockholders.

The bill prayed that the decree of foreclosure and order of sale and all other proceedings be vacated; that the answer withdrawn be reinstated; that the case be held for further hearing upon the issues joined by the bill and answer in the foreclosure suit; that the defendant Cass, then surviving trustee, be required to account; that the Pennsylvania Company be held to have received the rents, issues, and profits from all of said railroad property in trust for the benefit and use of the Coldwater Company; and that a receiver be appointed and an injunction issued against the further selling, leasing, or otherwise encumbering the property of the Coldwater Company during the pendency of the suit. There were annexed as exhibits to the bill the construction contract of July 20, 1871, the agreement of the Pennsylvania Company of May 4, 1872, and a complete transcript of the proceedings in the foreclosure suit.

Argument for Appellant.

The answer of the defendant, the Coldwater Company, to the bill of foreclosure in that suit averred that the company was not legally incorporated until January 6, 1873, and that prior to that date it possessed no power or authority to execute either the bonds or mortgages, and denied that they were the act of the corporation or constituted any valid lien upon its property; that while the company was created by the consolidation of a Michigan and an Ohio corporation by an agreement of April 13, 1871, no election of directors of said consolidated company was held until January 6, 1873, and that, until such election, the consolidated company did not succeed to the rights and franchises of the original corporation, nor was its organization perfect and complete until such election, nor did it have power to make contracts and incur liabilities; that the agreement of July 20, 1871, was entered into with one Willard S. Hickox, on behalf of the defendant, and that he subsequently entered into a traffic contract with the Pennsylvania Company, assuming to act for the Coldwater Company, and as president thereof. The answer further set up the contract of May 4, 1872, and alleged that at the date of the delivery of the bonds to the Pennsylvania Company such company was not entitled to any portion thereof; that "none of said bonds are held by *bona fide* owners, but the pretended holders and owners thereof have, and are chargeable with, notice of all the matters herein set forth, and all of the equities of the defendant arising therefrom." That the Pennsylvania Company had never earned the stock fraudulently delivered to it, nor had it entitled itself to any interest on the bonds delivered as aforesaid. The other allegations of the answer were much the same as those of the bill in the present case.

The bill was subsequently amended, and general demurrers were filed both to the original and amended bills, and upon the hearing of said demurrers the Circuit Court made a decree dismissing the bill. 36 Fed. Rep. 627. From this decree the plaintiff appealed to this court.

Mr. John H. Doyle for appellant contended, upon the points discussed in the opinion of the court:

I. Stockholders are not chargeable with notice; are not bound to examine records: and are not bound to suspect or presume frauds by their directors. *Pacific Railroad of Missouri* v. *Missouri Pacific Railway*, 111 U. S. 505; *Kilbourn* v. *Sunderland*, 130 U. S. 505.

II. As to laches, we recognize the fact that equity does not encourage stale demands or claims, and that it requires promptness and diligence on the part of its suitors. But no application of an equitable rule will ever be permitted to work inequity. What is diligence, or what constitutes a stale equity, are questions which depend upon the facts and circumstances of each case, and not on lapse of time alone. *Paschall* v. *Hinderer*, 28 Ohio St. 568.

Laches presupposes knowledge or neglectful ignorance. Where the party is ignorant of his rights, and is guilty of no negligence, he can never be said to be too late in asserting his claim, when he does it upon learning of them, until some statute of limitation bars him, and this without reference to fraud or concealment; but much less can it be said that his demand is stale, when by the fraud of the party adverse to him he has been prevented from sooner asserting it. See also *Meader* v. *Norton*, 11 Wall. 442; *Boomer* v. *French*, 40 Iowa, 601; *Humphreys* v. *Mattoon*, 43 Iowa, 556; *Reed* v. *Minell*, 30 Alabama, 61; *Wilson* v. *Ivy*, 32 Mississippi, 233; *Buckner* v. *Calcate*, 28 Mississippi, 432; *Hudson* v. *Wheeler*, 34 Texas, 356; *Munson* v. *Hallowell*, 26 Texas, 475; *S. C.*, 84 Am. Dec. 582; *Peck* v. *Bullard*, 2 Humph. 41.

Mr. J. T. Brooks for appellees submitted on his brief.

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

The bill in this case was dismissed in the court below upon the ground of laches, and also for the want of equity. The propriety of this action is now before us for review.

As the alleged fraudulent sale of this road, which constitutes the gravamen of the bill, took place August 28, 1877,

and the bill was not filed until August 30, 1887, ten years thereafter, there is certainly a presumption of laches, which it is incumbent upon the plaintiff to rebut. His reply is that he did not discover the fraud until a few months before the filing of the bill. The allegation of the original bill in that particular is very general, namely, that "until within a few months prior to the filing of this bill, he and those whom he represents were entirely ignorant of each and all of the fraudulent proceedings hereinafter set forth, and that this bill of complaint was filed in this court as soon after the acts of fraud, hereinafter set forth, came to his knowledge, as he could satisfy himself of the truth thereof. . . . And your orator had no knowledge of any of the fraudulent acts hereinbefore complained of, until very recently accidentally discovered." The amended bill is much more specific in its details, and avers that a certain supplemental mortgage, which appears to have been executed by the Coldwater Company, October 1, 1872, to the same parties as trustees, for the purpose of effecting the sale and negotiation of its bonds, at the time of its execution by the officers of the company, contained a full reference to the contract of May 4, 1872, the same having been inserted for the purpose of giving to all the purchasers of bonds due notice regarding the obligations of the Pennsylvania Company; but that after the execution of said supplemental mortgage, and the same had come into the possession of the officers of the Pennsylvania Company, it was altered by striking out all reference to the interest contract of May 4, 1872, or by taking out of the mortgage the page on which said reference was made, and substituting therefor another page in which said reference was omitted, and the mortgage was recorded as so altered. That the plaintiff and the other stockholders were thereby kept from all knowledge of this contract, and of the obligations of the Pennsylvania Company, and were also ignorant of the alteration of the supplemental mortgage until after the filing of the original bill. The amended bill further avers that, during all this time, the records of the railroad company were kept out of the reach of the stockholders; that no meeting of stockholders

was ever called after that of January, 1874; no notice was given for the election of directors; and that the knowledge of the contract of May 4, 1872, was purposely kept from the stockholders, plaintiff believing that the decree of foreclosure was final and the company hopelessly insolvent, and that there was no advantage in keeping up the organization of the company, and hence no annual meetings were called or held, all of which was brought about by the Pennsylvania Company as a part of the scheme and conspiracy to obtain the property, and defraud the stockholders of the Coldwater Company out of the same. Plaintiff further alleged that some time during the month of May, 1886, he was shown a copy of the contract of May 4, 1872; that until that time he neither knew or had any means of knowing or suspecting the unlawful proceedings alleged in the bill, or that there was or could be any lawful or valid defence to the foreclosure; that he began at once a careful examination of all the facts, but was greatly retarded by his inability to discover the records or papers of the company, or to find the original of this contract, and did not find them until within six months of the time of filing the bill. That the majority of the board of directors was made up of the officers and employés of the Pennsylvania Company, and, acting in this interest, kept from stockholders all means of obtaining information, and neglected to make reports or call stockholders' meetings for the purpose of enabling them to obtain information; and that if the plaintiff had known of the existence of such contract, or any of the matters in defence of the bill of foreclosure during the pendency of those proceedings, he would have called the same to the attention of the court.

Do these allegations exhibit such a state of facts as acquits the plaintiff of the charge of laches? Taken literally, they show that plaintiff had no knowledge of the contract of May 4, 1872, until May, 1886; but it also appears that in the original answer to the foreclosure bill, which was filed March 1, 1876, the substance of this contract was set out, and the same allegations of fraud with respect to the conduct of the Pennsylvania Company up to that time were made in the

answer as are made in the plaintiff's bill in this case. This answer, though nominally withdrawn by consent of the parties, does not appear to have been actually taken from the files, and, being a part of the records of the court, the presumption is that it would not be so taken away without leave of the court. It is also certified here by the clerk as a part of the record of the foreclosure suit. Not only was the contract set forth in this answer, but in the answer and cross petition of Swan, Rose & Co., judgment creditors of the road to the amount of $600,000, which was filed December 18, 1876, the same contract was set forth, and the authority of Hickox, the president of the defendant company, to make such contract was denied; and it was averred that the Pennsylvania Company had wrongfully obtained certificates for a million and a half of stock, and had assumed to manage and control the affairs of the company.

The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place, and the subject of such fraud is a railroad with whose ownership and management the public, and certainly the stockholders, may be presumed to have some familiarity. The foreclosure of this road could not have taken place without actual as well as legal knowledge of the fact by its stockholders, and if they believed they had any valuable interest to protect, it was their duty to have informed themselves by an inspection of the records of the court in which the foreclosure was carried on, of what was being done, and to have taken steps to protect themselves, if they had reason to believe their rights were being sacrificed by the directors. If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for

failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending the result of which may be prejudicial to such interests, he is bound to look into such proceedings so far as to see that no action is taken to his detriment. An examination of the records in this case would have apprised the plaintiff not only of the existence of the contract of May 4, 1872, but of the alleged fraudulent conduct of the Pennsylvania Company thereunder, and of the withdrawal of their answer by the directors, which is now claimed to be decisive proof of fraud. An inquiry of the directors, two of whom had protested against the resolution to withdraw the answer, and were within easy reach of the plaintiff, would have disclosed all the material facts set forth in plaintiff's bill, even to the reasons assigned for withdrawing the answer. The slightest effort on his part would have apprised him of the proceedings subsequent to the sale; of the purchase of the road by Lessley, the alleged employé of the Pennsylvania Company; of the subsequent organization of the Northwestern Ohio Railway Company; and of the lease of the new railway company to the Pennsylvania Company. Had he asked the leave of the court to intervene for the protection of his interest, it would have undoubtedly acceded to his request. Instead of this, he permits the sale to take place, and the road to pass into the hands of a new corporation, which has operated it for ten years without objection from the bondholders or creditors of the Coldwater Company, and without question as to its title. In the meantime many of the witnesses, including both Cass and Scott, trustees, whose alleged fraudulent betrayal of their trust constitutes the gravamen of this bill, are dead, as well as Lewis, the president, and Fish and F. V. Smith, directors of the defendant company, one of whom participated with Lewis in the meeting at which the attorneys were instructed to withdraw their defence, and all opportunity of explanation from them is lost. It is evident that the plaintiff in this suit has fallen far short of that degree of diligence which, under the most recent decisions of this court, the law exacts in condonation of this long delay. *Bailey* v. *Glover*, 21 Wall. 342;

Hammond v. *Hopkins*, 143 U. S. 224; *Hoyt* v. *Latham*, 143 U. S. 553; *Felix* v. *Patrick*, 145 U. S. 317.

We are the more readily reconciled to this conclusion from the fact that it does not appear that, if this sale were set aside and held for naught, the decree would redound to the advantage of the plaintiff. The only allegation as to his interest is that he is the owner and holder of 258 shares of the capital stock of the company of the par value of $12,900. It does not appear how much of its authorized capital stock of $4,000,000 was actually issued, though there is an allegation in the bill that the Pennsylvania Company wrongfully obtained $1,500,000 of the stock of the Coldwater Company in addition to the preferred stock, which the plaintiff averred was to be issued, for actual expenditures at cash values made by this company. Whatever amount was issued, it is safe to infer that plaintiff's interest was comparatively very small. If the decree were set aside and the case reinstated as he demands, his rights, as well as those of the other stockholders, would be subordinate to those of the bondholders, and probably also to those of the judgment creditors of the road. It is a difficult matter to say what amount of bonds was earned by the Pennsylvania Company, although it is admitted that iron was laid on 75 miles of the road, and the road completed for at least 47 miles, for which the Pennsylvania would be entitled to bonds at $20,000 per mile, and also that the company raised nothing toward the sinking fund which was provided for by the original mortgage. Under these circumstances, the trustees could hardly fail to obtain another decree of foreclosure for a large amount; and as the road was hopelessly insolvent, it is hardly within the bounds of possibility that it should sell for more than enough to pay the amount adjudged to be due, to say nothing of the judgment creditors' claims of Swan, Rose & Co. In a case of this kind, where the plaintiff seeks to annul a long-standing decree, it is a circumstance against him that he does not show a probability at least of a personal advantage to himself by its being done. A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an

abstract principle of justice or to compel the defendants to buy their peace, and if it appear that the parties really in interest are content that the decree shall stand, it should not be set aside at the suit of one who could not possibly obtain a benefit from such action.

In the view we have taken of this case upon the question of laches, it is unnecessary to consider whether the plaintiff has made such a case of fraud in the original decree as justifies the interposition of a court of equity.

The decree of the court dismissing the bill is, therefore,

Affirmed.

WARE *v.* GALVESTON CITY COMPANY.

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

No. 28. Submitted November 1, 1892. — Decided November 14, 1892.

The doctrine of laches applied to a suit in equity, the bill having been filed in 1881, more than 35 years after the cause of action accrued; and information having been obtained by the agent of the plaintiffs, in 1843, which imposed the duty of further inquiry; and like information having been obtained in 1854, and in 1858, and in 1869.

There was no distinct averment in the bill as to the time when the alleged fraud was discovered, and what the discovery was, nor did the bill or the proof show that the delay was consistent with the requisite diligence.

As to the statute of limitation, as affecting the question of laches, all the plaintiffs were capable of suing from 1854.

THE case is stated in the opinion.

Mr. Walter Gresham, *Mr. M. C. McLemore*, *Mr. S. W. Jones* and *Mr. G. E. Mann* for appellants submitted on their brief; citing, on the question of laches, *Oliver* v. *Piatt*, 3 How. 333, 411; *Bayard* v. *Farmers' and Mechanics' Bank*, 52 Penn. St. 232; *Telegraph Co.* v. *Davenport*, 97 U. S. 369; *Meader* v. *Norton*, 11 Wall. 442; *Bailey* v. *Glover*, 21 Wall.

342; *Michaud* v. *Girod*, 4 How. 502, 561; *Sears* v. *Eastburn*, 10 How. 187; *Galt* v. *Galloway*, 4 Pet. 332; *Holdsworth* v. *Evans*, L. R. 3 H. L. 263, 275; *Ormsby* v. *Vermont Copper Mining Co.*, 56 N. Y. 623.

Mr. A. H. Willie for appellee submitted on his brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Texas, on March 18, 1881, by Asenath A. Ware, the widow of Robert J. Ware and the daughter of David White; David P. Lumpkin, the son of Lucy S. Lumpkin, a deceased daughter of said David White; Mary A. Holtzclaw, daughter of Mary A. Cowles, a deceased daughter of said David White, and James T. Holtzclaw, husband of the said Mary A. Holtzclaw; Thomas W. Cowles, son of said Mary A. Cowles; and Daniel O. White and Clement B. White, sons of J. Osborne White, a deceased son of the said David White, the plaintiffs being citizens of Alabama and Florida; against the Galveston City Company, a Texas corporation. The plaintiffs filed the bill as heirs at law of the said David White.

The bill set forth that on June 15, 1837, one Michael B. Menard, of the first part, Robert Triplett, Sterling Neblett, and William F. Gray, of the second part, and Thomas Green, Levi Jones, and William R. Johnson, of the third part, entered into a written agreement, which recited that Menard claimed title to a league and labor of land, consisting of 4605 acres, situated on the east end of Galveston Island, in the territory of the Republic of Texas; that, Triplett claiming on behalf of himself and Neblett and Gray 640 acres of land, part of said league and labor, articles of agreement were entered into by Menard and Triplett, bearing date April 11, 1837, by which Menard agreed to relinquish to Triplett 640 acres out of said league and labor; that Menard, by deed or act bearing date April 18, 1837, conveyed the residue of said league and labor, after deducting the said 640 acres, to Jones, to be sold and

disposed of by him in the manner and for the purposes prescribed in the said act or deed; that Jones, intending to execute the trust created by said deed, had proposed to divide the premises into 1000 shares, for which certificates were to be issued to the purchasers, and in pursuance thereof had actually issued certificates for 400 shares, of which it was believed many shares had been sold; that Triplett, together with Menard, by deed duly executed by them, had conveyed the 640 acres to Green, Jones, and Johnson, to be sold and disposed of in the manner therein prescribed; that, after further reciting that, it being the intention of all the parties to lay off the league and labor of land into lots for the purpose of building a town thereon, it had been found most beneficial to the parties concerned that the whole of said league and labor should be held on joint account in the proportions thereinafter specified, and should be under the control and at the disposition of the same set of trustees, acting upon one common plan in regard to the whole, instead of being held partly by Jones and partly by Green, Jones and Johnson, under different titles and plans, it was witnessed that the parties thereto covenanted and agreed with each other, among other things, that the said league and labor of land should be conveyed to Green, Jones and Johnson, as trustees and commissioners, to carry into effect the purposes of the agreement; that the said league and labor of land should be divided by the trustees into 1000 shares, of which the 400 shares for which certificates had been issued by Jones should be regarded as 400 shares, and the lawful holders of the said certificates should be on the same footing and entitled to the same rights with the holders of certificates issued under said agreement of June 15, 1837, and upon surrendering their said certificates new certificates in lieu thereof should be issued by said trustees; that the remaining 600 shares should be sold by said trustees in such manner as they should think expedient, no share to be sold for a less sum than $1500, unless a majority of said trustees should be of opinion that it would be expedient to reduce the price; that a certificate, signed by at least two of the trustees, should be issued to every purchaser, who should have a right to

demand a separate certificate for each share; that the certificates should be transferable by assignment in writing thereon, signed and sealed by the holder, and acknowledged in the presence of two witnesses before any justice of the peace or notary public; that the trustees, as soon as, in their opinion, a sufficient number of shares had been sold, should call a meeting of the shareholders at such time and place as should be designated by them, of which they should give sufficient and convenient notice to shareholders; that the trustees should hold the title to the said league and labor of land, subject to the orders of the shareholders, as adopted at their general meetings, and the rules and regulations prescribed by them, and make all conveyances which the shareholders might require them to make, any two of them being authorized to make conveyances and perform all other acts; and that it was thereby further witnessed that the parties thereto of the first and second parts, in consideration of the premises thereto, and the further consideration of $10 to them in hand paid by the parties of the third part, did thereby sell and convey unto Green, Jones, and Johnson, their heirs and assigns, the said league and labor, in trust to execute the agreements thereinbefore set forth.

The bill further showed that Green, Jones and Johnson accepted the trust created by said written instrument, and took upon themselves its discharge, and in June, 1837, having supplied themselves with 1000 printed certificates, as the representatives of a like number of shares, which certificates were bound into five books of 200 certificates each, designated as Books A, B, C, D, and E, solicited subscriptions for shares; that many persons became purchasers for value and owners of shares therein, to whom said trustees issued a certificate of ownership for each share so purchased; that on April 13, 1838, on due notice given by said trustees, the shareholders held a meeting in Galveston, Texas, and formally organized themselves into a joint stock company, under the name of the Galveston City Company, by the election of a president and four directors, who were to constitute the board of directors of the company, and to whom was confided the care and control of

its property, with power to pass ordinances and by-laws for its government, appoint an agent, apply for a charter of incorporation, require from said trustees a deed for said league and labor of land, so as to vest the legal title in the said board of directors and their successors, lay off the land into blocks and lots, make sales thereof and convey title to the purchasers, declare dividends of the proceeds of sales among the stockholders, and otherwise manage and control the property as they might deem best for the interest of the company; but the bill alleged that said trustees, with the approval and consent of the company, continued to make sales of shares in its stock, and as many as 1000, the number designated in said written articles, eventually were disposed of, and certificates of ownership thereof issued by said trustees to persons entitled thereto.

The bill further showed that David White, late of Mobile, Alabama, in his lifetime, on November 7, 1838, subscribed for and became the owner and proprietor of 67 shares in the capital stock of said company, in evidence of which the said trustees appointed under the instrument of June 15, 1837, issued and delivered to him 67 certificates of ownership, duly signed by two of them, to wit, 17 out of Book A, numbered from 108 to 124, inclusive, and 50 out of Book C, numbered from 1 to 50, inclusive, each certificate being in the form set forth in the margin.[1]

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[1] "City of Galveston in one thousand shares.

"The proprietors, M. B. Menard, Robert Triplett, Sterling Neblett, and Wm. Fairfax Gray conveyed to the undersigned, as trustees, by their deed of the 15th of June, 1837, a league and labor of land containing 4605 acres on the east end of Galveston Island, to be sold as joint stock in 1000 shares.

"By the terms of said deed certificates of shares when issued are to be assigned by endorsement under hand and seal, in the presence of two witnesses, before any justice of the peace or notary public.

"The trustees, any two of whom may act, are to call a meeting of the shareholders when deemed advisable.

"In the proceedings of the stockholders in general meeting each share to be entitled to one vote and to be represented in person or by proxy, and a majority in interest to determine all questions which may arise. The company may prescribe such rules and regulations for its government and management and give such orders and directions to the trustees for the sale

Opinion of the Court.

The bill further showed that on December 31, 1838, at a regular meeting of the board of directors of the company, an ordinance was passed by it requiring its agent, as soon as a charter could be procured, to open a book for the registration and transfer of stock, and to give due notice of such opening, and conferring the right on stockholders, after such notice, to file and register the certificates issued to them by the said trustees, and receive in lieu thereof certificates under the seal of the company, stating the number of shares to which the party was entitled, which last certificate should not be transferred, except on the regular books of transfer of the company, and should be necessary in every case to entitle the shareholder to receive the dividends due him; that another ordinance was passed requiring the trustees to convey said league and labor to the five persons who were then the directors of the company, and their successors in office; that on April 12, 1839, the said trustees, by deed duly executed and recorded, conveyed the said league and labor in fee to the said directors, by virtue whereof the latter became seized and possessed of it in trust for the stockholders of the company; that afterwards the said Galveston City Company was incorporated under the same name by an act of the Congress of the Republic of Texas, approved February 5, 1841; and that said David White was one of the original corporators thereof.

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of lots or any other purpose as it may think promotive of the general interest.

"*Certificate of Stock. Book* —, *No.* —.

"This is to certify that we, Levi Jones, William R. Johnson and Thomas Green, trustees of the city of Galveston, in consideration of ——, do grant, bargain and sell to David White, his heirs and assigns forever, one share, No. —, in the city of Galveston, to be holden and enjoyed by him and his assigns upon the terms prescribed in the deed bearing date the 15th of June, 1837, of M. B. Menard, Robert Triplett, Sterling Neblett, and William Fairfax Gray, constituting us the trustees, and in the agreement entered into between us and the stockholders in said city, as set forth in the proposal for subscription.

"Witness our hands this 7th day of November, 1838.

"Levi Jones,

"Thomas Green,

"*Trustees.*"

The bill further showed that the directors of the company laid off the said land into blocks and lots, and offered the same for sale, and from time to time made sales and conveyances, of numerous parcels of it to different persons, receiving in part consideration therefor $1,000,000 and upwards; that there remains a large portion yet unsold, of the value of $500,000 and upwards; that the company adopted the policy of accepting from its stockholders shares of stock in exchange for its lands, and the directors, in a large majority of the sales of lots by them, accepted and received from the purchasers in payment therefor, instead of a money consideration, a surrender of shares in the capital stock of said company, owned by said purchasers, in all such instances cancelling upon the books of the company the shares thus surrendered; that very many shares had been in that manner retired, until now there were not more than 50 shares outstanding; that no dividend of the cash proceeds arising from sales of land had been declared among the stockholders, although the same had always greatly exceeded the expenses of the company, but the profits had been permitted to accumulate; and that the market value of a share in the capital stock of the company far exceeded now the face value of such share, to wit, $10,000 and upwards.

The bill further showed that on April 8, 1839, by an instrument in writing, White appointed one Abner S. Lipscomb his attorney in fact, for him, among other things, to transfer any or all of his Galveston stock, or any interest he might have in the city of Galveston; that White thereupon delivered to Lipscomb, for that purpose, the said 67 certificates of stock; that on December 3, 1841, Lipscomb surrendered to the company 3 of the certificates issued to White, namely, certificates numbered 33, 36 and 39, out of Book C, and with the consent of the company, and by an entry on its books, but without authority and in fraud of the rights of White, transferred the 3 shares of stock represented by the 3 certificates into his own name, receiving from the company, in lieu thereof, a certificate of ownership of said three shares, issued under its seal in his name; that White died on December 10, 1841, leaving Mary S. White, his wife, the plaintiff Asenath A. Ware, his daugh-

ter, and the 5 plaintiffs who are his grandchildren, his only heirs at law; that he was entitled at the time of his death to a considerable personal estate, and possessed of 24 shares in the stock of the Galveston City Company, including the 3 shares so alleged to have been fraudulently transferred by Lipscomb into his own name; that 21 of said shares were, at the time of said White's death, standing in his name on the books of the company, and the certificates of ownership thereof so issued to him, to wit, those numbered 108, 116, 118, 119, 120, 121, 122 and 124, out of Book A, and those numbered 10, 12, 27, 28, 34, 42, 43, 44, 45, 46, 47, 48 and 49, out of Book C, were at that time in the possession or power of said Lipscomb; that the personal estate of which White died possessed was more than sufficient, exclusive of the 24 shares of stock, to pay his debts, and they had long since been paid; and that there was no administration of his estate in Texas, nor any necessity therefor.

The bill further showed that Mary S. White died in 1853, without having disposed of the right or interest she was entitled to as the widow of David White, in the said 24 shares of stock, leaving her daughter, the said Asenath, and her said 5 grandchildren her only heirs at law her surviving; and that they as such, and as the only heirs at law of David White, thereupon became entitled to said shares of stock.

The bill further showed that Lipscomb, after the death of said White, and with the connivance of the company, and by an entry on its books, but without authority, and in fraud of the rights of the plaintiffs, transferred the said 24 shares of stock to some persons unknown, the company at the time taking up and cancelling the said certificates of ownership thereof, and delivering to the transferees new certificates under its seal in their names, representing the shares to be $1000 each; that the company subsequently procured the said 24 shares, and the certificates corresponding thereto, to be surrendered to it by those to whom Lipscomb had so transferred them, or by their assigns, at the same time cancelling said shares upon its books, thus retiring them, and was now claiming the benefit thereof; that the transfer of said shares

by Lipscomb, after the death of White, was without warrant and void, and the company, in contemplation of law, was a party to his said illegal acts, and liable to the plaintiffs for all the consequences thereof; and that the company held the stock in trust for the plaintiffs.

The bill further charged that the truth of the said matters would appear by the books, certificates, writings, papers, and memoranda relating to said shares of stock, in the possession or power of the company, if it would discover and produce the same, which it refused to do, though frequently applied to for that purpose.

The bill further charged that the company, and its agents and servants, had always studiously concealed from the plaintiffs the said matters relating to the stock of the said White, and particularly the said illegal acts of Lipscomb and the company's participation therein, by withholding from the plaintiffs all information in reference to said stock, and refusing them access to its books and papers; that the plaintiffs were in total ignorance of said illegal acts of Lipscomb, and their rights in the premises, until about 12 or 14 months next before the filing of the bill; that the plaintiffs, except the said Asenath, were, at the time of the death of said White, minors of tender age, and resided in Alabama and Florida, at a distance of 800 miles and upwards from Galveston, where Lipscomb resided, and where the said illegal acts were committed; that the plaintiffs were not apprised even of the fact that said White had owned shares in the capital stock of the company, until some years after his death; that after they were so apprised, to wit, in 1869, and again on March 19, 1879, at Galveston, by one Thomas J. Molton, their agent in that behalf, and at divers other times and by other persons, they made application to the company, its agents and servants, for information as to what disposition, if any, had been made of the shares owned by said White, and also for permission to examine its books and papers, to ascertain their rights; but the company, on every such application, declined to disclose to the plaintiffs any facts relating to said stock, and refused them access to its books and papers.

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The bill further showed that Lipscomb died in December, 1856, notoriously insolvent, and without having accounted to the plaintiffs or any of them for the 24 shares of stock or any interest therein; that the plaintiffs had applied to the company to cancel the alleged transfers of said 24 shares and the entries of such transfers in its books, and to revive said shares in the names of the plaintiffs as the heirs at law of said White and his widow, and to enter the names of the plaintiffs in its books as the owners of said stock and to issue and deliver to them certificates therefor, in the proper form, but that it refused to comply with such requests.

The bill called for an answer, but not upon oath, the benefit whereof was expressly waived. It prayed that the alleged transfer of the 3 shares of stock by Lipscomb into his own name from that of White, and the entry thereof in the books of the company, and the delivery by it to Lipscomb of a certificate of ownership of the 3 shares, might be declared to be a fraud upon White; that it might be declared that the alleged transfers by Lipscomb of the 24 shares, after the death of White, and the subsequent retirement or cancellation of said shares by the company, were without lawful warrant and void; that the said 24 shares might be declared to be the property of the estate of White, and the plaintiffs might be declared entitled to have the same to their own use, and to share ratably with the other stockholders of the company in all accumulations of property by the company since the date of said illegal transfers; that the company might be decreed to cancel said transfers and the entries thereof in its books, and to revive the said 24 shares, to enter the names of the plaintiffs in its books as the owners of the stock, and to issue and deliver to the plaintiffs a certificate of ownership for each of said 24 shares at the face value of $1000 each; that, if the revival of said stock and the transfer thereof on the books of the company into the names of the plaintiffs were impracticable, then the company might be decreed to pay to the plaintiffs the market value thereof; and for general relief.

The answer of the defendant sets forth, by way of demurrer for want of equity, that the cause of action of the plaintiffs,

and of those under whom they claim, accrued more than 35 years before the filing of the bill; that no reasonable or sufficient cause or excuse is alleged why the suit was not earlier brought, or why all the facts therein pretended to be known were not earlier discovered; that it was not shown in the bill when or how any discovery of facts alleged not to have been before known, or to have been concealed, was made by the plaintiffs, nor any diligence to ascertain the same, nor any excuse for the want of such diligence, nor any statement as to the course of proceedings or any facts connected with the administration of the estates of David White or his widow in Alabama, or as to the knowledge or acts of the legal representatives thereof in regard to the alleged rights and claims which are the subject of this suit, nor to remove the presumptions that all matters relating to the said stock, and on which the rights thereto were dependent, were fully known to said representatives; that the plaintiffs' cause of action is barred by the law of limitations of Texas and the lapse of more than 35 years since the same accrued before this suit was brought; that the suit had been delayed such great lapse of time, and parties holding the certificates of stock alleged to have been issued in renewal of those which belonged to White had many years ago obtained full value therefor in the property of the company, and the rights of third and innocent parties, as the only holders of the present alleged stock in the company, had intervened and been permitted to grow up and become of great value; and that, therefore, the plaintiffs' cause of action was barred by such lapse of time and laches, was stale and inequitable, and ought not to be heard in a court of equity.

The answer sets forth various denials of material allegations in the bill, and various alleged defences, thereto. It further sets forth that no person survives who was connected with the business or administration of the company, or who had any connection with the stock, or could be reasonably presumed to have any knowledge respecting the same.

The answer further says that the defendant pleads that suit on the matters alleged in the bill had been forborne until all persons connected with the transactions to which it related,

knowing particular facts and details in regard to said stock, and the receipt and appropriation of proceeds therefor, were dead; and it pleads the laches, neglect and delay of the plaintiffs in bar of the suit, and alleges that the same is stale and inequitable, and ought not to be further heard or considered.

The answer further sets forth that by the statute of limitation of suits in Texas, passed in 1841 and ever since in force, all actions for personal property must be commenced and sued within two years after the cause of action accrued, all actions of debt grounded upon any contract in writing must be commenced and sued within four years next after the cause of such action or suit, and the longest period of limitation for suits or actions of any kind was ten years; that the plaintiffs' cause of action, if any they ever had, accrued more than ten years and more than thirty-five years before the filing of the bill; that said statute had not failed to be operative against the plaintiffs on account of any exception therefrom, contained therein, within the principles of equity and good conscience restraining the same. It denies all concealment, fraud or wrong charged in the bill on the part of the defendant, to prevent the running of said statute, and denies that any diligence had been shown or existed on the part of the plaintiffs, or any excuse for the lack thereof, to prevent the running of said statute; and it pleads the same as a bar to the plaintiffs' suit. It further answers that the great lapse of time, rendering impossible correct knowledge of facts at the present day, resulting from the death of all parties to the transactions, the laches of the plaintiffs, and the *bona fide* accrual of the large and valuable rights of the other stockholders in the company, render the bill a stale, inequitable, and unconscientious demand, which ought not to be heard in a court of equity; and the defendant pleads the same in bar and estoppel.

A replication was filed to the answer, proofs were taken, and the cause was heard. The Circuit Court, in November, 1886, dismissed the bill, with costs, and allowed an appeal to this court, by the plaintiffs. No written opinion was delivered, but it is stated in the brief of the appellants that the Circuit Court held that the claim could not be prosecuted, by reason

of the laches of the plaintiffs. We think there was good cause on that ground for the dismissal of the bill, and the decree of the Circuit Court must be affirmed.

David White died in December, 1841. Whatever cause of action, if any, the plaintiffs had, arose either then or in March, 1842, when Lipscomb assigned to one James Love shares of the stock. It is contended for the plaintiffs that the discovery on which their suit was based was made only a short time before 1881; but an agent was sent to Texas in 1843 expressly to obtain information. He saw Lipscomb, and obtained from the office of the Galveston City Company, in June, 1843, a full report as to the persons who surrendered the original certificates and got renewals. The report showed that the 3 certificates embraced in this suit, numbered 33, 36 and 39, were renewed to Lipscomb. It showed the fact of the renewal of 16 shares to Love. There was information enough to make it the duty of the agent to make further inquiry. In July, 1844, Robert J. Ware, executor of David White, visited Texas for the purpose of seeing Lipscomb, but did not meet him. Then ensued the period from 1844 to 1854, when no diligence was shown by the representative of White's estate. In July, 1844, administration on the estate of White was opened in Texas by W. B. Lipscomb, the son of A. S. Lipscomb. He brought a suit against Menard, claiming that the latter owed White's estate over $14,000 and interest, and that the claim was a lien on all the property of the Galveston City Company. Jones, the trustee, was made a party to the suit, and an injunction was prayed against all the operations of the company. This suit was brought with the knowledge and privity of Ware, the executor; but the administration in Texas did not assert any rights against the company, such as are asserted in the present suit. Ware visited Texas again and saw Lipscomb prior to 1854, and had an opportunity to make inquiries of the company.

In 1854, one A. F. James, as agent of David White's estate, made inquiry at the office of the company as to the rights and interest which White had in the company at the time of his death. The books, records and papers were all opened to his inspection, and the agent of the company made out for him an

historical record of White's stock. At that time, no suspicion existed of a claim against the company in the matter, and it was supposed that the search was made as the foundation of a liability on the part of Lipscomb. Therefore, there could have been no purpose on the part of the company of any concealment. The information contained in the report of the company's agent was sufficient to put James upon inquiry.

Ware went to Texas again in 1858, when James, as his agent, made a further examination. This was after A. S. Lipscomb had died. It appears that then, in 1858, the question arose between Ware and James as to the liability of the company to account to the heirs of White for the stock which, it was alleged, was transferred by Lipscomb after the death of White. Thus, in 1858, twenty-three years before this suit was brought, the attention of Ware was directed to the point of the liability of the company for any transfers of White's stock made by Lipscomb after White's death. Then the whole matter appears to have been dropped for eleven years, until 1869. At that time, Ware had died, and his executor, with Mr. Molton, went to Galveston in the interest of Ware's estate and of his widow; and the question arose as to a claim for the stock against the company.

On June 17, 1873, the firm of Ballinger, Jack & Mott, of Galveston, lawyers at that time employed by the company, wrote to Molton that very careful and thorough examination had satisfied them, without doubt, that the heirs of David White could not recover against the company for stock improperly transferred to others in the company's books. The matter was then dropped until 1881, when a bargain was made with a land agent of Galveston to employ counsel and bring a suit, for a contingent interest of one-half.

On all these facts, the defence of laches is sustained, on the principles established by this court in the cases of *Stearns* v. *Page*, 7 How. 819, 829; *Moore* v. *Greene*, 19 How. 69, 72; *Beaubien* v. *Beaubien*, 23 How. 190; *Badger* v. *Badger*, 2 Wall. 87, 94; *New Albany* v. *Burke*, 11 Wall. 96, 107; *Broderick's Will*, 21 Wall. 503, 519; *Upton* v. *Tribilcock*, 91 U. S. 45; *Sullivan* v. *Railroad Co.*, 94 U. S. 806, 811, 812; *Godden*

v. *Kimmell*, 99 U. S. 201; *Wood* v. *Carpenter*, 101 U. S. 135; *Hoyt* v. *Sprague*, 103 U. S. 613; *Lansdale* v. *Smith*, 106 U. S. 391; *Philippi* v. *Philippi*, 115 U. S. 151, 157; *Speidel* v. *Henrici*, 120 U. S. 377, 386, 387; *Richards* v. *Mackall*, 124 U. S. 183, 187, 188; *Hanna* v. *Moulton*, 138 U. S. 486, 495; *Underwood* v. *Dugan*, 139 U. S. 380, 383; *Hammond* v. *Hopkins*, 143 U. S. 224, 274.

Within the rules laid down in the cases above cited, there are not in the bill sufficiently distinct averments as to the time when the alleged fraud was discovered, and what the discovery was; nor does the bill or the proof show that the delay was consistent with the requisite diligence. On the evidence in the record, the case stood in March, 1881, when the bill was filed, on no different ground from that on which it stood in 1858, or that on which it stood from 1843, or, in fact, from the date of White's death. Molton married a daughter of the plaintiff, Asenath A. Ware, and granddaughter of David White. He testified that in the spring of 1869 he went to Texas as agent of the heirs of David White, especially to examine carefully into the facts of the transfers of the shares of stock which had belonged to White.

Nor is there anything which takes any of the plaintiffs out of the operation of the statutes of limitation of Texas, so as to affect the question of laches. David White's widow was a *feme sole* from 1841 to 1853. The plaintiff Lumpkin became of age in 1843, the plaintiff Daniel O. White in 1847, the plaintiff Clement B. White in 1850, the plaintiff Cowles in 1852, and the plaintiff Mary A. Holtzclaw in 1854. Robert J. Ware died in 1867, and his widow since that time has been a *feme sole*. The longest period of limitation for any cause of action in Texas, is ten years.

Decree affirmed.

BELLAIRE *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

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

No. 38. Submitted November 4, 1892. — Decided November 14, 1892.

The petition of a city in a state court, against the lessor and the lessee of a parcel of land, to condemn it for the purpose of extending a street, cannot be removed into the Circuit Court of the United States upon the ground of a separable controversy between the lessee and the plaintiff.

THE case is stated in the opinion.

Mr. J. A. Gallaher for plaintiff in error.

Mr. John K. Cowen, *Mr. John H. Collins* and *Mr. Hugh L. Bond, Jr.*, for defendants in error.

MR. JUSTICE GRAY delivered the opinion of the court.

The original petition was filed May 5, 1887, in the court of common pleas for the county of Belmont and State of Ohio, under sections 2233–2238 of the Revised Statutes of the State, by the city of Bellaire, a municipal corporation of that State, against the Baltimore and Ohio Railroad Company, a corporation of Maryland, and the Central Ohio Railroad Company, a corporation of Ohio, to condemn and appropriate, for the purpose of opening and extending a street across the railroad tracks of the defendants, a strip of land about sixty feet wide and one hundred and sixty feet long, of which, the petition alleged, "said defendants claim to be the owners, legal and equitable," "but as to the proportionate interest of each of said defendants this plaintiff is not advised." Notice of the petition was issued to and served upon both defendants within the State of Ohio.

After the return day, and before trial, the case was removed into the Circuit Court of the United States for the Southern District of Ohio by the Baltimore and Ohio Railroad Company, which alleged that this defendant was in possession of the land in question under a lease from its codefendant, and that there was a controversy wholly between the plaintiff and this defendant and which could be fully determined as between them; and further alleged, on the affidavit of its agent, that from prejudice and local influence it would not be able to obtain justice in the courts of the State. The city of Bellaire moved to remand the case to the state court.

On July 5, 1887, the Circuit Court of the United States, as appears by its decision and order entered of record, overruled the motion to remand, upon this ground: "The Baltimore and Ohio Railroad Company has in this case a separate controversy, which is wholly between it and the city of Bellaire and which can be fully determined as between them. This is the question of the value of the leasehold interest of the Baltimore and Ohio Railroad Company in the land which the city seeks to appropriate. This interest is wholly apart from the interest of the Central Ohio Railroad Company in the fee, and entitles the Baltimore and Ohio Railroad Company to a separate verdict."

The case was afterwards tried by a jury, and a verdict returned upon which judgment was rendered for the Baltimore and Ohio Railroad Company. The city of Bellaire sued out this writ of error, assigning errors in the denial of the motion to remand, and in sundry rulings and instructions at the trial.

Under the act of Congress in force at the time of the removal of this case and of the refusal to remand it, prejudice and local influence which would prevent the party removing it from obtaining justice in the state court must be proved to the satisfaction of the Circuit Court of the United States, if its jurisdiction is to be supported on that ground. Act of March 3, 1887, c. 373, § 2, 24 Stat. 552; *Pennsylvania Co., Petitioner*, 137 U. S. 451, 457; *Fisk* v. *Henarie*, 142 U. S. 459, 468.

In the case at bar the question of prejudice and local influence appears not to have been insisted on or considered in the

Circuit Court. But that court refused to remand the case, solely because in its opinion there was a separable controversy between the petitioning defendant and the original plaintiff.

In this the Circuit Court erred. The object of the suit was to condemn and appropriate to the public use a single lot of land, and not (as in *Union Pacific Railway* v. *Kansas*, 115 U. S. 2, 22, cited by the defendant) several lots of land, each owned by a different person. The cause of action alleged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned; and that controversy was not the less a single and entire one, because the two defendants owned distinct interests in the land, and might be entitled to separate awards of damages. *Kohl* v. *United States*, 91 U. S. 367, 377, 378. The ascertaining of those interests, and the assessment of those damages, were but incidents to the principal controversy, and did not make that controversy divisible, so that the right of either defendant could be fully determined by itself, apart from the right of the other defendant, and from the main issue between both defendants on the one side and the plaintiff on the other. *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280; *Graves* v. *Corbin*, 132 U. S. 571, 588; *Torrence* v. *Shedd*, 144 U. S. 527, and other cases there cited.

The judgment of the Circuit Court, therefore, must be reversed for want of jurisdiction, with costs against the Baltimore and Ohio Railroad Company, and with directions to award costs against it in that court, and to remand the case to the state court.

Judgment reversed accordingly.

Syllabus.

SAN PEDRO AND CAÑON DEL AGUA COMPANY *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 7. Argued October 17, 24, 1892. — Decided November 14, 1892.

Idaho & Oregon Land Co. v. *Bradbury*, 132 U. S. 509, affirmed to the point that "the authority of this court, on appeal from a Territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court."

A bill in equity on the part of the United States to set aside a patent of public lands issued by mistake or obtained by fraud will lie either when there are parties to whom the government is under obligation in respect to the relief invoked, or when that government has a direct pecuniary interest in such relief each of which facts appears to exist in this case, and one of which is not denied in the letter of Attorney General Brewster, which is set forth in the opinion of the court.

When the government has a direct pecuniary interest in the subject-matter of the litigation the defences of stale claim and laches cannot be set up as a bar. *United States* v. *Dalles Military Road Co.*, 140 U. S. 599, affirmed to this point.

T. was a special agent and examiner of surveys for the Land Department. After this suit had been commenced, he was directed by the Land Department to proceed to the disputed territory and make an examination as to the survey. He did so, and besides making surveys and taking photographic views, he also obtained thirteen affidavits of witnesses, selected by himself, as to boundaries, etc. When called as a witness he produced these affidavits as part of his testimony, and gave his conclusions as to the proper boundaries of the grant, based partly at least upon the information obtained from them. After his deposition containing these matters had been filed in the case, and before the hearing in the District Court, two motions were made by the defendant — one to strike out the entire deposition, and the other to suppress parts of it. Both were overruled and no exception taken. The District Court found for the defendant, and entered a decree dismissing the bill. An appeal having been taken to the Supreme Court of the Territory, the entire record was transferred to that court. There, no new motion to strike out this deposition, or any part of it, was presented, nor were the two motions made in the District Court renewed in the Supreme Court,

or action asked of that court thereon. The Supreme Court reversed the decision of the District Court, and set aside the patent. A motion for a rehearing was made, which was denied. *Held*,

(1) That no motion to exclude the deposition, or any part of it, having been made in the Supreme Court before decision, and it not appearing in the record that the Supreme Court in giving its decision passed upon the question of its admissibility, there was nothing in that decision to review in that regard;

(2) That the action of the court on the motion for a rehearing presented no question for review by this court;

(3) That this court could not review the action of the District Court.

On the facts it appearing that a fraud was committed in making the survey for the patent, and that the defendant was not a *bona fide* purchaser, it is immaterial that the surveyor was not a party to the fraud.

On February 12, 1844, José Serafin Ramirez, a citizen of the republic of Mexico and a resident of Sante Fé, in the department of New Mexico, petitioned the governor of that department for a grant of a tract of land known as the "Cañon del Agua," together with the confirmation of the title to a mine claimed as an inheritance from his grandfather. The material part of the petition is as follows:

"I apply to your excellency in the name of the donation laws of the 4th of January, 1813, and 18th of August, 1824, and in the name of the Mexican nation, asking for a tract of vacant land known as the Cañon del Agua, near the placer of San Francisco, called Placer del Tuerto, and distant from that town about one league, more or less.

"The land I ask for is vacant and without owner and I solicit it because I have no possession or property by which I can support my family. The boundaries solicited are: On the north, the road leading from the placer to the Palo Amarillo; on the south, the northern boundary of the grant of San Pedro; on the east, the spring of the Cañon del Agua; on the west, the summit of the mountain of the mine known as My Own, as will appear by the accompanying document No. 1, for which I ask your ratification and that of the departmental assembly, in the manner that I received it, as an inheritance from my grandfather Don Francisco Dias de Moradillos; and I ask that this title be ratified according to the mining ordinances dated

in the year 1813, title 5, article 1; in view of all of which I pray and request your excellency to grant me possession of the mine, to work it, and the land which it embraces, which is about one league, for cultivation and pasturing my animals, and for grinding ore and smelting metal.

"José Serafin Ramirez.

"Sante Fé, February 12, 1844."

To which petition the departmental assembly and the governor thus responded:

"Departmental assembly of New Mexico.

"In session of to-day the departmental assembly decrees that Don Serafin Ramirez, auditor of the departmental treasury, and the other heirs of Don Francisco Dias de Moradillos, deceased, have a right as grandchildren to the mine referred to in the petition, and title of possession and property, as expressed in the mining laws, and further decrees that his excellency the governor of the department, in conformity with the colonization laws, shall grant the tract of land prayed for.

"Martinez, *President.*

"Thomas Oztiz, *Secretary.*

"Santa Fé, *February* 13, 1844.

"And in answer to your petition I grant you the tract asked for and revalidation of the title to the mine, which are enclosed herewith.

"God and liberty. Mariano Martinez.

"To Don Serafin Ramirez, auditor of the departmental treasury, Santa Fé."

The same year juridical possession of the tract was given, the description in the certificate thereof being: "On the north, the road of the Palo Amarillo; on the south, the boundary of the Rancho San Pedro; on the east, the spring of the Cañon del Agua; on the west, the highest summit of the little mountain of El Tuerto, adjoining the boundary of the mine known

as Inherited Property, from this date, according to the colonization laws of the republic."

By the treaty of Guadalupe Hidalgo, in 1848 (9 Stat. 922), the Territory of New Mexico was transferred to the United States. In 1859, Ramirez filed with the surveyor general of New Mexico his petition, asking official recognition by this government of his grant. The description in this petition was: "The quantity of land claimed is five thousand varas square, making one Castilian league, and bounded on the north by the placer road that goes down to the yellow timber; on the south, the northern boundary of the San Pedro grant; on the east, the spring of the Cañon del Agua; on the west, the summit of the mountain of the mine known as the property of your petitioner, as appears by the original title deeds accompanying the notice, numbered 1, 2, 3, 4, 5." A hearing was had on this application on the 10th day of January, 1860. The surveyor general reported in favor of the grant, and on June 12, 1866, Congress passed the following act of confirmation (14 Stat. 588, c. 118):

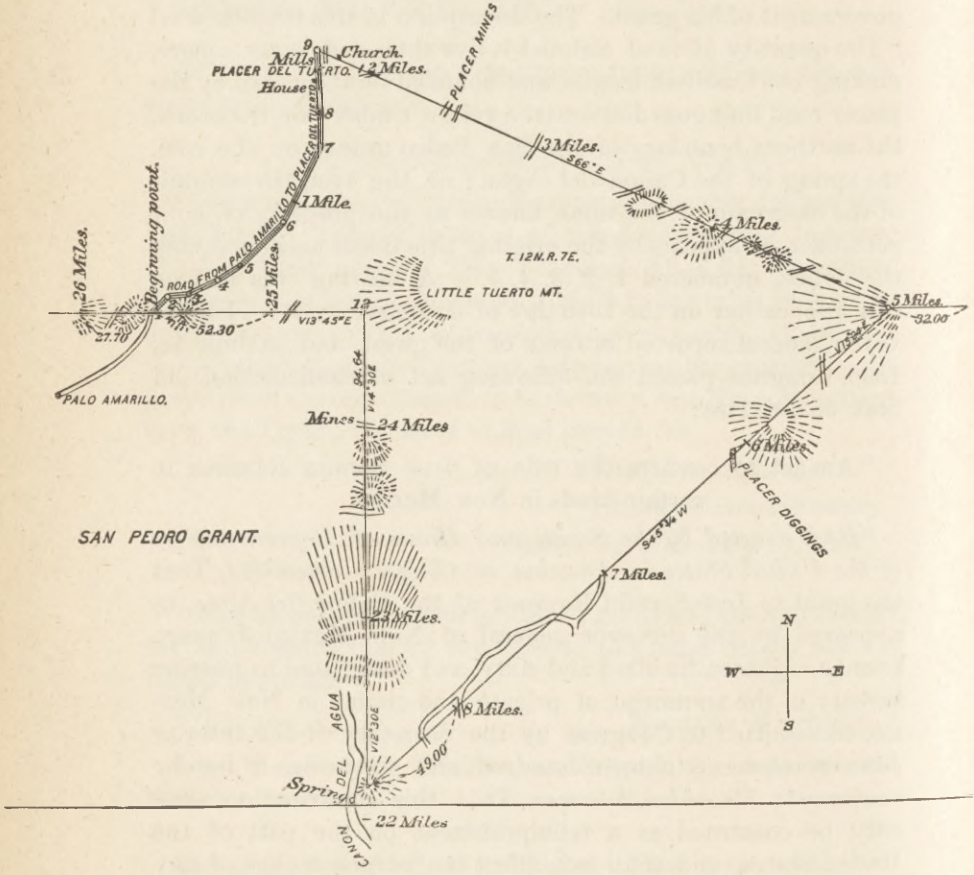
"An act to confirm the title of José Serafin Ramirez to certain lands in New Mexico.

"*Be it enacted by the Senate and House of Representatives of the United States in America in Congress assembled*, That the grant to José Serafin Ramirez of the Cañon del Agua, as approved by the surveyor general of New Mexico January twenty, eighteen hundred and sixty, and designated as number seventy in the transcript of private land claims in New Mexico, transmitted to Congress by the Secretary of the Interior January eleven, eighteen hundred and sixty-one, is hereby confirmed: *Provided, however*, That this confirmation shall only be construed as a relinquishment on the part of the United States, and shall not affect the adverse rights of any person whomsoever.

"Approved June 12, 1866."

On August 9, 1866, a survey was made by a deputy surveyor, under the direction of the surveyor general of New

Mexico. This survey, after approval by such surveyor general, was forwarded to the Land Department at Washington, and on July 1, 1875, a patent was issued granting the land with boundaries as established by this survey. The following is a plat of the property as surveyed and patented:



In 1866, Ramirez conveyed the property to Cooley and others, from whom, in 1880, it passed to the present defendant. Thereafter, and on September 15, 1881, this suit was commenced by the United States in the District Court of the First Judicial District of the Territory of New Mexico, to set

aside the patent and annul the title conveyed thereby on the ground of fraud in the survey. An answer was filed, proofs were taken, and the case went to final hearing before the District Court. By that court, on February 16, 1885, a decree was entered in favor of the defendant, dismissing the bill. From such decree an appeal was taken to the Supreme Court of the Territory, which, on January 28, 1888, reversed the decision of the District Court, and entered a decree in favor of the government, setting aside and annulling the patent and the survey upon which it was based; from which decree the defendant appealed to this court.

Mr. George Hoadly for appellant.

I. The United States has no interest in this controversy, and did not in good faith institute and prosecute this suit.

This proposition is founded on the following letter from Attorney General Brewster, which is on file in the First Judicial District Court of the Territory of New Mexico, and appears in the record of the cause, not as part of the testimony, but as having been filed therein.

"Department of Justice,

"Washington, October 17, 1883.

"F. W. Clancy, Esq.,

"1426 Corcoran St.,

"Washington, D. C.:

"*Sir.* — To your inquiry whether the United States will pay the costs incurred in the case against the San Pedro and Cañon del Agua Company, I answer that the United States has no beneficial interest in the proceeding. It was instituted at the instance of parties who claimed a right to the possession of the lands. Upon their request special counsel were appointed by this Department to commence and carry on the suit, but they were not to be compensated by the United States, and it was the understanding of this Department, as in other similar cases, that whatever costs and expenses were

incurred in the preparation and conduct of the case should be paid by the parties on whose petition the proceedings were instituted. I must decline, therefore, for the government, to pay said costs and expenses or any part thereof.

"Very respectfully,

"Benjamin Harris Brewster,

"*Attorney General.*"

II. The prosecution of this suit is barred by laches.

It is quite true that the action was brought within seven years after the issue of the patent, and it may be urged that the statute of limitations does not run against the United States, and that the government cannot be guilty of laches. *United States* v. *Dalles Military Road Co.*, 140 U. S. 599.

These considerations might have much force if the suit were brought by the government for its own benefit. They have no application to a case of this character. *United States* v. *Des Moines Navigation Co.*, 142 U. S. 510, is directly in point.

The parties for whose benefit this suit was brought might have been beaten by the defence of lapse of time, had they sued on their claims in their own names. *Bryan* v. *Forsyth*, 19 How. 334; *Meehan* v. *Forsyth*, 24 How. 175.

This question of laches was properly raised by the demurrer overruled by Chief Justice Axtell. *Wollensak* v. *Reiher*, 115 U. S. 96; *Graham* v. *Boston, Hartford & Erie Railroad Co.*, 118 U. S. 161; *Bryan* v. *Kales*, 134 U. S. 126. This is therefore sufficient ground for reversing upon appeal.

It is true that Chief Justice Axtell held with the defendants on the merits, after overruling the demurrer; but upon appeal the fact that the suit was brought too late was a sufficient defence, even though the court might have differed with Chief Justice Axtell on the merits. The following authorities sustain the application of the doctrine of laches to this case. *Badger* v. *Badger*, 2 Wall 87; *Sullivan* v. *Portland etc. Railroad*, 94 U. S. 806; *Brown* v. *Buena Vista County*, 95 U. S. 157; *Godden* v. *Kimmel*, 99 U. S. 201; *Coddington* v. *Railroad Company*, 103 U. S. 409; *Young* v. *Clarendon Township*, 132

U. S. 340; *Société Foncière* v. *Milliken*, 135 U. S. 304; *Norris* v. *Haggin*, 136 U. S. 386; *Mackall* v. *Casilear*, 137 U. S. 556; *Hanner* v. *Moulton*, 138 U. S. 486; *Cressey* v. *Meyer*, 138 U. S. 525; *Underwood* v. *Dugan*, 139 U. S. 380; *Boone County* v. *Burlington & Missouri River Railroad*, 139 U. S. 684; *McLean* v. *Clapp*, 141 U. S. 429; *Galliher* v. *Cadwell*, 145 U. S. 368.

III. Much of the testimony of John B. Treadwell and the exhibits attached thereto were incompetent and should have been excluded, and for this reason alone, if there were no other, the decree of the Supreme Court of the territory ought to be reversed and this Court should proceed to final decree upon the merits, or should remand to the Supreme Court of the territory for further proceedings.

Of the importance of this proposition to this case this court can entertain no doubt.

After the taking of testimony upon both sides had been closed and the depositions published, and a day fixed for hearing by order of the court, N. C. McFarland, then commissioner of the General Land Office, on the 14th day of December, 1883, addressed a letter to John B. Treadwell, examiner of surveys, Deming, New Mexico, instructing him as follows, viz.: "To examine the said survey with a view to ascertaining whether the Griffin survey was made in accordance with the call of the grant in order that you may be enabled to testify in court as to the correctness or incorrectness of said survey.

"In case you should find the survey to be incorrectly made, you will ascertain the true location of the calls by such examination as may be found necessary, furnishing notes and diagrams as evidence in the premises.

"It is desired that your examination be made with as little publicity as possible, referring to this office direct for any further information which may be needed.

"It may be necessary for you, in establishing the boundaries of the grant, to take the testimony of witnesses who are familiar with the country and competent to testify in this particular, and should you need the services of an interpreter

you are authorized to employ one and such other assistants as may be required.

"When your examination shall have been completed, which must be at the earliest practicable date, you will advise this office by telegraph and await further orders."

In obedience to this order, Treadwell went on the ground, made a survey, and took the testimony of thirteen witnesses by affidavits *ex parte*. The opinion of Chief Justice Long in this case shows that of the witnesses whose affidavits were thus procured by Treadwell, six had been examined and cross-examined and their testimony filed and published in the case. In the application for leave to take this testimony no reference was made to these *ex parte* affidavits.

After the cause was brought to issue the defendant's solicitors filed their motion, to suppress all the testimony of Treadwell and the exhibits filed therewith, "for the reason that the same is in no way pertinent to the issue in this case; that it is based upon hearsay; that said exhibits contain affidavits of witnesses who have not been produced for cross-examination in this case, and contain certain sketches or pictures, the authorship of which is not stated, and the truth or correctness of which is in no manner substantiated or verified or even stated or referred to, and for other good reasons apparent on the face of the said testimony." This was overruled on the same day.

The defendants then further moved to exclude specified portions of the deposition, viz.: (1) such as was hearsay; (2) such as was taken *ex parte;* (3) because it contained pictures without its appearing by whom they were made, or whether they were faithful representations of anything. This was in like manner overruled.

I respectfully submit that this motion is itself an exception to the testimony. No form is necessary for an exception. All that is needed is that there shall be a distinct objection made to the reading of the testimony and its use by the court, brought to the court's knowledge, and this is shown in this case. Estee's Pleadings, 3d. ed. by Pomeroy, 332.

When the cause came on to be heard in the Supreme Court,

objections were made at the hearing to the testimony of Treadwell and the exhibits thereto.

This was done both orally and by brief, and this constitutes a sufficient exception under the act of Congress regulating the practice of appeals from territorial courts.

Then, after the decision, an application was made for a rehearing. The order of the court refusing this petition contains the following: "The court . . . does now overrule such petition and refuses to grant the same for reasons set forth in an opinion by Chief Justice Long." The second reason assigned for rehearing was the following: "2. The court bases its conclusion as to the location of said Sierra del Tuerto largely upon *ex parte* affidavits taken by one John B. Treadwell without notice to any one or opportunity for cross-examination, improperly injected into the record of the court below after all the proofs on both sides were closed, which defendant moved to strike out and suppress before the final hearing as is shown by the record."

Chief Justice Long says, in the opinion which is thus incorporated into the order of the court that "the defendant has filed a petition for rehearing assigning therein twelve reasons why the same should be granted. The . . . second . . . points made, are but a repetition of those urged both in oral argument and in the printed briefs and already fully considered and determined. They present no new consideration and are fully met by the opinion."

I submit that the reference in the order, denying the petition for rehearing, in this opinion filed by Chief Justice Long, incorporates the opinion into the record, and that it is not merely a "recorded and filed" opinion as required by the rules of the Supreme Court of the Territory of New Mexico, or a certified opinion as required by the rules of this court, but that it is thus by reference made part of the record of proceedings of the Supreme Court, with the same effect as if the reasons referred to by the court in its order and stated therein to have been "set forth in an opinion by Chief Justice Long," had been incorporated into the order itself.

I further submit that this reference to the opinion shows

that both in the oral argument and in the printed briefs it was objected at the hearing, that Treadwell's testimony and *ex parte* affidavits were without cross-examination or notice to any one improperly injected into the record in the court below, and retained there in the face of the defendant's motion to strike out and suppress. This is the only form in which the objection could have been made in the oral argument and the printed briefs.

And I also submit that the denial of the rehearing to which the defendant was entitled upon the second ground above stated by its counsel, is a sufficient objection and exception to the testimony of Treadwell and the *ex parte* affidavits attached thereto.

Mr. Assistant Attorney General Parker and *Mr. Thomas Smith* for appellee.

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

The Supreme Court of the Territory, at the request of the defendant made and certified a statement of the facts in the case. This is in accordance with the act of April 7, 1874, 18 Stat. 27, which, in section 2, a section providing for the exercise of the appellate jurisdiction of this court over the judgments and decrees of territorial courts, reads: "That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree." Construing this statute, it was held, in the case of *Idaho & Oregon Land Company* v. *Bradbury*, 132 U. S. 509, 514, that "the authority of this court, on appeal from a territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the ad-

mission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. *Stringfellow* v. *Cain*, 99 U. S. 610; *Cannon* v. *Pratt*, 99 U. S. 619; *Neslin* v. *Wells*, 104 U. S. 428; *Hecht* v. *Boughton*, 105 U. S. 235, 236; *Gray* v. *Howe*, 108 U. S. 12; *Eilers* v. *Boatman*, 111 U. S. 356; *Zeckendorf* v. *Johnson*, 123 U. S. 617." Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review that testimony for the purpose of ascertaining whether the findings in the statement of facts are or are not in accordance with the weight of the evidence. This narrows materially the range of our inquiry.

The first proposition of the appellant is that the United States has no interest in the controversy, and did not in good faith institute and prosecute this suit. This claim rests upon the fact that in the record is found the following letter:

"DEPARTMENT OF JUSTICE,

"WASHINGTON, *October* 17, 1883.

"F. W. CLANCY, Esq., 1426 Corcoran St., Washington, D. C.

"SIR: To your inquiry whether the United States will pay the costs incurred in the case against the San Pedro and Cañon del Agua Company, I answer that the United States has no beneficial interest in the proceeding. It was instituted at the instance of parties who claimed a right to the possession of the lands. Upon their request special counsel were appointed by this Department to commence and carry on the suit, but they were not to be compensated by the United States, and it was the understanding of this Department, as in other similar cases, that whatever costs and expenses were incurred in the preparation and conduct of the case should be paid by the parties on whose petition the proceedings were instituted. I must decline, therefore, for the government, to pay said costs and expenses or any part thereof.

"Very respectfully, BENJAMIN HARRIS BREWSTER,

"*Attorney General.*"

Apparently the attention of the court below was not called to this letter, nor any action taken in reference to it. It simply appears as a paper filed by some one in the clerk's office, and by the clerk, of his own motion, incorporated into the record. Mr. Clancy, to whom the letter was addressed, was, up to January, 1883, the clerk of the court in which the suit was pending; subsequently, although, so far as the record discloses, not till after October, 1883, he became one of the counsel for defendant.

There are several reasons why the claim of the defendant in this respect cannot be sustained. In the first place, we have no assurance that the letter is genuine. Such a paper does not prove itself. It was not offered in evidence. The court took no notice of it. It was addressed, not to an officer of the court or a counsel in the case, but to a stranger. The clerk, by merely filing such a document, does not adjudicate that it is in fact that which on its face it purports to be.

Again, even if it be regarded as the letter of the Attorney General, it does not contain any such statement as precludes the government from maintaining this action. There is nowhere an intimation that Attorney General MacVeagh, the predecessor of the writer of the letter, when commencing the suit, was not acting in the utmost good faith, and in the belief that the government had a pecuniary interest in the lands, or was under an obligation to third parties, which it could protect only by setting aside this patent; and while the letter declares that the United States has no beneficial interest in the controversy, it does not deny that the United States is under obligation to other parties respecting the relief invoked; and that, it is now settled, is sufficient for maintaining an action to set aside a patent. *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273; *United States* v. *Beebe*, 127 U. S. 338, 342, in which latter case it was said: "And it may now be accepted as settled that the United States can properly proceed by bill in equity to have a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud where the government has a direct interest or is under an obligation respecting the relief invoked." See

also *United States* v. *Missouri, Kansas & Texas Railway,* 141 U. S. 358, 380.

But, chiefly, the statement made by the Supreme Court shows that in fact there were parties to whom the United States was under obligation in respect to the relief invoked; and, also, that the government had a direct pecuniary interest in the relief sought. The application for a grant described a tract of vacant land near the placer of San Francisco called Placer del Tuerto, and distant from that town about one league, more or less. This town, with a varying population of a few hundred, perhaps thousands, of people was in existence before the application of Ramirez for the grant, at the date of the annexation of New Mexico to this country, and at the time of the survey and patent. The inhabitants held their possessions by the indefinite and unrecorded titles of dwellers in Mexican villages. By the treaty of cession, as well as the general law in respect to the acquisition of foreign territory, the United States was bound to respect all existing rights, and among them the rights and titles of these inhabitants. Yet the survey and patent included the town. It is true that the act of conformation, as well as the patent, recites that it is only a relinquishment on the part of the United States, and is not to affect the adverse rights of any person, and it is very likely that the equitable titles of the inhabitants could be established notwithstanding the patent; but the government owed it to them not to burden their equitable rights by an apparently adverse legal title, and having been induced to do so through the fraudulent acts of the patentee and his associates, it is discharging a moral obligation, at least, when it takes steps to set aside such patent, and to relieve them from the apparent cloud on their title.

Further, the statement of facts finds that —

"Outside of the boundary line of the said Cañon del Agua grant as granted to said Ramirez by the government of Mexico there was at the time when the supplemental bill in this cause was filed a mining property of great value, known as the Big Copper mine, yielding valuable quantities of both copper and gold. There were also numerous other mines of the precious metals east of the Cañon del Agua spring.

These mines were and are upon a part of the public domain of the United States, but within the lines of the said grant as fraudulently extended by Ramirez and his confederates aforesaid. The defendant, as shown by its answer to the supplemental bill at the time of the filing of the same, actually occupied and possessed said Big Copper mine, and was extracting ore therefrom, claiming the legal right to do so as against the United States, and was also in possession of the land upon which said other mines were situated, and also claiming the right to the same. The defendant was not so in possession under the mineral laws of the United States as a locator, or claiming under or through any locator by virtue of such mining laws, but was in possession under and by means of the said fraudulent survey, and was claiming under the agricultural patent to Ramirez, the action of the surveyor general thereon, the confirmation by Congress, the survey and patent thereunder, the lawful right to hold said mines and extract therefrom the precious metals for its own use to the exclusion of the United States therefrom, and, in defiance of the mineral laws of the United States, predicating such claim of right upon mesne conveyances from parties holding under and by virtue of said patent.

"The possession of the said mine by the defendant as aforesaid, and the manner in which the same is being worked and carried on, is such as to prevent other mining prospectors from locating thereon or making any claim or acquiring any title thereto by location and development under the mining laws of the United States, and, if permitted to continue, would enable the defendant, under claim of legal title, which does not exist, to continuously extract therefrom large quantities of valuable precious metals, and thus greatly to lessen the value of said property, and to hinder and delay the development thereof, and to prevent location thereon and development under the mining laws of the United States. The claim of said defendant constitutes a cloud upon a title to the said mines and upon the right of the United States to open the same to be prospected, located and developed as mineral land, and deprives it of the revenue which would

otherwise accrue to it from such settlement and development."

The United States has therefore a pecuniary interest in maintaining this action, that it may recover possession of these mines and secure to itself the revenue naturally derivable therefrom.

This last matter is also a sufficient answer to the second point made by the appellant, and that is, that the prosecution of this suit is barred by laches, for it is well settled that when the government has a direct pecuniary interest in the subject-matter of the litigation the defences of stale claim and laches cannot be set up as a bar. *United States* v. *Dalles Military Road Company*, 140 U. S. 599, and cases cited in the opinion.

The third point of appellant is, that much of the testimony of John B. Treadwell, and the exhibits attached thereto, were incompetent and should have been excluded, and because they were not the decree of the Supreme Court of the Territory ought to be reversed. Mr. Treadwell was a special agent and examiner of surveys for the Land Department. After this suit had been commenced, he was directed by the Land Department to proceed to the disputed territory and make an examination as to the survey. He did so, and besides making surveys and taking photographic views, he also obtained thirteen affidavits of witnesses, selected by himself, as to boundaries, etc. When called as a witness he produced these affidavits as part of his testimony, and gave his conclusions as to the proper boundaries of the grant, based partly at least upon the information obtained from them. After his deposition containing these matters had been filed in the case, and before the hearing in the District Court, two motions were made by the defendant — one to strike out the entire deposition, and the other to suppress parts of it. Both were overruled and no exception taken. The District Court, as heretofore stated, found for the defendant, and entered a decree dismissing the bill. An appeal having been taken to the Supreme Court of the Territory, the entire record was transferred to that court. There, no new motion to strike out this deposition, or any part of it, was presented, nor were the

two motions made in the District Court renewed in the Supreme Court, or action asked of that court thereon. Obviously the defendant, relying upon its success in the District Court, with this testimony in the case and before the court, did not deem the matter of sufficient importance either to renew the motions made in the District Court, or to file additional ones, and so let the case pass to the consideration of the Supreme Court with all the testimony, including this deposition, unchallenged. But our inquiry is limited to the rulings of the Supreme Court of the Territory; it is its judgment which we are reviewing. By the appeal the case was transferred as a whole from the District Court to the Supreme Court. The rulings of the former court did not bind or become those of the latter, either as to the admission or rejection of testimony, or the decree to be entered. All the testimony taken and filed in the one court was spread before the other, and was apparently proper for its consideration. If the defendant had wished to narrow the examination of that court to any portion of the testimony, it should by appropriate motion to it have challenged the supposed objectionable parts. Counsel, appreciating this necessity of the case, has endeavored to show that the Supreme Court did in fact rule on the admissibility of this testimony; but we think his contention is not borne out by the record. Certainly no new motion was filed in the Supreme Court, or any entry made of a renewal of the motions in the District Court or of a decision thereon; and if error is to be predicated upon any ruling of the lower court, it would seem that the ruling should affirmatively and distinctly appear. And in this connection notice may well be taken of Rule 13 of this court: "In all cases of equity . . . heard in this court no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

Upon what grounds does counsel contend that the Supreme Court did rule upon this matter? In the order of the court refusing the petition for rehearing is the following:

"The court . . . does now overrule such petition and refuses to grant the same for reasons set forth in an opinion by Chief Justice Long."

This was the second reason assigned for rehearing:

"2. The court bases its conclusion as to the location of said Sierra del Tuerto largely upon *ex parte* affidavits taken by one John B. Treadwell, without notice to any one or opportunity for cross-examination, improperly injected into the record of the court below after all the proofs on both sides were closed, which defendant moved to strike out and suppress before the final hearing, as is shown by the record."

And in the opinion is this statement:

"The defendant has filed a petition for rehearing, assigning therein twelve reasons why the same should be granted. The . . . second . . . points made are but a repetition of those urged both in oral argument and in the printed briefs, and already fully considered and determined. They present no new consideration and are fully met by the opinion."

But this does not show that any motion was made in the Supreme Court or any ruling had thereon. The second reason assigned is, that the court based its conclusion upon this improper testimony. It is true reference is made to a motion to suppress, but it is only by way of description of the improper matter, and the motion referred to is one "shown by the record," and the only such motion is the one made in the District Court. The record shows none in the Supreme Court.

Again, it is insisted that the denial of the rehearing, one of the grounds therefor being that already stated, is in itself a sufficient objection and exception to the testimony. But when the petition for rehearing was filed, the case had been decided. A petition for rehearing is no more significant than a motion for a new trial, which, as well settled, presents no question for review in this court. Further, it would be strange if a case could be submitted on certain testimony and decided, and then the defeated party could by motion for a new trial or petition for rehearing compel the striking out of a part of that testimony, and thus a retrial of the case. By not challenging

the objectionable testimony until after the decision, he waives his right to challenge it at all.

Again, after the decision the defendant made application for a statement of the facts of the case, and also the rulings of the court on the admission and rejection of the evidence, to be transferred to this court, which motion was consented to by the United States, and a statement of facts prepared. Thereafter, the defendant moved to have included in such statement the testimony of Treadwell, the rulings of the District Court on the motions, and also the rulings of the Supreme Court upon said testimony, which motion was denied, and on complaint of the defendant that the statement did not contain any rulings of that court on the admission or rejection of evidence, and especially with respect to the testimony of John B. Treadwell, and the exhibits filed therewith, the Supreme Court said: "The motion for an additional finding touching the admission of the deposition, map, and exhibits of John B. Treadwell has been considered. The appeal was taken by the United States. There being no cross appeal by the appellee, we decline to review the action of the court below, as that is not before us on this appeal, and overrule said motion and decline any action upon it for reasons stated."

Whatever may be thought of the reason given by the Supreme Court, the fact appears from this language that present action only was invoked, which was action after the decision; and, further, that such action was only in reference to a review of the ruling of the District Court. Indeed, not only is the silence of the record conclusive against any motion in the Supreme Court to exclude the testimony, or any action by that court in the way of exclusion, but also the fair inference, from all the matters presented by counsel, is that after the decision it was sought to get from the Supreme Court only some review of the ruling of the District Court on the motion to exclude the testimony. We cannot review the action of the District Court, and no action was taken by the Supreme Court prior to the decision. The appellant can, therefore, take nothing by this contention.

Again, it is insisted that upon the facts of the case the

appellant is entitled to a reversal. But clearly this is untenable. The statement of facts is plain, to the effect that the survey was inaccurate and obtained by fraud. The force of this is not obviated by the fact that Griffin, the surveyor, was not found to have been a party to the fraud. The wrong is the wrong of the patentee; and the fact, if it be a fact, that he did not secure the wrongful assistance of all the officers of the government connected with the survey, does not make his wrong any the less. It may be, as Chief Justice Long intimates, that Griffin, the surveyor, was innocent; that he was misled by the misrepresentations and fraudulent acts of others; but if it be, as found by this statement of facts, that the survey was erroneous, that it and the patent were obtained by fraud, and that the patentee was a party to such fraud, that is enough to sustain a decree setting aside the survey and the patent, and leaving the defendant to whatever rights may exist under the original confirmation.

Finally, it is insisted that the defendant was a *bona fide* purchaser; but the findings of fact do not warrant this conclusion. The president of the company, and a large stockholder, together with others interested, visited the property before the purchase. They were warned of the adverse claims. They examined the land and could easily perceive the situation of some of the points named in the description, and also the presence within the limits of the patent of this town of San Francisco. Indeed, it is distinctly stated in the findings that "the said defendant, through its said company, had notice, in fact, by the means aforesaid, of the adverse claim to said grant, and in addition thereto information sufficient to put it on inquiry as to the fraud alleged in the bill of complaint."

Undoubtedly, upon the facts as found and stated by the court, the defendant was not entitled to hold as a *bona fide* purchaser.

These are all the matters complained of, and in them finding no error, the decree of the Supreme Court of the Territory is

Affirmed.

Syllabus.

CLYDE MATTOX *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 1008. Submitted October 31, 1892. — Decided November 14, 1892.

When the trial court excludes affidavits offered in support of a motion for a new trial, and due exception is taken, and that court, in passing upon the motion exercises no discretion in respect of the matters stated in the affidavits, the question of the admissibility of the affidavits is preserved for the consideration of this court on a writ of error, notwithstanding the general rule that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed.

In determining what may or may not be established by the testimony of jurors to set aside a verdict, public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow it; but evidence of an overt act, open to the knowledge of all the jury, may be so received.

Perry v. *Bailey*, 12 Kansas, 539, approved and followed.

On a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to impeach or support the verdict; but a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated on his mind; and he may also testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial.

Woodward v. *Leavitt*, 107 Mass. 453, approved and followed.

The jury in this case, (an indictment for murder,) retired October 7, to consider their verdict. On the morning of October 8, they had not agreed on their verdict. A newspaper article was then read to them, the tendency of which was injurious to the accused. They returned a verdict of guilty. Affidavits of jurors of this fact were offered in support of a motion for a new trial, and were rejected. *Held*, that this was reversible error.

Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant.

In this case, a few hours after the commission of the act, and while the wounded man was perfectly conscious, the attending physician informed him that the chances were all against him, and that there was no show for him. He was then asked who did the shooting. He replied that he did

Statement of the Case.

not know. The evidence of this was received without objection. Defendant's counsel then asked whether in addition to saying that he did not know who shot him, he did not say further that he knew the accused and knew that it was not he. This was objected to on the ground of incompetency, and the objection sustained. *Held*, that this was error.

THIS was an indictment charging Clyde Mattox with the murder of one John Mullen, about December 12, 1889, in that part of the Indian Territory made part of the United States judicial district of Kansas by section two of the act of Congress of January 6, 1883, (22 Stat. 400, c. 13,) entitled "An act to provide for holding a term of the District Court of the United States at Wichita, Kansas, and for other purposes."

Defendant pleaded not guilty, was put upon his trial, October 5, 1891, and on the eighth of that month was found guilty as charged, the jury having retired on the seventh to consider of their verdict. Motions for a new trial and in arrest of judgment were severally made and overruled, and Mattox sentenced to death. This writ of error was thereupon sued out.

The evidence tended to show that Mullen was shot in the evening between eight and nine o'clock, and that he died about one or two o'clock in the afternoon of the next day; that three shots were fired and three wounds inflicted; that neither of the wounds was necessarily fatal, but that the deceased died of pneumonia produced by one of them described as "in the upper lobe of the right lung, entering about two or three inches above the right nipple, passing through the upper lobe of the right lung, fracturing one end of the fourth rib, passing through and lodging beneath the skin on the right side beneath the shoulder blade." The attending physician, who was called a little after nine o'clock and remained with the wounded man until about one o'clock in the morning, and visited him again between eight and nine o'clock, testified that Mrs. Hatch, the mother of Clyde Mattox, was present at that visit; that he regarded Mullen's recovery as hopeless; that Mullen, being "perfectly conscious" and "in a normal condition as regards his mind," asked his opinion, and the doctor said to him: "The chances are all against you; I do not think

there is any show for you at all." The physician further testified, without objection, that, after he had informed Mullen as to his physical condition, he asked him as to who shot him, and he replied, "he didn't have any knowledge of who shot him. I interrogated him about three times in regard to that — who did the shooting — and he didn't know." Counsel for defendant, after a colloquy with the court, propounded the following question: "Did or did not John Mullen, in your presence and at that time, say in reply to a question of Mrs. Hatch, 'I know your son, Clyde Mattox, and he did not shoot me; I saw the parties who shot me and Clyde was not one of them.'" This question was objected to as incompetent, the objection sustained, and defendant excepted. Counsel also propounded to Mrs. Hatch this question: "Did or did not John Mullen say to you on the morning you visited him, and after Dr. Graham had told him that all the chances for life were against him, 'I know Clyde Mattox, your son, and he was not one of the parties who shot me?'" This was objected to on the ground of incompetency, the objection sustained, and defendant excepted.

In support of his motion for new trial the defendant offered the affidavits of two of the jurors that the bailiff who had charge of the jury in the case after the cause had been heard and submitted, "and while they were deliberating of their verdict," "in the presence and hearing of the jurors or a part of them, speaking of the case, said: 'After you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him.' And at another time, in the presence and hearing of said jury or a part of them, referring to the defendant, Clyde Mattox said: 'This is the third fellow he has killed.'" The affidavit of another juror to the same effect in respect of the remark of the bailiff as to Thompson was also offered, and in addition, the affidavits of eight of the jurors, including the three just mentioned, "that after said cause had been submitted to the jury, and while the jury were deliberating of their verdict, and before they had agreed upon a verdict in the case, a certain newspaper printed and published in the city of

Wichita, Kansas, known as The Wichita Daily Eagle, of the date of Thursday morning, October 8, 1891, was introduced into the jury room; that said paper contained a comment upon the case under consideration by said jury, and that said comment upon said case so under consideration by said jury, was read to the jury in their presence and hearing; that the comment so read to said jury is found upon the fifth page of said paper, and in the third column of said page, and is as follows:

"'*The Mattox case — The jury retired at noon yesterday and is still out.*

"'The destiny of Clyde Mattox is now in the hands of the twelve citizens of Kansas composing the jury in this case. If he is not found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict. The hour passed and nine more of them with it, and still a verdict was not reached by 10.30 last night, when the jury adjourned and went to their rooms at the Carey. Col. Johnson, of Oklahoma City, defended him, and made an excellent speech in his behalf to the jury. Mr. Ady also made a fine speech and one that was full of argument and replete with the details of the crime committed as gathered from the statements of witnesses. The lawyers who were present and the court officers also agree that it was one of the best and most logical speeches Mr. Ady ever made in this court. It was so strong that the friends of Mattox gave up all hope of any result but conviction. Judge Riner's instructions to the jury were very clear and impartial, and required nearly half an hour for him to read them. When the jury filed out, Mattox seemed to be the most unconcerned man in the room. His mother was very pale and her face indicated that she had but very little hope. She is certainly deserving of a good deal of credit for she has stuck by her son, as only a mother can, through all his trials and difficulties, and this is not the first one by any

means, for Clyde has been tried for his life once before. He is a youthful-looking man of light build, a beardless face and a nervous disposition. The crime for which he has just been tried is the killing of a colored man in Oklahoma city over two years ago. Nobody saw him do the killing and the evidence against him is purely circumstantial, but very strong, it is claimed, by those who heard all the testimony.'"

The bill of exceptions states that these affidavits and a copy of the newspaper referred to "were offered in open court by the defendant in support of his motion for a new trial and by the said District Court excluded; to which ruling the defendant, by his counsel then and there excepts and still excepts." And the defendant excepted to the overruling of his motions for new trial and in arrest of judgment.

Mr. J. W. Johnson and *Mr. T. F. McMechan* for plaintiff in error.

Mr. Assistant Attorney General Maury for defendant in error.

I. The first assignment of error relates to the rejection of the prisoner's offer to prove a statement or declaration of the deceased, John Mullen, made shortly before his death.

For that purpose the defence called Dr. Samuel Graham, the physician who attended Mullen after the shooting. The witness said that he told the deceased "The chances are all against you; I don't think there is any show for you at all."

This was between 8 and 9 o'clock in the morning, and about 1 or 2 o'clock that day Mullen died. The witness then said that, after making the above statement, he interrogated Mullen about three times as to who shot him, and that he replied, "he didn't have any knowledge of who shot him."

The question that elicited this testimony was not objected to by the counsel for the government.

The counsel for the defence then asked the witness whether the deceased, after he had been told by the witness what his condition was, as above, made any statement to Mrs. Hatch

"as to who it was shot him, or as to what knowledge he had as to who shot him." To this question the counsel for the prosecution objected, stating, "It has not been proven that the party knew that death was impending." The question, as thus propounded, was objected to by the prosecution, and the objection was sustained by the court, and thereupon the defence excepted.

The offer to prove the alleged statement of the deceased to Mrs. Hatch, the mother of the accused, came from the defence, and it was incumbent on the party thus offering the evidence to show, satisfactorily, that it was admissible as a dying declaration and was not on the footing of mere hearsay. But Dr. Graham, the witness, was not asked whether the deceased had said or done anything that indicated that he regarded death as impending before or at the time the alleged declaration was made. Why some such question was not put, particularly after the remark of the court that counsel knew he had not laid a proper foundation for the evidence, and that the question was not what the doctor thought, but "what the man thought about it," is not readily perceived.

It is true that what the deceased said to the doctor about the shooting went in without objection, and without even the usual inquiries from the court as to the circumstances under which the statements were made, but that was no reason why some other and different conversation between the deceased and another person, Mrs. Hatch, should have been admitted over the prosecution's objection.

The point we make is not that the deceased made no remark with reference to Dr. Graham's statement of his condition, but that he made no manifestation of any sort showing that he regarded himself as *in extremis*. The mere fact that the physician told the deceased that "the chances are all against you; I don't think there is any show for you at all," shows, as the court remarked, that the "doctor didn't have much hope," but does not show that the deceased was without hope. It is never safe to conclude in such cases that the declarant believed death impending because his physician told him so. See *Rex* v. *Reany*, 7 Cox, C. C. 209; *Woodcock's*

Case, 1 Leach, 500; *Van Butchell's Case*, 3 C. & P. 631; *Hill* v. *Commonwealth*, 2 Gratt. 594; *Donnelly* v. *State*, 2 Dutcher, (26 N. J. Law,) 463, 498, 499, a case in which the late Mr. Justice Bradley bore a prominent part; *Regina* v. *Bedingfield*, 14 Cox, C. C. 341; *Rex* v. *Spilsbury*, 7 C. & P. 187; *Rex* v. *Hayward*, 6 C. & P. 157; *Rex* v. *Mead*, 2 B. & C. 605, 608; *Regina* v. *Hind*, 8 Cox, C. C. 300; *Moore* v. *Alabama*, 12 Alabama, 764; *S. C.* 46 Am. Dec. 276; *Moeck* v. *People*, 100 Illinois, 242.

It would seem that these cases proceeded on a safe principle. To allow such evidence to be received would be a temptation to the unscrupulous to wring from the dying victim some statement favorable to his assailant. It would be a dangerous obstruction to the enforcement of criminal justice if those on trial for murder could shelter themselves behind such evidence.

But the question propounded to Mrs. Hatch was objectionable, also, because of its leading character, and properly ruled out on that ground alone.

II. The remaining assignments of error, except the eighth, may be grouped together and disposed of under one principle.

It will be observed that they are all founded on so much of the bill of exceptions as relates to the denial of the defendant's motion for a new trial and the several grounds thereof. But nothing is better settled than that the exercise of the trial judge's discretion in allowing or denying a motion for a new trial is not reviewable by this court by writ of error. This court says in *Newcomb* v. *Wood*, 97 U. S. 581, 583, 584: "It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result *cannot be made the subject of review upon a writ of error*." See also *Insurance Co.* v. *Barton*, 13 Wall. 603.

A motion for a new trial, whatever be its technical merits, should never be allowed against the real justice of the case. It is because the determination of such a motion involves the exercise of a wide equitable discretion, and requires such an appreciation of the case as the judge before whom it was tried

can generally, alone possess, that the granting or denying of such a motion will not be reviewed by writ of error. A court of error could not, in many instances, be made to see the case as the trial judge saw it, and therefore could not, in such cases certainly, safely review his action. It follows, therefore, that the alleged misconduct of the bailiff and jury cannot be considered by this court.

It being clear that the judge below was not guilty of an abuse of discretion in denying the motion for a new trial, it is quite unnecessary to inquire whether the affidavits of the jurors rejected by the court were admissible. Should, however, that question be to be determined, the court will be glad to have a reference to the valuable opinion of the Supreme Court of Kansas, in the case of *Perry* v. *Bailey*, 12 Kansas, 539, delivered by Mr. Justice Brewer, then a judge of that court.

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

The allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject of review by writ of error, *Henderson* v. *Moore*, 5 Cranch, 11; *Newcomb* v. *Wood*, 97 U. S. 581; but in the case at bar the District Court excluded the affidavits, and, in passing upon the motion, did not exercise any discretion in respect of the matters stated therein. Due exception was taken and the question of admissibility thereby preserved.

It will be perceived that the jurors did not state what influence, if any, the communication of the bailiff and the reading of the newspaper had upon them, but confined their statements to what was said by the one and read from the other.

In *United States* v. *Reid*, 12 How. 361, 366, affidavits of two jurors were offered in evidence to establish the reading of a newspaper report of the evidence which had been given in the case under trial, but both deposed that it had no influence

on their verdict. Mr. Chief Justice Taney, delivering the opinion of the court, said: "The first branch of the second point presents the question whether the affidavits of jurors impeaching their verdict ought to be received. It would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice. It is, however, unnecessary to lay down any rule in this case, or examine the decisions referred to in the argument. Because we are of opinion that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swear that these papers had not the slightest influence on their verdict." The opinion thus indicates that public policy which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may in the interest of justice create an exception to its own rule, while, at the same time, the necessity of great caution in the use of such evidence is enforced.

There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

This distinction is thus put by Mr. Justice Brewer, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kans. 539, 545: "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven

may be heard. Under this view of the law the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one."

The subject was much considered by Mr. Justice Gray, then a member of the Supreme Judicial Court of Massachusetts, in *Woodward* v. *Leavitt*, 107 Mass. 453, where numerous authorities were referred to and applied, and the conclusions announced, "that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." See, also, *Ritchie* v. *Holbrooke*, 7 S. & R. 458; *Chews* v. *Driver*, 1 Coxe (N. J.), 166; *Nelms* v. *Mississippi*, 13 Sm. & Marsh. 500; *Hawkins* v. *New Orleans Printing Co.*, 29 La. Ann. 134, 140; *Whitney* v. *Whitman*, 5 Mass. 405; *Hix* v. *Drury*, 5 Pick. 296.

We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority. These affidavits were within the rule, and being material their exclusion constitutes reversible error. A brief examination will demonstrate their materiality.

It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiassed judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or *prima facie*, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took

place. Wharton Cr. Pl. and Pr. §§ 821, 823, 824, and cases cited.

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Indeed, it was held in *People* v. *Knapp*, 42 Michigan, 267, that the presence of an officer during the deliberations of the jury is such an irregular invasion of the right of trial by jury as to absolutely vitiate the verdict in all cases without regard to whether any improper influences were actually exerted over the jury or not. And in *Kansas* v. *Snyder*, 20 Kansas, 306, where the bailiff, who had charge of the jury, had been introduced and examined as a witness on behalf of the State, and had testified to material facts against the accused, his presence in the jury room during the deliberations of the jury was held fatal to the verdict.

In *Gainey* v. *People*, 97 Illinois, 270, the Supreme Court of Illinois was of opinion that the presence of a bailiff, in charge of a jury in a capital case, in the jury room during a part of their deliberations, was a grave irregularity and a breach of duty on the part of the officer, which would or would not vitiate the verdict, depending upon the circumstances in each particular case, and the application of the rule in *Kansas* v. *Snyder*, was approved; but the conclusion reached in *People* v. *Knapp* was not fully sanctioned. The text-books refer to many cases in which the action of the officer having a jury in charge, when prejudice might have resulted; or unauthorized communications having a tendency to adverse influence; or the reading of newspapers containing imperfect reports of the trial, or objectionable matter in the form of editorial comments or otherwise, have been held fatal to verdicts.

The jury in the case before us retired to consider of their verdict on the 7th of October, and had not agreed on the morning of the 8th, when the newspaper article was read to them. It is not open to reasonable doubt that the tendency of that article was injurious to the defendant. Statements that the defendant had been tried for his life once before;

that the evidence against him was claimed to be very strong by those who had heard all the testimony; that the argument for the prosecution was such that the defendant's friends gave up all hope of any result but conviction; and that it was expected that the deliberations of the jury would not last an hour before they would return a verdict, could have no other tendency. Nor can it be legitimately contended that the misconduct of the bailiff could have been otherwise than prejudicial. Information that this was the third person Clyde Mattox had killed, coming from the officer in charge, precludes any other conclusion. We should, therefore, be compelled to reverse the judgment because the affidavits were not received and considered by the court; but another ground exists upon which we must not only do this, but direct a new trial to be granted.

Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant as well as against him. 1 East P. C. 353; *Rex* v. *Scaife*, 1 Mood. & Rob. 551; *United States* v. *Taylor*, 4 Cranch, C. C. 338; *Moore* v. *Alabama*, 12 Alabama, 764; *Commonwealth* v. *Matthews*, 89 Kentucky, 287. But it must be shown by the party offering them in evidence that they were made under a sense of impending death. This may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. The length of time elapsing between the making of the declaration and the death is one of the elements to be considered, although as stated by Mr. Greenleaf, "it is the impression of almost immediate dissolution, and not the rapid succession of death, in point of fact, that renders the testimony admissible." 1 Greenleaf Ev. 15th ed. §§ 156, 157, 158; *State* v. *Wensell*, 98 Missouri, 137; *Commonwealth* v. *Haney*, 127 Mass. 455; *Kehoe* v. *Commonwealth*, 85 Penn. St. 127; *Swisher* v. *Commonwealth*, 26 Gratt. 963; *State* v. *Schmidt*, 73 Iowa, 469. In

Regina v. *Perkins*, 9 C. & P. 395, the deceased received a severe wound from a gun loaded with shot, of which wound he died at five o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover, made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration *in articulo mortis*. There the declaration was against the accused, and obviously no more rigorous rule should be applied when it is in his favor. The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected. In this case the lapse of time was but a few hours; the wounds were three in number and one of them of great severity; the patient was perfectly conscious, and asked the attending physician his opinion, and was told that the chances were all against him, and that the physician thought there was no "show for you [him] at all." He was then interrogated as to who did the shooting, and he replied that he did not know. All this was admitted without objection. Defendant's counsel then endeavored to elicit from the witness whether, in addition to saying that he did not know the parties who shot him, Mullen stated that he knew Clyde Mattox, and that it was not Clyde who did so. The question propounded was objected to on the sole ground of incompetency, and the objection sustained. In this, as the case stood, there was error. So long as the evidence was in the case as to what Mullen said, defendant was entitled to refresh the memory of the witness in a proper manner and bring out, if he could, what more, if any-

thing, he said in that connection. It was not inconsistent with Mullen's statement that he did not know the parties, for him also to have said that he knew Mattox was not one of them. His ignorance of who shot him was not incompatible with knowledge of who did not shoot him. We regard the error thus committed as justifying the awarding of a new trial.

The judgment is reversed, and the cause remanded to the District Court of the United States for the District of Kansas, with a direction to grant a new trial.

ROBY *v.* COLEHOUR AND ANOTHER.

ROBY *v.* COLEHOUR.

ROBY *v.* COLEHOUR AND ANOTHER.

ROBY *v.* COLEHOUR AND ANOTHER.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Nos. 990, 987, 988, 989. Submitted May 2, 1892. — Decided November 7, 1892.

In error to a state court, although it may not appear from the opinion of the court of original jurisdiction, or from the opinion of the Supreme Court of the State, that either court formally passed upon any question of a Federal nature, yet, if the necessary effect of the decree was to determine, adversely to the plaintiff in error, rights and immunities in proceedings in bankruptcy, claimed by him in the pleadings and proof, the jurisdiction of this court may be invoked on the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed.

A bankrupt who purchases from his assignee in bankruptcy real estate to which he held the legal title at the time of the assignment is not thereby discharged from an obligation to account to a third party for an interest in the land as defined in a declaration of trust by the bankrupt, made before the bankruptcy, but takes title subject to that claim.

Whether such relations existed between the bankrupt and such third party

as prevented him from acquiring such absolute title, discharged from all obligations growing out of the declaration of trust, is not a Federal question.

THIS was a motion to dismiss. The case is stated in the opinion.

Mr. Henry S. Monroe and *Mr. William C. Goudy* for the motions.

Mr. John M. Palmer opposing.

MR. JUSTICE HARLAN delivered the opinion of the court.

The principal facts appearing upon the present motion to dismiss these writs of error for want of jurisdiction in this court or to affirm the decrees, are as follows:

By deed of date of July 18, 1871, Henry F. Clarke and others conveyed to William H. Colehour certain lands in Cook County, Illinois, embracing those here in dispute, subject to a mortgage for $4000 held by Mary P. M. Palmer. The sum of $10,000 was paid in cash, and the grantee executed his notes, aggregating $86,000, for the balance of the purchase money; and, for the purpose of securing them, executed a deed conveying the lands to V. C. Turner in trust. William Hansbrough, Charles W. Colehour, Wesley Morrill and Francis M. Corby were interested in the profits to be derived from their sale. Hansbrough sold and assigned his interest to Charles W. Colehour and Edward Roby; and Charles W. Colehour acquired the interests of Corby and Morrill. Roby executed to Hansbrough his notes for $4400, and subsequently paid them. The Colehours and Roby made an arrangement for subdividing and selling the property. That arrangement was evidenced by a written declaration of trust made by William H. Colehour in October, 1873, which Charles W. Colehour and Edward Roby accepted, and by which it was provided, among other things, that after the payment of all sums due on the notes secured on the land, and all moneys advanced for its

development, Roby should be entitled to one-fourth, Charles W. Colehour to one-half, and William H. Colehour to one-fourth of the net profits. Subsequently, a part of the land was subdivided and improved by grading streets, making ditches, etc., and a part sold, freed from the lien created by the deed of trust given to Turner.

It may be here stated that another writing was produced bearing date August 16, 1873, and purporting to be a declaration of trust with respect to this property.

Charles W. Colehour, September 22, 1876, released and conveyed to William H. Colehour all his right, title and interest in certain lands, including those here in controversy; and, subsequently, August 30, 1878, filed his petition in bankruptcy, showing debts to the amount of over $800,000. Having been adjudged a bankrupt, he conveyed his property and interests of every kind, according to the course and practice of the court, to an assignee in bankruptcy; and thereafter — the answer of Roby in the principal case alleges — "said Charles W. Colehour had no right or interest therein." The same answer, referring to this petition in bankruptcy, further states: "Said Charles W. Colehour having in 1876, for a sufficient and valuable consideration, conveyed all his interest in and to said land and all claims thereon to said William H. Colehour, and having no interest in said land or the proceeds thereof, or in the title in said William H. Colehour, did not mention the same or any part thereof in his inventory filed in said District Court of the United States in such proceeding in bankruptcy; and said Charles W. Colehour had not, at said date, to wit, on the 30th day of August, 1878, any right, title or interest in or to, or claim on, said lands, or any of the proceeds thereof."

Roby, August 31, 1878, filed his petition in bankruptcy. Having been adjudged a bankrupt, he conveyed, September 7, 1878, all his assets to his assignee, and afterwards, November 23, 1880, was discharged from all debts and claims provable against his estate existing on the day his petition in bankruptcy was filed.

On the 1st day of May, 1879, William H. Colehour executed to Charles W. Colehour a deed, covering the lands in dispute,

subject to the terms of certain declarations of trust which the grantor had previously made.

On the 30th of January, 1890, Charles W. Colehour brought a suit in equity (the principal one of the above cases) in the Circuit Court of Cook County, Illinois, against Edward Roby and William H. Colehour. For the purposes of the present hearing it is only necessary to state that the theory of the bill was that Roby, by fraud and in violation of his obligations as attorney for the plaintiff and the defendant, William H. Colehour, had acquired, at execution sales and otherwise, the legal title to the lands in dispute, embraced by the deed of trust of October, 1873; and that if not barred in equity by his acts and conduct from claiming any interest in them, he was entitled to only one-quarter of the net profits after all debts and liens against them were paid. The relief prayed was a decree declaring a certain deed from W. H. Colehour to Roby to be void, and that it be set aside as a cloud upon the title of the plaintiff and W. H. Colehour; that a receiver be appointed to whom should be conveyed the titles claimed by the respective parties; that the lands be sold and the proceeds held subject to the final decree in the cause; that the plaintiff and W. H. Colehour be decreed to be the owners of the equity of redemption; and that such other relief be given as was agreeable to equity.

The defendants answered the bill, and W. H. Colehour filed a cross-bill for a decree establishing the interests of the parties to be one-fourth in Roby and W. H. Colehour, each, and one-half in Charles W. Colehour.

In his answer to the original bill, which stood as his answer to the cross-bill, Roby denied that he had acted in bad faith, or that the relation of attorney and client existed between him and the Colehours, or either of them, at the time he purchased the lands in dispute. Referring to the proceedings in bankruptcy against him, his answer alleged that after the 31st day of August, 1878, the date of the filing of his petition in bankruptcy, "to wit, on the 4th day of February, A.D. 1882, the assignee in bankruptcy of this defendant sold the assets of this defendant, including all his interest derived

under the said declarations of trust, unto this defendant, and duly assigned and conveyed the same, including all interest in the said lands embraced in said declarations of trust from said William H. Colehour to this defendant, and said sale was duly approved and made absolute by the said District Court; and from thenceforward this defendant has been the owner of said declaration of trust from said William H. Colehour to this defendant, and also of an undivided half of the said declaration of trust from said William H. Colehour to William Hansbrough, and of all interests and claims arising under the same, or either of them."

The court, while acquitting Roby of any actual or intentional fraud, held that, consistently with the relations existing between him and the Colehours, he could not, at the time of acquiring the titles under which he claims, buy the lands and hold them adversely to those jointly interested with him. Judge Tuley, delivering the opinion of the Circuit Court of Cook County, said: "The law will hold Mr. Roby to be a trustee for the Colehours, for C. W. Colehour to the extent of one-half, and W. H. Colehour one-quarter, of all the property so purchased by him under or through such judgment proceedings, he, however, to be refunded the moneys which he has paid therefor. He cannot hold the property, because he must be treated as acquiring it while the relation of attorney and client existed."

A decree, in accordance with these views, was entered, appointing a receiver of the property, requiring Roby, William H. Colehour and Charles W. Colehour to convey to him all the titles to the lands respectively acquired or held by them, etc.

At the same time the court dismissed for want of equity certain suits — three of the suits mentioned in the title to this opinion — which Roby had instituted for the recovery of part of the lands under the titles which, as stated, he had acquired by purchase at execution sales and otherwise. These suits had been previously consolidated with the suit, just above mentioned, brought by Charles W. Colehour.

Upon appeal to the Supreme Court of Illinois, the decrees

of the Circuit Court of Cook County were affirmed. The several cases have been brought here for review upon writs of error. In the record is a certificate of the Chief Justice of the Supreme Court of Illinois, in which it was stated that the court decided:

1. That, in opposition to the contention of Roby, the proceedings whereby he was adjudged a bankrupt and discharged from his obligations, etc., "did not operate in law or equity to discharge said Roby from all his obligations, liabilities, duties and trusts with respect to and growing out of his interest in said lands and of his relations to said parties."

2. That Roby claimed and insisted that under and by virtue of the provisions of the laws of the United States he, as purchaser from his assignee in bankruptcy, took such interest as a stranger, free and clear from any duties or obligations or connections existing, prior to his petition in bankruptcy, between him and the Colehours, or either of them, and that the above deed of May 1, 1879, was void, both as to his assignee in bankruptcy and to him as purchaser from such assignee, and passed no right to Charles W. Colehour; "but this court [the Supreme Court of Illinois] decided against all the said claims so made by said Roby, and also decided that such deed was and is valid against said assignee in bankruptcy, and against said Roby as purchaser from such assignee."

3. That Roby insisted that by the proceedings in bankruptcy against Charles W. Colehour the latter was divested of all interest in and claims upon the lands in his present bill mentioned or the profits thereof, and of all interest in common with W. H. Colehour or either of them, and that he, Roby, was by operation thereof exempted from all claims of Charles W. Colehour and from his suit on account of said land, and that the necessary effect of such record and proceedings in bankruptcy was that he was not chargeable to Charles W. Colehour; "but this court," the certificate of the Chief Justice proceeds, "in considering the law and facts of the cases, decided against the claims of said Roby so pleaded, claimed and insisted on, and decided that such was not the legal operation and effect of such proceedings; and that Charles W. Colehour

had a right to sue upon said instrument, dated May 29, 1873, [being a power of attorney from William H. to Charles W. Colehour;] that said deed dated May 1, 1879, was and is valid as against said assignee in bankruptcy and against said Roby as purchaser from said assignee, and gives said Charles W. Colehour the right to defend the first three above-entitled cases against said Roby and to prosecute the fourth against said Roby, and to claim and enforce all rights of partner, trustee and co-tenant against said assignee in bankruptcy of said Roby and against said Roby as purchaser from such assignee."

Has this court jurisdiction to review the decree in these consolidated causes under the statute, (Rev. Stat. § 709,) providing that "a final judgment or decree in any suit in the highest court of a State where any title, right, privilege or immunity is claimed under the Constitution, or any . . . authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, . . . or authority, may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error?"

This question is a close one. But although it does not appear from the opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court formally passed upon any question of a Federal nature, the necessary effect of the decree was to determine, adversely to Roby, the rights and immunities claimed by him, in the pleadings and proof, under the proceedings in bankruptcy to which reference has been made. We must not be understood as holding that the certificate from the Chief Justice of the latter court is, in itself, and without reference to the record sufficient to confer jurisdiction upon this court to reëxamine the judgment below. Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the

necessary effect in law of the judgment. *Parmelee* v. *Lawrence*, 11 Wall. 36, 38; *Brown* v. *Atwell, Administrator*, 92 U. S. 327, 329; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 485; *Felix* v. *Scharnweber*, 125 U. S. 54, 59. The present case may be held to come within this rule. In view of the certificate by the Chief Justice of the state court, the office of which, as said in *Parmelee* v. *Lawrence*, was, as respects the Federal question, "to make more certain and specific what is too general and indefinite in the record," we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the Federal rights which that certificate states were claimed by Roby, but were withheld, and were intended to be withheld, from him by the court below.

While the motion to dismiss must, therefore, be overruled, yet, as there was color for it, we must inquire whether the questions on which jurisdiction depends are such as, in the language of our rule (6), not to need further argument. We are of opinion that they are of that class. When Charles W. Colehour was adjudged a bankrupt he does not appear to have held any interest in the lands now in controversy. The answer of Roby distinctly states that he, Charles W. Colehour, in 1876, for a sufficient and valuable consideration, conveyed all his interest to W. H. Colehour, and had no interest in said lands at the date of his petition in bankruptcy filed in 1878. The decree is evidently based, so far as Charles W. Colehour is concerned, upon the deed to him by William H. Colehour, executed in 1879, although the respective interests of the parties were established with reference to the declaration of trust made in October, 1873. There is, consequently, no ground upon which to rest the contention that Charles W. Colehour had any interest or right in the lands that passed to his assignee in bankruptcy.

Equally without force is the contention that the adjudication of Roby to be a bankrupt, followed by his conveyance to his assignee in bankruptcy, and his purchase from such assignee, had any effect upon the rights of William H. Colehour or Charles W. Colehour. The respective interests of

Roby and the Colehours in the lands, at the date of Roby's bankruptcy, could have been determined in a suit or proceeding to which they and Roby's assignee in bankruptcy were parties, so that the purchaser at the assignee's sale would have acquired a title discharged from any claim upon them by either of the Colehours. But it does not appear that any such suit was brought or that the conflicting interests of the parties were determined as between them, or either of them, and Roby's assignee in bankruptcy. Roby's claim is that his purchase of the lands from his assignee in bankruptcy, the legal title to which was in him, of record, discharged him from all obligation to recognize any claim, upon the part of either of the Colehours, arising out of the relations existing between them and him prior to his bankruptcy. If, at the time of filing his petition in bankruptcy, he was bound by his relations to the Colehours, although holding the legal title, to account to them for their portions of the lands, as defined in any previous declaration of trust to which he was a party or to which he assented, or by which he was bound, he was not discharged from that obligation by merely purchasing the lands from his assignee in bankruptcy. It does not appear that any issue was framed and determined in the bankruptcy court as between him or his assignee and the Colehours. The conveyance to his assignee passed to the latter only such interest as he, in fact, had, and when he bought from the assignee he purchased only such as he could rightfully have conveyed, originally, to his assignee. If, before he went into bankruptcy, the Colehours had any interest in the lands, which they could assert, as between themselves and him, he could not, by simply purchasing it from his assignee, acquire an absolute title, freed from their claim. We are of opinion that the proceedings in bankruptcy against Roby, and the purchase from his assignee, did not defeat the claims now asserted by the Colehours in these lands, and which were recognized by the decree below.

Whether such relations, in fact, existed between the Colehours and Roby as prevented him, consistently with those relations, from purchasing the lands for himself, in other

words, whether he was the attorney of the Colehours when he acquired the legal title, or whether, upon principles of equity, Roby should be deemed to have acquired the title for them and himself, subject to the declaration of trust referred to in the pleadings and decree, are not questions of a Federal nature. The decree below, in respect to those matters, is not subject to reëxamination by this court. The Federal questions having been decided correctly, and those questions being such as not to need any further argument beyond that presented in the briefs of counsel, the decree in each of the cases must be

Affirmed.

MORLEY *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 1. Argued October 14, 17, 1892. — Decided November 14, 1892.

The Court of Appeals of the State of New York having held that a judgment obtained before the passage of the act of the Legislature of that State of June 20, 1879, reducing the rate of interest, (Sess. Laws 1879, 598, c. 538,) is not a "contract or obligation" excepted from its operation under the provisions of § 1, this court accepts that construction as binding here.

The provision in § 10 of Art. 1, of the Constitution of the United States that "no State shall" "pass any" "law impairing the obligation of contracts," does not forbid a State from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts; as the judgment creditor has no contract whatever in that respect with the judgment debtor, and as the former's right to receive, and the latter's obligation to pay exists only as to such an amount of interest as the State chooses to prescribe as a penalty or liquidated damages for the nonpayment of the judgment.

A state statute reducing the rate of interest upon all judgments obtained within the courts of the State does not, when applied to one obtained previous to its passage, deprive the judgment creditor of his property without due process of law, in violation of the provisions of § 1 of the Fourteenth Amendment to the Constitution of the United States.

This case was first argued on the 23d and 24th days of October, 1888, at October term, 1888. *Mr. Lucien Birds-*

eye for plaintiff in error. *Mr. E. S. Rapallo* for defendant in error. On the 29th of the same month it was ordered for reargument.

It was ordered continued at that term, and also at October terms 1889, 1890 and 1891. At the present term it was argued on the 14th and 17th days of October. The case then made is stated in the opinion.

Mr. William Ford Upson (with whom was *Mr. William Forse Scott* on the brief) and *Mr. George Hoadly* for plaintiff in error.

Mr. Edward S. Rapallo for defendant in error.

Mr. Justice Shiras delivered the opinion of the court.

John S. Prouty, of the city and State of New York, was a holder and owner of certain preferred and guaranteed stock of the Michigan Southern and Northern Indiana Railroad Company. This stock was issued in the city of New York, in the year 1857, and the guaranteed dividends and interest were to be there paid. Subsequently, it being alleged that the said company was in arrears of dividends and interest due Mr. Prouty as holder and owner of its stock, an action was commenced by him in the Supreme Court of the State of New York in and for the city and county of New York, special term, upon the equity side, to compel the said company specifically to perform its contract and agreement with him. During the pendency of the action, evidence was produced tending to show that, after the commencement of the same, the said company was, with various other companies, merged or consolidated into the Lake Shore and Michigan Southern Railway Company, the present defendant in error. Upon this evidence the consolidated company was permitted to be brought in as defendant by supplemental complaint. In pursuance of this complaint, after a trial at special term, the Supreme Court, on motion, decreed that the railroad company should specifically perform all and every act and acts necessary and proper for

the specific performance of the contract and agreement in the findings and decisions of the special term set forth, and made, as therein stated, with the plaintiff as holder and owner of the stock in question, and to pay the plaintiff the amount of the arrears as dividends, being $27,426.67 with interest, the whole aggregating $53,184.88; and also decreed that immediately after service of a copy of the judgment the company should declare and make payable, and pay out of any of the net earnings of the company, the said sum of $53,184.88 together with interest thereon from the entry of said judgment, and that in case of failure, within thirty days after service of the judgment, to pay the said sum of $53,184.88, and said interest, the plaintiff should have execution therefor against the defendant. On appeal by the defendant from this decree to the general term of the Supreme Court, and afterwards to the Court of Appeals, the decree was affirmed, and was entered in the office of the clerk of the county of New York on the 26th day of January, 1878. The proceedings in the action prior to this decree do not appear in the record before this court, but such facts as are not shown by the record, and which deserve to be stated here, are gathered from the briefs and data therein cited, and seem to be undisputed.

The directions of the said decree not being complied with, on the 21st day of May, 1881, an execution was duly issued for the amount of the decree, with interest, and thereupon the defendant company paid to the sheriff the said amount, with interest at the rate of seven per cent per annum up to January 1, 1880, and interest at the rate of six per cent per annum from January 1, 1880, to May 21, 1881, the time of such payment, and demanded that the execution be returned satisfied. It would seem that the reason for the refusal to pay seven per cent interest after January 1, 1880, was the passage of the act of June 20, 1879, of the legislature of the State of New York, changing the rate of interest upon the loan or forbearance of any money, goods, or things in action from seven per cent to six per cent per annum, which act, upon January 1, 1880, began to take effect. The sheriff and plaintiff received the said sum on account and demanded an additional amount,

which would be the balance due upon computing the interest at the rate of seven per cent per annum for the whole time. Thereupon, the railroad company, by its attorney, obtained a rule to show cause why the said execution should not be returned fully satisfied, or why the said judgment should not be discharged and marked satisfied of record, or why the sheriff should not be forever enjoined from making any levy or sale under said execution. This application was, at a special term of the Supreme Court of New York, denied. The general term of the same court afterwards affirmed the denial of this motion by the special term. An appeal was then taken from the said general term of the said Supreme Court to the Court of Appeals, where the decision of the Supreme Court was reversed, and that court was ordered to grant the motion. (95 N.Y. 428 and 667.)

The complainant thereupon, by a writ of error, brought the matter from the Court of Appeals, which is the highest court having jurisdiction thereof in the State of New York, to this court.

In considering this case we shall find it convenient to have before us certain sections of the statutes of New York, namely:

Revised Statutes, Part II, c. IV, tit. 3; enacted December 4, 1827, and taking effect January 1, 1830 (1 Rev. St. 1st ed. 771).

"SEC. 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action shall continue to be seven dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time."

Laws 1879, 598, c. 538. (An act to amend the title containing the section above quoted, passed June 20, 1879, and taking effect January 1, 1880.)

"SEC. 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action shall be six dollars upon one hundred dollars for one year, and after that rate for a greater or less sum, or for a longer or shorter time; but

nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act.

"SEC. 2. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

"SEC. 3. This act shall take effect on the first day of January, 1880."

Laws 1877, 468, 477, c. 417. (An enactment of June 2, 1876, taking effect September 1, 1877.)

"SEC. 1211. A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record directing the payment of money, bears interest from the time when it is entered."

The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the Court of Appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. In *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294, this court, speaking by Mr. Justice Field, says: "Whether such a construction [by judicial decisions upon a clause of the state constitution] was a sound one, is not an open question. . . . The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. . . . The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it." "The rule of construction adopted by the highest court of the

State, in construing their own constitution, and one of their own statutes in a case not involving any question reëxaminable in this court under the twenty-fifth section of the judiciary act, must be regarded as conclusive in this court." *Provident Institution* v. *Massachusetts*, 6 Wall. 611, 630. "The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." *Leffingwell* v. *Warren*, 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a State, is conclusive upon this court. *Randall* v. *Brigham*, 7 Wall. 523, 541. If, then, the law as enacted by the legislature, and construed by the state judiciary, will be the law of the State, it follows that, as to the proper construction of the statute and as to what should be regarded as among its terms, no Federal question could arise. The most that could be claimed would be that, although the statute of the State was unobjectionable, yet the state court had erroneously construed it. This would constitute a purely judicial error, involving no question of the validity of the law; which latter question alone is, by the plainest possible terms of the Constitution and judiciary act, subject to investigation here. Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the state court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment, infringe a contract within the meaning of the Constitution of the United States?

Before we state the conclusions reached by this court, the contention on behalf of the plaintiff in error may be briefly stated, as follows:

The judgment was based on a contract, which, as soon as it became a cause of action by the failure of the defendant to comply with its terms, began, under the then existing law of the State, to draw interest at the rate of seven per cent per annum, and, when merged into judgment, was entitled to draw interest at that rate until paid; that such judgment was itself a contract in the constitutional sense; and that the in-

terest accruing and to accrue was as much a part of the contract as the principal itself, and equally within the protection of the Constitution.

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the State, as declared by its statutes. If the State declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.

After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the State shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for non-payment of a judgment be determined by a State, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment,

and his right is to receive, and the defendant's obligation is to pay, as damages, just what the State chooses to prescribe.

It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium.* The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." *Wyman* v. *Mitchell*, 1 Cowen, 316, 321. In *McConn* v. *New York Central, &c. Railroad*, 50 N. Y. 176, 180, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract." In *Bidleson* v. *Whytel*, 3 Burrow, 1545, it was held by Lord Mansfield, after great deliberation, and after consultation with all the judges, that "a judgment is no contract, nor can be considered in the light of a contract: for *judicium redditur in invitum.*" To a *scire facias* on a judgment, entered in 13 Car. II, the defendant for plea alleged that the contract upon which recovery was had was usurious, to which plea the plaintiff demurred, saying that judgments cannot be void upon such a ground, since by the judgment the original contract which is supposed to be usurious is determined, and cited the case of *Middleton* v. *Hall*, (Gouldsb. 128; *S. C. sub nom. Middleton* v. *Hill*, Cro. Eliz. 588). And according to this the plea was ruled bad, and judgment given for the plaintiff. *Rowe* v. *Bellaseys*, 1 Siderfin, 182. "To a *scire facias* on a judgment by confession, the defendant pleaded that the warrant of attorney was given on an usurious contract. And upon demurrer it was held that this was not within the statute 12 Anne [of usury], or to be got at

this way, for this is no contract or assurance, a judgment being *redditum in invitum.*" *Bush and others* v. *Gower*, 2 Strange, 1043. In *Louisiana* v. *New Orleans*, 109 U. S. 285, 288, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the Federal Constitution as such, it was said that "the term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence." Where the transaction is not based upon any assent of parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. *Garrison* v. *City of New York*, 21 Wall. 196, 203. It is true that in *Louisiana* v. *New Orleans*, and in *Garrison* v. *City of New York*, the causes of action merged in the judgments were not contract obligations; but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore.*

A large portion of the able argument in behalf of the plaintiff in error was directed to a discussion of the question how far the legislature may change remedies on existing contracts, without impairing their obligation in the constitutional sense, and our special attention was asked to the case of *Gunn* v. *Barry*, 15 Wall. 610. That was a case wherein this court held that, as respects a creditor who had obtained by his judgment a lien on the land which a former exemption secured to him while the new one destroyed it, the law creating the new exemption impaired the obligation of a contract, and was unconstitutional and void. The doctrine of that and similar cases does not seem to be applicable to the present case. Much discussion has been had in many cases, in this and other courts, in the attempt to fix definitely the line between the alterations of the remedy which are deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. But if we are right in our view of the nature of the present case, we are not called upon to review or consider those cases. If it be true, as we have

endeavored to show, that interest allowed for non payment of judgments is in the nature of statutory damages, and if the plaintiff in the present case has received all such damages which accrued while his judgment remained unpaid, there is no change or withdrawal of remedy. His right was to collect such damages as the State, in its discretion, provided should be paid by defendants who should fail to promptly pay judgments which should be entered against them, and such right has not been destroyed or interfered with by legislation. The discretion exercised by the legislature in prescribing what, if any, damages shall be paid by way of compensation for delay in the payment of judgments is based on reasons of public policy, and is altogether outside the sphere of private contracts.

The well settled rule that in a suit on this New York judgment in another State the interest recoverable is that allowed by the latter, points to the conclusion that such interest is in the nature of damages, and does not arise out of any contract between the parties; for, as is said by Chief Justice Marshall in *Ogden* v. *Saunders*, 12 Wheat. 213, 343, "if the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other State as in New York, and would still retain the stipulation originally introduced into it."

The further contention of the plaintiff in error, that he has been deprived of his property without due process of law, can be more readily disposed of. If, as we have seen, the plaintiff has actually received on account of his judgment all that he is entitled to receive, he cannot be said to have been deprived of his property; and whether or not a statutory change in the rate of interest thereafter to accrue on the judgment can be regarded as a deprivation of property, the adjudication of the plaintiff's claims by the courts of his own State must be admitted to be due process of law. Nor are we authorized by the judiciary act to review this judgment of the state court, because this judgment refuses to give effect to a valid contract or because such judgment in its effect impairs the obligation of a contract. If we did, every case decided in the state courts could be brought here, when the party setting up a

contract alleged that the court took a different view of its obligation from that which he held. *Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

The result of these views is, that we find no error in the record, and that the judgment of the New York Court of Appeals is accordingly *Affirmed.*

Mr. Justice Harlan, with whom concurred Mr. Justice Field and Mr. Justice Brewer, dissenting.

In an action brought in the Supreme Court of New York by John S. Prouty against the Lake Shore and Michigan Southern Railway Company and others to compel the specific performance of a certain contract, it was adjudged, January 26, 1878, that the company pay the plaintiff out of its net earnings $53,184.88, "together with interest thereon *from the entry of said judgment.*" It was also adjudged that if the company, within a time specified, failed to pay to the plaintiff the above principal sum "and such interest," the plaintiff might have execution therefor against the defendant. Judgment was also entered in plaintiff's favor for $1437.73 for his costs and allowance in the action.

By the statutes of New York, in force when this judgment was rendered, seven per cent was the legal rate of interest. It was provided that "every judgment shall bear interest from the time of perfecting the same," that is, "from the time when it is entered." Laws of 1844, c. 324; Rev. Stats. N. Y. Pt. II, c. 4, tit. 3, p. 771, 1st ed.; Laws of 1877, c. 417, pp. 468, 477. It was also provided that "whenever a judgment shall be rendered and execution shall be issued thereon, it shall be lawful to direct, upon such execution, the collection of interest upon the amount recovered, from the time of recovering the same *until such amount be paid.*"

Execution was issued on the above judgment, and, by written endorsement upon it, the sheriff was directed to collect thereon $54,622.61 (which was the aggregate amount, principal and costs, adjudged in favor of the plaintiff,) with interest at seven per cent from the date of the judgment. Was

it competent for the legislature, by the act of 1879, which took effect January 1, 1880, to reduce to six per cent the interest collectible, *after its passage*, on the above judgment? I think it was not, and, therefore, dissent from the opinion and judgment of the court.

It may be conceded, for the purposes of this case, that a judgment, into which is merged a contract that does not itself provide for interest, will bear interest as may be prescribed by the statute in force when the judgment is entered, whatever may have been the rate of interest upon judgments at the time such contract was made. But it does not follow, when interest is given by a judgment in conformity with the statutes in force when it is rendered, that the right thus acquired can be affected or taken away by subsequent legislation. The difficulty is not met by saying that the allowance of interest upon a *judgment* is wholly within legislative discretion, and not a matter of agreement between the parties. Rights may be acquired by legislation that cannot be taken away by subsequent enactments. When the judgment in question was rendered the plaintiff was entitled, by statute, to require the collection of interest upon the amount recovered, from the time of the recovery "until such amount be paid." And that right was asserted in the mode prescribed, when the plaintiff by his endorsement on the execution required the sheriff to collect the amount adjudged with seven per cent interest till paid. Although the contract upon which the judgment was based did not, in terms, provide for interest upon any judgment rendered for its specific performance, it was necessarily implied, in such contract, that the party suing for a breach of it, or suing to compel its specific performance, should receive, from the other party, the amount judicially ascertained to be due, with such interest, if any, as the law allowed, and as the court legally awarded, at the time judgment might be entered. Indeed, it is an implied condition of every agreement that the party failing to comply with its terms shall be liable to the party injured in such sum as the law will give him at the time the default is adjudged.

Mr. Justice Story says: "Express contracts are, where the

terms of the agreement are openly avowed and uttered at the time of the making of it. Implied contracts are such as reason and justice dictate from the nature of the transaction, and which, therefore, the law presumes that every man undertakes to perform. The Constitution makes no distinction between the one class of contracts and the other. It then equally embraces and applies to both. Indeed, as by far the largest class of contracts in civil society, in the ordinary transactions of life, are implied, there would be very little object in securing the inviolability of express contracts if those which are implied might be impaired by state legislation. The Constitution is not chargeable with such folly or inconsistency." 2 Story, Const. § 1377. The principle was applied in *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131, 134, where this court, speaking by Justice Miller, said: "The vice of the argument of the Supreme Court of Louisiana is in limiting the protecting power of the constitutional provision against impairing the obligation of contracts to express contracts, to specific agreements, and in rejecting that much larger class in which one party having delivered property, paid money, rendered service, or suffered loss at the request of or for the use of another, the law completes the contract by implying an obligation on the part of the latter to make compensation. This obligation can no more be impaired by a law of the State than that arising on a promissory note."

This principle was illustrated in another case in this court. I allude to *McCracken* v. *Hayward*, 2 How. 608, 613. The question there was as to the validity of a statute of Illinois, prohibiting property from being sold on execution for less than two-thirds of the valuation made by appraisers, pursuant to the directions contained in the law. That statute was held to impair the obligation of contracts made before its passage, and to be inoperative upon executions issuing on judgments founded on such contracts. This court said: "The obligation of the contract between the parties in this case was to perform the promises and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an exe-

cution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract, as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. If the defendant had made such an agreement as to authorize a sale of his property, which should be levied on by the sheriff, for such price as should be bid for it at a fair public sale on reasonable notice, it would have conferred a right on the plaintiff which the Constitution made inviolable; and it can make no difference whether such right is conferred by the terms or law of the contract."

A case in point is *Cox* v. *Mailatt*, 36 N. J. Law, (7 Vroom,) 389. The principal question there, as stated by the court, was, "whether after a judgment has been obtained, which carries a certain rate of interest under the then existing law, a change of that law by a subsequent statute, increasing or diminishing the former rate of interest, will affect the amount that can be collected under execution upon such judgment." The court said: "The effect of a judgment is to fix the rights of the parties thereto by the solemn adjudication of a court having jurisdiction. How those rights can be affected by any subsequent legislation is not apparent. This contract of the highest authority cannot be disturbed so long as it remains unreversed and unsatisfied. Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they be evidenced by statute, by judgment, or by agreement of the parties." After referring to several cases, the court proceeds: "It will be seen that these cases are decided on the principles above stated, that the parties' rights are fixed by the judgment of the court, and the judgment carries with it its incidents, equally determined and all relating to the date of its entry." It is of no consequence, in the present case, that the judgment, although calling for interest on the amount adjudged, did not specify the rate of interest. The statute, then in force, fixed the rate, and, as said in *Amis* v. *Smith*, 16 Pet. 303, 311, interest upon

a judgment, secured by positive law, is "as much a part of the judgment as if expressed in it."

It seems to me that the law made it a part of the contract upon which Prouty's judgment was founded, that for any breach of it, or for any failure to perform it by the other party, he should be entitled to sue and to have judgment for such sum, whether principal or interest, as the law, *at the time of judgment*, entitled him to demand. The statute in question took away his right to receive a part of the amount which a court, having full jurisdiction of the subject-matter and of the parties, adjudged to be due him, and, therefore, impaired the obligation of the contract.

If the statute in question is constitutional, then it was competent for the legislature, not simply to reduce the interest upon unsatisfied judgments previously rendered, but to take away the right to all interest after its passage. Indeed, I do not see why, under the reasoning of the court, the legislature might not, after the judgment was rendered, have forbidden the collection of any interest whatever upon it. If it be said that the right to interest, at seven per cent, had become established, up to the passage of the last act, and could not be affected by its provisions, with equal force it could be said that the right to interest from the entry of the judgment, until the payment of the principal, was established by the judgment. Nor do I see why, under the principles of the opinion, it was not competent for the legislature to have increased the rate of interest, and thus compelled the defendant to pay more than it was bound to pay when the judgment was rendered.

Look at the question in another aspect. Suppose, by the law in force when a judgment is rendered, the plaintiff is entitled to execution upon it. If the legislature, subsequently, for the purpose of favoring debtors requires the return of all outstanding executions, and forbids any execution upon judgments or decrees for money, to be issued for twelve months, when the law, at the date of the judgment, authorized an execution to be issued in ten days after judgment, could not such legislation, under the principles of the decision in this

case, be sustained as not impairing the obligations of contracts? Those who would seek to sustain legislation of that character need only say that, as the right to execution upon a judgment for money was not given by the agreement of the parties, but by the statute regulating executions, it was within legislative discretion to modify the law in force when the judgment was rendered, in respect to the mode of enforcing the judgment. I do not think that such an argument would be heeded. Yet, I take leave to say, with all respect for the opinions of others, that it ought to prevail, in the case supposed, if it be true, as is now held, that it is competent for the legislature, consistently with the contract clause of the Constitution, to declare that a party, adjudged by a court of competent jurisdiction, in a case *ex contractu*, to pay a given sum with interest until paid, at the rate then established, shall not be required to perform that judgment in all of its parts, but may go acquitted by paying less interest than that so fixed both by the existing law and by the judgment.

There is still another view of the case which, in my opinion, is conclusive against that taken by the court. If the rights of the parties as established by the judgment were not protected by the clause of the Constitution forbidding the passage of State laws impairing the obligations of contracts, was not the right of Prouty to collect the sum, principal and interest, awarded him by the judgment, a right of property, of which he could not be deprived by legislative enactment? Could the legislature have taken from him the right to collect the principal sum found to be due from the railroad company? Clearly not, if any effect whatever is to be given to that clause of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law. But if the judgment, as respects the principal sum, was property of which Prouty could not be arbitrarily deprived, why is not the interest which the judgment, in conformity with law, awarded to him, equally property, and entitled to like protection? In *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 289, 291, it was held that a judgment against a municipal

corporation for damages caused by a mob was not within the protection of the contract clause of the Constitution. But the court conceded that such judgments, "though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value." It, however, held that the Fourteenth Amendment did not apply to that case, for the reason that, as the judgments continued an existing liability against the city, the relators could not be said to have been deprived of them. In that case, Mr. Justice Bradley concurred in the judgment on a special ground, namely, "that remedies against municipal bodies for damages caused by mobs, or other violators of law unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease." But he, also, said: "An ordinary judgment of damages for a tort, rendered against the person committing it, in favor of the person injured, stands upon a very different footing. Such a judgment is founded upon an absolute right, and is as much an article of property as anything else that a party owns; and the legislature can no more violate it without due process of law than it can any other property. To abrogate the remedy for enforcing it, and to give no other adequate remedy in its stead, is to deprive the owner of his property within the meaning of the Fourteenth Amendment. The remedy for enforcing a judgment, is the life of a judgment, just as much as the remedy for enforcing a contract is the life of the contract. Whilst the original Constitution protected only contracts from being impaired by State law, the Fourteenth Amendment protects every species of property alike, except such as in its nature and origin is subject to legislative control."

In my opinion, the right which a party has by a judgment for money — at least where the cause of action is *ex contractu* — to collect the sum awarded thereby, with interest until paid, at the rate then established by law, is a right of property of which he cannot be deprived by mere legislative enactment,

even to the extent of reducing the interest collectible under such judgment.

I am authorized by MR. JUSTICE FIELD and MR. JUSTICE BREWER to say that they concur in this opinion.

HARDEE *v.* WILSON.

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

No. 34. Argued November 3, 1892. — Decided November 21, 1892.

Where a decree in equity is a joint one against all the defendants, all the parties defendant must join in the appeal from it.

There is nothing in the facts in this case to take it out of the operation of that general rule.

THE case is stated in the opinion.

Mr. William D. Harden (with whom was *Mr. Charles N. West* on the brief) for appellant.

Mr. Thomas P. Ravenel (with whom were *Mr. Rufus E. Lester* and *Mr. Livingston Kenan* on the brief) for appellee.

MR. JUSTICE SHIRAS delivered the opinion of the court.

It appears by this record that Benjamin J. Wilson filed in the Superior Court of Washington County, in the State of Georgia, his bill of complaint against James M. Minor, Annie E. Minor and John L. Hardee, and that the cause was subsequently removed into the Circuit Court of the United States for the Southern District of Georgia. In his bill the complainant charged that a certain conveyance of land, made on the 18th day of March, 1876, by said James M. Minor to himself as trustee for his wife, Annie E. Minor, and a certain

other deed of conveyance of the same lands, made on the 6th day of February, 1877, to John L. Hardee, were without consideration, and with the intention of putting said lands beyond the reach of his creditors, and particularly with the intention to delay, hinder and defraud him, the said complainant, in the collection of a certain judgment in his favor against Minor, and prayed that said deeds might be declared null and void as to his said demand.

Answers were filed to this bill by Hardee, and by Minor and his wife, and the case was so proceeded with that, on the 12th day of December, 1887, a final decree was entered declaring, in effect, that the trust deed in favor of Minor's wife was void, and that the deed to Hardee could only operate as a security for the payment of a certain sum of money found to be due Hardee on an account stated by a master.

From this decree Hardee has appealed, and the question presents itself whether his appeal can be heard in the absence of Minor and his wife, who were codefendants with him in the court below, and who have taken no appeal.

Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal. *Owings* v. *Kincannon*, 7 Pet. 399; *Mussina* v. *Cavazos*, 6 Wall. 355.

In the present case, Hardee, the appellant, complains that the decree below was wrong, as respects him, in two particulars: First, in declaring that the deed, absolute in form, from Minor and wife to him, was merely a security; and, second, if the deed were a security only, in fixing the amount of his debt at too small a sum. And as it was the interest of Minor and wife to have their deed to Hardee held to be a security, merely, and also to have the debt thereby secured found as small as possible, particularly as the decree gave them a beneficial interest in the proceeds of the sale of the land ordered by the decree, it was contended that it would be for the interest of Minor and wife to have the decree stand, and that hence Hardee might prosecute his appeal alone.

At the same time it was said that if this were not so, the Minors had disclaimed any interest. But the disclaimer was

nothing more than that the Minors agreed with the position taken by Hardee, which, however, the Circuit Court held to be untenable. And it further appears that one matter in controversy in the court below was the validity of the deed of trust declared by Minor in favor of his wife, and which deed was declared by the decree in the court below to have been given without consideration, and in fraud of Wilson and other creditors of Minor, and as respects this feature of the decree it was the right of Minor and wife to have taken an appeal. In the case of *Masterson* v. *Herndon*, 10 Wall. 416, it was held that, "It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. In the case of *Williams* v. *Bank of the United States*, 11 Wheat. 414, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd* v. *Daniel*, 16 Pet. 521, it is said distinctly that such is the proper course. This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession; but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment was to bar the party who refused to proceed,

from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal. The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the Circuit Court for an appeal that Maverick [the codefendant] refused to prosecute the appeal with him. We do not attach importance to the technical mode of proceeding called summons and severance. We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made in permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested."

In the case of *Downing* v. *McCartney*, reported in the Appendix to 131 U. S. at page 98, where the decree below was joint against three complainants, and one only appealed, and there was nothing in the record showing that the other

complainants had notice of this appeal, or that they refused to join in it, the appeal was therefore dismissed. *Mason* v. *United States*, 136 U. S. 581, was a case where a postmaster and the sureties on his official bond being sued jointly for a breach of the bond, he and a part of the sureties appeared and defended. The suit was abated as to two of the sureties, who had died, and the other sureties made default, and judgment of default was entered against them. On the trial a verdict was rendered for the plaintiff, whereupon judgment was entered against the principal and all the sureties for the amount of the verdict. The sureties who appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default. The plaintiff in error moved to amend the writ of error by adding the omitted parties as complainants in error, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed. In *Feibelman* v. *Packard*, 108 U. S. 14, a writ of error was sued out by one of two or more joint defendants, without a summons and severance or equivalent proceeding, and was therefore dismissed.

The state of facts shown by the record brings the present case within the scope of the cases above cited, and it follows that the appeal must be

Dismissed.

COOK *v.* HART.

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

No. 1067. Argued October 31, November 1, 1892. — Decided November 21, 1892.

Ker v. *Illinois*, 119 U. S. 436, and *Mahon* v. *Justice*, 127 U. S. 700, affirmed as to the following points:

(1) That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State;

Statement of the Case.

(2) That the question of the applicability of this doctrine to a particular case is as much within the province of a state court, as a question of common law or of the law of nations, as it is of the courts of the United States.

Ex parte Royall, 117 U. S. 241, and *Ex parte Fonda*, 117 U. S. 516, adhered to as to the point that where a person is in custody under process from a state court of original jurisdiction for an alleged offence against the laws of that State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, a Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, which discretion will be subordinated to any special circumstances requiring immediate action.

The exercise of the power to issue writs of *habeas corpus* to a state court proceeding in disregard of rights secured by the Constitution and laws of the United States, before the question has been raised or determined in the state court, is one which ought not to be encouraged.

In this case the court affirms the judgment of the Circuit Court refusing to discharge on writ of *habeas corpus* a prisoner who had been surrendered by the Governor of Illinois on the requisition of the Governor of Wisconsin as a fugitive from justice, but who claimed not to have been such a fugitive, it appearing that the case was still pending in the courts of the State of Wisconsin, and had not been tried upon its merits; and this court further held,

(1) That no defect of jurisdiction was waived by submitting to a trial on the merits;

(2) That comity demanded that the state courts should be appealed to in the first instance;

(3) That a denial of his rights there would not impair his remedy in the Federal Courts;

(4) That no special circumstances existed here such as were referred to in *Ex parte Royall*, 117 U. S. 241.

This was an appeal from an order of the Circuit Court for the Eastern District of Wisconsin discharging a writ of *habeas corpus*, and remanding the petitioner Charles E. Cook to the custody of the sheriff of Dodge County, Wisconsin. The facts of the case were substantially as follows:

On March 9, 1891, the governor of Wisconsin made a requisition upon the governor of Illinois for the apprehension and delivery of Cook, who was charged with a violation of section 4541 of the laws of Wisconsin, which provides that "any officer, director, . . . manager, . . . or agent of any bank, . . . or of any person, company, or corporation, engaged in whole or in part in banking, brokerage, . . .

or any person engaged in such business in whole or in part, who shall accept or receive on deposit or for safe keeping, or to loan, from any person, any money . . . for safe keeping or for collection, when he knows or has good reason to know, that such bank, company or corporation, or that such person is unsafe or insolvent, shall be punished," etc. Rev. Stat. Wis. § 4541. The affidavits annexed to the requisition tended to show that the petitioner Cook and one Frank Leake, in May, 1889, opened a banking office at Juneau, in the county of Dodge, styled the "Bank of Juneau," and entered upon and engaged in a general banking business, with a pretended capital of $10,000 and continued in such business, soliciting and receiving deposits up to and including June 20, 1890, when the bank closed its doors; that during all this time Cook had the general supervision of the business, and was the principal owner of the bank, and all business was transacted by him personally, or by his direction by one Richardson, acting as his agent; that Cook frequently visited the bank, and well knew its condition; that from January 6 to June 20, 1890, Cook, by the inducements and pretences held out by the bank, received deposits from the citizens of that county to the amount of $25,000; that this was done by the express order and direction of Cook, and such amount appeared upon the books of the bank at the time it failed as due to its depositors; that Cook, while receiving these deposits, drew out of the bank all of its pretended capital stock, if any were ever put in, and also all the deposits, except the sum of $5048 in money and securities, which was in the bank at the time it closed; that on June 23, 1890, Cook and Leake assigned their property for the benefit of their creditors; that on the sixth of January, 1890, and from that time onward, Cook knew and had good reason to know that both he and Leake and the bank were each and all of them unsafe and insolvent; that on June 20, 1890, at about four o'clock in the afternoon, the said Cook and Leake accepted and received a deposit in said bank from one Herman Becker, to the amount of $175 in money; and that said deposit was received by direction and order of the said Cook, he knowing that said bank was unsafe and insolvent. There

was also annexed a complaint setting forth substantially the same facts, and a warrant issued by a justice of the peace for Dodge County for the apprehension of Cook. Upon the production of this requisition, with the documents so attached, the governor of Illinois issued his warrant for the arrest and delivery of Cook to the defendant, as agent of the executive authority of the State of Wisconsin. Cook was arrested by the sheriff of Cook County, Illinois, and on the same day, and while still in the custody of the sheriff, procured a writ of *habeas corpus* from the Circuit Court of Cook County to test the legality of his arrest. That court on June 6, 1891, decided that the arrest was legal, remanded Cook to the custody of the sheriff, and he was thereupon delivered to the defendant as executive agent, and conveyed to Wisconsin, where he was examined before the magistrate issuing the warrant, and held to answer the charge. During the September term of the Circuit Court of that county an information was filed against him, charging him with the offence set out in the original complaint. Upon his application the trial was continued to the term of said court beginning in February, 1892. He appeared and was arraigned at that term, pleaded not guilty, and the trial was begun, when and during the pendency of such trial, Cook sued out a writ of *habeas corpus* from the Circuit Court of the United States, claiming that his extradition from Illinois to Wisconsin, was in violation of the Constitution and laws of the United States. It was established upon the hearing, to the satisfaction of the court below, that Cook for some years prior to the 20th day of June, 1890, and for some years prior to his arrest upon the warrant of the executive of Illinois, had been and still was a resident of the city of Chicago; that he made occasional visits to Wisconsin in connection with his banking business at Juneau and elsewhere; that he left Chicago on June 17, 1890, and went to Hartford, in the county of Washington, State of Wisconsin, where he spent the whole of the 18th day of June, proceeding thence to Beaver Dam, in the county of Dodge, where he was engaged during the whole of the 19th day of June with business not connected with the Bank of Juneau; that early in the morn-

ing of June 20 he left Beaver Dam, and made a continuous journey to Chicago, arriving there at 2 o'clock in the afternoon; and that he did not, on the occasion of that visit to Wisconsin, visit or pass through the village of Juneau, and had not been there for some three weeks prior to the closing of the bank on June 20. It was also conceded at the hearing that the particular deposit by Herman Becker, charged in the complaint upon which the requisition proceedings were had, was actually made at 4 o'clock in the afternoon of June 20, and after the petitioner's arrival in Chicago.

Upon the hearing of the writ of *habeas corpus*, the petitioner was remanded to the custody of the defendant, (49 Fed. Rep. 833,) and thereupon he appealed to this court.

Mr. Solicitor General for appellant.

I. The petitioner was not at the time of the commission of the alleged offence, the suing out of the requisition, and his arrest and rendition thereunder, a fugitive from justice.

It is conceded that he was not in Wisconsin at the time when the deposit of Herman Becker was received, but in the State of Illinois, the State of his citizenship. "To be a fugitive from justice in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another." *Roberts* v. *Reilly*, 116 U. S. 80, 97.

This court also held that the fugitive was entitled under the act of Congress, "to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction so that he could not be reached by her criminal process." *Ex parte Reggel*, 114 U. S. 642, 651.

It was held in the following cases that actual personal presence in the demanding State at or after the commission of the crime is essential to make one a "fugitive from justice:" *Ex parte Joseph Smith*, 3 McLean, 121; *Jones* v. *Leonard*, 50 Iowa, 106; *Wilcox* v. *Nolze*, 34 Ohio State, 520; *In re Mohr*, 73 Alabama, 503; *Tennessee* v. *Jackson*, 36 Fed. Rep. 258; *Hartman* v. *Aveline*, 63 Indiana, 344.

II. Unless a fugitive from justice, such arrest and detention was without jurisdiction, unauthorized and void, and contrary to the rights guaranteed the petitioner under the Constitution of the United States, and he should be released by this court on *habeas corpus*.

The Supreme Court of the United States recognizes that this is a personal right, and not alone a right of the State where the accused is found. *Ex parte Reggel*, 114 U. S. 642, 651. See also *United States* v. *Rauscher*, 119 U. S. 407; *Holmes* v. *Jennison*, 14 Pet. 540; *People* v. *Curtis*, 50 N. Y. 321.

The result of all the authorities is that there can be no extradition or interstate rendition, except as authorized by the Constitution and laws of the United States. The States can do nothing except under that authority, and the citizen or the fugitive is exempt, unless his conduct has brought him within its terms.

No one would claim that the Governor of Illinois could send any citizen of that State, demanded by the Governor of Wisconsin, to the latter State for trial. On the other hand, if such action can only be taken under the conditions prescribed by the Constitution and by the laws of the United States, a case not within those conditions is beyond the jurisdiction of the governors. It requires no argument to demonstrate that it is not in conformity with our laws or the spirit of our Constitution to permit the citizen's liberty to be thus invaded and him to be taken to a foreign State, because a ministerial officer, on *ex parte* affidavits, has decided these jurisdictional facts against him (which has not been done in this case, the warrant simply reciting that he, Cook, is "represented to be a fugitive from justice").

All writers are practically agreed that flight from justice is jurisdictional. If jurisdictional, why should not the courts investigate upon *habeas corpus?* If a court with a jury were proceeding without jurisdiction, the right to so investigate could not be denied. The right is asserted to exist even after conviction in *ex parte Royall*, *ubi supra*, a proceeding under an alleged unconstitutional act — that is, a proceeding without jurisdiction. If it exists as the right of the prisoner as against courts and juries, it certainly exists against the mere agent of the State or the governor authorizing his act.

III. The right to be released is as available after removal to the demanding State as before, if the conditions prescribed by the Constitution and laws of Congress did not exist at the date of the crime or extradition proceedings.

Mr. W. C. Williams (with whom was *Mr. P. G. Lewis* on the brief) for appellee.

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

Petitioner claims his discharge upon the ground that he is accused of having illegally received a deposit in his bank at Juneau, when in fact he had not been in Juneau within three weeks before the deposit was received, and that, at the time it was received, which was about 4 o'clock in the afternoon of June 20, 1890, he was in Illinois, and had been in that State for more than two hours before the deposit was received. He had in fact left Beaver Dam, Wisconsin, at an early hour that day, and travelled continuously to Chicago, not stopping at Juneau, and having no actual knowledge of the illegal deposit charged. Upon this state of facts petitioner insists that his journey from Wisconsin to Illinois was not a "fleeing from justice" within the meaning of Article 4, section 2, of the Constitution; that it is essential to the jurisdiction of the trial court that he should have been a fugitive from justice; and hence that the Circuit Court of Dodge County was without authority to try him for the offence charged, and he should,

therefore, be relieved from its custody upon this writ of *habeas corpus*.

We regard this case as controlled in all its essential features by those of *Ker* v. *Illinois*, 119 U. S. 436, and *Mahon* v. *Justice*, 127 U. S. 700. The former case arose upon a writ of error to the Supreme Court of Illinois. The petitioner had pleaded, in abatement to an indictment for larceny in the criminal court of Cook County, that he had been kidnapped from the city of Lima, in Peru, forcibly placed on board a vessel of the United States in the harbor of Callao, carried to San Francisco, and sent from there to Illinois upon a requisition made upon the Governor of California. After disposing of the point that he had not been deprived of his liberty without "due process of law," the court intimated, in reply to an objection that the petitioner was not a fugitive from justice in the State of California, that "when the governor of one State voluntarily surrenders a fugitive from the justice of another State to answer for his alleged offences, it is hardly a proper subject of inquiry on the trial of the case to examine into the details of the proceedings by which the demand was made by the one State and the manner in which it was responded to by the other." p. 441. The court further held that the petitioner had not acquired by his residence in Peru a right of asylum there, a right to be free from molestation for the crime committed in Illinois, or a right that he should only be removed thereto in accordance with the provisions of the treaty of extradition; and winds up the opinion by observing that "the question of how far his forcible seizure in another country, and transfer by violence, force or fraud to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws or treaties of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence. . . .

However this may be, the decision of that question is as much within the province of the State court as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States." p. 444.

The case of *Mahon* v. *Justice*, 127 U. S. 700, arose upon an application of the Governor of West Virginia to the District Court of the United States for the District of Kentucky, for the release of Mahon upon a writ of *habeas corpus*, upon the ground that he had been, while residing in West Virginia, and in violation of her laws, without warrant or other legal process, arrested by a body of armed men from Kentucky, and, by force and against his will, carried out of the State to answer to a charge of murder in the State of Kentucky. As stated in the opinion of the court, the governor "proceeded upon the theory that it was the duty of the United States to secure the inviolability of the territory of the State from the lawless invasion of persons from other States, and when parties had been forcibly taken from her territory and jurisdiction to afford the means of compelling their return." p. 704. This court held that, while the accused had the right while in West Virginia of insisting that he should not be surrendered to the Governor of Kentucky, except in pursuance of the acts of Congress, and was entitled to release from any arrest in that State not made in accordance with them, yet that as he had been subsequently arrested in Kentucky under the writs issued under the indictments against him, the question was not as to the validity of the arrest in West Virginia, but as to the legality of his detention in Kentucky. "The only question, therefore," said the court, "presented for our determination is whether a person indicted for a felony in one State, forcibly abducted from another State and brought to the State where he was indicted by parties acting without warrant or authority of law, is entitled under the Constitution or laws of the United States to release from detention under the indictment by reason of such forcible and unlawful abduction." p. 706. After a full review of all the prior authorities upon the point, the court came to the conclusion that the

jurisdiction of the court of the State in which the indictment was found was not impaired by the manner in which the accused was brought before it. "There is, indeed," said the court, "an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another State, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offence charged. They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another State." p. 712.

There was a vacancy in the office of Chief Justice at the time, and two members of the court (Mr. Justice Bradley and Mr. Justice Harlan) dissented upon the ground that the Constitution had provided a peaceful remedy for the surrender of persons charged with crime; that this clearly implied that there should be no resort to force for this purpose; that the cases upon which the court relied had arisen where a criminal had been seized in one country and forcibly taken to another for trial, in the absence of any international treaty of extradition; and that as the application in that case was made by the governor of the State whose territory had been lawlessly invaded, he was entitled to a redelivery of the person charged.

These cases may be considered as establishing two propositions: 1. That this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State. 2. That the question of the applicability of this doctrine to a particular case is as much within the province of a State court, as a question of common law or of the law of nations, as it is of the courts of the United States.

An attempt is made to distinguish the case under consideration from the two above cited, in the fact that those were cases of kidnapping by third parties, by means of which the accused were brought within the jurisdiction of the trial State,

and the State had not acted, as here, under legal process, or been in any way a party to the proceedings; that they were cases of tort for which the injured parties could sue the tort-feasors, while in the case under consideration the action is under and by virtue of an act of Congress, and hence the party can ask this court to inquire whether the power thus invoked was properly exercised. The distinction between cases of kidnapping by the violence of unauthorized persons without the semblance of legal action, and those wherein the extradition is conducted under the forms of law, but the governor of the surrendering State has mistaken his duty, and delivered up one who was not in fact a fugitive from justice, is one which we do not deem it necessary to consider at this time. We have no doubt that the governor upon whom the demand is made must determine for himself, in the first instance, at least, whether the party charged is in fact a fugitive from justice, (*Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80,) but whether his decision thereon be final is a question proper to be determined by the courts of that State. A proceeding of that kind was undertaken in this case when Cook applied to the State Circuit Court of Chicago to obtain a writ of *habeas corpus* to test the legality of his arrest. Upon the hearing of this writ the court decided the arrest to be legal, and remanded Cook to the custody of the sheriff, by whom he was delivered to the defendant as executive agent of the State of Wisconsin. Cook acquiesced in this disposition of the case, and made no attempt to obtain a review of the judgment in a superior court. Long after his arrival in Wisconsin, however, and after the trial of his case had begun, he made this application to the Circuit Court of the United States for that district upon the ground he had originally urged, namely, that he was not a fugitive from justice within the meaning of the Constitution and laws of the United States. That court decided against him, holding that he had been properly surrendered.

It is proper to observe in this connection that, assuming the question of flight to be jurisdictional, if that question be raised before the executive or the courts of the surrendering State, it is presented in a somewhat different aspect after the accused

has been delivered over to the agent of the demanding State, and has actually entered the territory of that State, and is held under the process of its courts. The authorities above cited, if applicable to cases of interstate extradition, where the forms of law have been observed, doubtless tend to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding State; that it is too late for him to object even to jurisdictional defects in his surrender, and that he is rightfully held under the process of the demanding State. In fact, it is said by Mr. Justice Miller in *Ker* v. *Illinois*, p. 441, that "the case does not stand where the party is in court and required to plead to an indictment, as it would have stood upon a writ of *habeas corpus* in California." Some reasons are, however, suggested for holding that, if he were not in fact a fugitive from justice and entitled to be relieved upon that ground by the courts of the surrendering State, he ought not to be deprived of that right by a forced deportation from its territory before he could have an opportunity of suing out a writ of *habeas corpus*. That question, however, does not necessarily arise in this case, since the record before us shows that he did sue out such writ before the criminal court of Cook County, and acquiesced in its decision remanding him to the custody of the officer.

As the defence in this case is claimed to be jurisdictional, and, in any aspect, is equally available in the State as in the Federal courts, we do not feel called upon at this time to consider it or to review the propriety of the decision of the court below. We adhere to the views expressed in *Ex parte Royall*, 117 U. S. 241, and *Ex parte Fonda*, 117 U. S. 516, that, where a person is in custody under process from a state court of original jurisdiction for an alleged offence against the laws of that State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court of the United States has a discretion whether it will discharge him in advance of his trial in the court in which he is indicted, although this discretion will be subordinated to any special circumstances requiring immediate action. While the Federal courts have the power and may discharge the accused in ad-

vance of his trial, if he is restrained of his liberty in violation of the Federal Constitution or laws, they are not bound to exercise such power even after a State court has finally acted upon the case, but may, in their discretion, require the accused to sue out his writ of error from the highest court of the State, or even from the Supreme Court of the United States. As was said in *Robb* v. *Connolly*, 111 U. S. 624, 637: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." We are unable to see in this case any such special circumstances as were suggested in the case of *Ex parte Royall* as rendering it proper for a Federal court to interpose before the trial of the case in the state court. While the power to issue writs of *habeas corpus* to state courts which are proceeding in disregard of rights secured by the Constitution and laws of the United States may exist, the practice of exercising such power before the question has been raised or determined in the state court is one which ought not to be encouraged. The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with the Federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the Federal court will remain unimpaired. So far from there being special circumstances in this case to show that the Federal court ought to interfere, the fact that, with ample opportunity to do so, he did not apply for this writ until after the jury had been sworn and his trial begun in the state court, is of itself a special circumstance to indicate that the Federal court should not interpose at this time.

The judgment of the court below refusing the discharge, is therefore,

Affirmed.

STOTESBURY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 30. Argued November 11, 1892. — Decided November 21, 1892.

A decision by the Commissioner of Internal Revenue on an application for the refunding of taxes collected, authorizing the same to be refunded, which was made under the authority conferred upon him by the act of July 13, 1866, c. 184, § 9, 14 Statutes, pages 98, 109, 111, (Rev. Stat. § 3220) and was reported to the Secretary of the Treasury for his consideration and advisement July 26, 1871, under the Treasury Regulations then in force, is held by the court not to have been a final decision, but to have been subject to revision by the secretary and to be returned by him to the successor of the Commissioner for reëxamination.

On December 19, 1870, the firm of Harris & Stotesbury appealed to the Commissioner of Internal Revenue for the refunding of $67,335.85, internal revenue taxes claimed to have been erroneously assessed and collected from them. This claim was examined and rejected and notice thereof given to the claimants. An application for a rehearing was made and sustained. On July 26, 1871, the Commissioner having examined the claim, signed and transmitted to the Secretary of the Treasury the following schedule:

"No. 99. — *A schedule of claims for the refunding of taxes erroneously assessed and paid, which have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement in accordance with regulations dated January* 12, 1866.

District.	Claimants.	Amount.	Disposition.	Reason of disposition.
1st Penn.	Harris & Stotesbury	$67,335 85	Allowed	Were not sugar-refiners within the definition of section 75 of an act to provide internal revenue, etc., approved July 1, 1862, as amended by the act approved March 3, 1863.
" "	Harris, Heyle & Co.	26,642 96	"	

"I hereby certify that the foregoing claims for the refunding of taxes erroneously assessed and paid have been examined and allowed, and are transmitted to the Secretary of the Treasury for his consideration and advisement. A. PLEASONTON, *Commissioner.*"

Statement of the Case.

On August 8, 1871, Commissioner Pleasonton resigned, and on the next day J. W. Douglass, having been duly appointed his successor, entered upon the discharge of the duties of the office. On that day the Secretary of the Treasury sent to him this letter:

"TREASURY DEPARTMENT,

"WASHINGTON, D. C., *August* 9, 1871.

"SIR: The enclosed refunding claims of Harris & Stotesbury and Harris, Heyle & Co., transmitted by your predecessor to this office for approval, would seem to have been passed by a reversal of the construction of the law relative to sugar manufactures which obtained during the whole period of its existence.

"Under these circumstances I deem it proper to return them to you for reëxamination, declining to consider them unless again submitted by your office.

"Respectfully yours, GEO. S. BOUTWELL,

"*Secretary of the Treasury.*

"Hon. J. W. Douglass, Com'r of Int. Revenue."

And on the 9th of November, 1871, the Commissioner endorsed on the claim these words: "November 9, 1871. Rejected on reëxamination. J. W. Douglass, Commissioner;" notice of which action was duly given to the claimants. On the wrapper or jacket enclosing the papers in this claim appear the following endorsements:

"(Office of Internal Revenue. Rec'd Dec. 19, '70. Div. 1, sec. 3.)

Coll'r not'd Dec. 20, '70. J. D. 3395.

Wrote claimants Nov. 13, '71. J. D.

12, 21, '70.

(46) Claim for refunding taxes collected.

Serial No. 18. No. of draft, ——, $67,335.85.

Harris & Stotesbury, claimant —.

Post-office address, Philadelphia.

Verified by — W. J. POLLOCK, *Collector.*

1 district of Penna.

Assessed upon sp. tax sugar-refiners.
Basis of claim: Claims that they do not refine sugar.
Nov. 9, 1871, rejected on reëxamination.
(Signed) J. W. Douglass, *Comm'r.*
Examined and rejected Dec. 19, 1870, by —
(Signed) Chs. Chesley.
Allowed by Commissioner July 26, 1871.
(Signed) A. Pleasonton,
Commissioner."

No notice was given to the claimants of the action of Commissioner Pleasonton, and it does not appear that they were aware of it until 1880, when, on being informed thereof, they made application for the payment of the money as having been duly allowed them by such decision of Commissioner Pleasonton. This application was denied, but the question of the liability of the government was transmitted by the Secretary of the Treasury to the Court of Claims. A petition in that court was filed in the name of Thomas P. Stotesbury, sole surviving partner of Harris & Stotesbury, and afterwards, on his death, the suit was revived in the name of the present appellants, his executors. The decision was in favor of the government, (23 Ct. Cl. 285,) from which decision the executors brought this appeal.

Mr. Enoch Totten for appellants. *Mr. Thomas W. Neill* filed a brief for same.

Mr. Assistant Attorney General Cotton for appellee.

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

The Court of Claims decided that the action of Commissioner Pleasonton did not constitute a final award binding the government; and whether it was so or not is the question presented to us for decision.

The law under which the Commissioner acted is found in

Rev. Stat. § 3220:[1] "The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, on appeal to him made, to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount or in any manner wrongfully collected." Regulations were prescribed by the Secretary of the Treasury, the only ones of importance in this case being the 3d, 4th, 5th, and 7th, as follows:

"3d. When the appeal has been fully heard and examined, the Commissioner of Internal Revenue must put into the case a certificate of his decision or judgment, with the amount in writing which should be paid back.

"4th. A proper book or docket must be carefully kept in the office of the Commissioner of Internal Revenue, in which should be entered, under its proper date, the name of the claimant, with the amount of the tax which is the subject of appeal, and the final decision of the said Commissioner.

"5th. When from time to time and as the Commissioner of Internal Revenue in the course of his public duties shall complete his examination and give his judgment on these appeal cases, he will transmit a weekly list of them to the First Comptroller of the Treasury, together with all the vouchers upon which, as evidence, he rests his decision, as a matter of account, giving upon the list the proper date, the name of the claimant, and the amount found due each claimant."

"7th. Where the case of an appeal involves an amount exceeding two hundred and fifty dollars, and before it is finally decided, the Commissioner of Internal Revenue will transmit the case, with the evidence in support of it, to the Secretary of the Treasury for his consideration and advisement."

It is contended by appellants that the duty of determining whether any, and, if so, how much, shall be returned to claim-

[1] See the act of July 13, 1866, 14 Stat. 98, c. 184, p. 98, "to reduce Internal Taxation and to amend 'an act to provide Internal Revenue,'" etc. The provision incorporated into Rev. Stat. § 3220 will be found on p. 111, in section 9.

ants, is committed by section 3220 to the Commissioner; that the Secretary has no revising power; and that the regulations which he may prescribe are in respect to the manner of payment, and cannot determine the procedure to be followed by the Commissioner in hearing and deciding upon claims. It may be conceded that the power of final decision is vested in the Commissioner, and that there is no appeal from him to the Secretary of the Treasury; but without inconsistency the power of decision may be vested in one person, and the ordering of rules of procedure in another. Indeed, in ordinary litigation the one is given to the judiciary, while the other is largely prescribed by the legislature. Here the authority to the Secretary to prescribe regulations is given in full and general terms, and certainly it is a very reasonable regulation that the chief financial officer of the government shall be heard by the Commissioner before a final decision is made.

Further, the original internal revenue act, in which by section 44 "the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury," was authorized to pay back duties erroneously and illegally collected by the government, etc., was enacted on June 30, 1864. 13 Stat. c. 173, pp. 223, 239. These regulations were prescribed by the Secretary of the Treasury on January 12, 1866, and on July 13, 1866, the internal revenue act was amended, (14 Stat. c. 184, 98, 111,) section 44 being amended by striking out all after the enacting clause, and inserting in lieu thereof that which now appears as section 3220 of the Revised Statutes. It might well be held that Congress, having knowledge of the Secretary's regulations of January, 1866, by reënacting in modified form section 44, approved these regulations, among them the seventh, the one in question. If that be so, of course there could have been no final action by the Commissioner, but only a transmission of the matter to the Secretary for his consideration and advice.

But if this be not so, and the regulation be considered as in excess of the authority vested in the Secretary of the Treasury, in that it is an attempt to regulate the procedure before the Commissioner, still it cannot be held that there was a final

determination by the Commissioner. Whether these regulations were valid or invalid, the Commissioner acted under them, and, therefore, the meaning and scope of his action must be interpreted by them. The schedule purports to be transmitted to the Secretary for consideration and advisement, in accordance with the regulations. The certificate made to the Secretary repeats the statement. Read in the light of the seventh regulation, it is as though the Commissioner said: "I have examined this claim, and think it should be allowed, but before final decision I await your consideration and advisement." Certainly, if the Commissioner was waiting for such consideration and advisement, he was not making or intending to make a final decision. Not only is this the plain import of the language of the schedule, but the further fact that the Commissioner did not comply with either the third, fourth, or fifth regulations emphasizes the correctness of such construction. He made no formal certificate of his decision or judgment, with the amount in writing which should be paid back; no entry of a decision appears in any docket; and no list, including this award, was ever transmitted by him to the First Comptroller of the Treasury; and the fifth regulation, surely, is within the competency of the Secretary of the Treasury. The facts that he ignored those three provisions, and that he expressly adopted the seventh regulation as the guide to his procedure, make it perfectly clear that no final determination was made or intended by Commissioner Pleasonton. Therefore, the matter was one still pending until the action of Commissioner Douglass, on November 9, 1871, rejecting the claim.

The decision of the Court of Claims was right, and its judgment is

Affirmed.

Counsel for Parties.

SOUTHERN PACIFIC COMPANY *v.* DENTON.

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

No. 403. Submitted November 7, 1892. — Decided November 21, 1892.

Under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, a corporation incorporated in one State only, and doing business in another State, is not thereby liable to be sued in a Circuit Court of the United States, held in the latter State.

The want of the requisite citizenship of parties to give jurisdiction to a Circuit Court of the United States, when apparent on the face of the petition, may be taken advantage of by demurrer.

An objection to the jurisdiction of a Circuit Court of the United States, for want of the requisite citizenship of the parties, is not waived by filing a demurrer for the special and single purpose of objecting to the jurisdiction, or by answering to the merits upon that demurrer being overruled.

The right of a corporation, sued in a Circuit Court of the United States, to contest its jurisdiction for want of the requisite citizenship of the parties, is not affected by a statute of the State in which the court is held, requiring a foreign corporation, before doing business in the State, to file with the secretary of state a copy of its charter, with a resolution authorizing service of process to be made on any officer or agent engaged in its business within the State, and agreeing to be subject to all the provisions of the statute, one of which is that the corporation shall not remove any suit from a court of the State into the Circuit Court of the United States; nor by doing business and appointing an agent within the State under that statute.

A statute of a State, which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of non-residence, is not applicable to actions in a Circuit Court of the United States, held within the State, under Rev. Stat., § 914.

Motion to dismiss or to affirm. The case is stated in the opinion.

Mr. D. A. McKnight for the motion.

Mr. J. Hubley Ashton opposing.

Opinion of the Court.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an action brought January 29, 1889, in the Circuit Court of the United States for the Western District of Texas, against the Southern Pacific Company, by Elizabeth Jane Denton, to recover damages to the amount of $4970, for the death of her son by the defendant's negligence near Paisano in the county of Presidio on January 31, 1888. The petition alleged that "the plaintiff is a citizen of the State of Texas, and resides in the county of Red River, in said State; that the defendant is a corporation duly incorporated under the laws of the State of Kentucky, is a citizen of the State of Kentucky, and is and at the institution of this suit was a resident of El Paso County, in the State of Texas;" that at the day aforesaid and ever since "the defendant was and is engaged in the business of running and propelling cars for the conveyance of freight and passengers over the line of railway extending eastwardly from the city of El Paso, Texas, into and through the counties of El Paso and Presidio and the city of San Antonio, all of the State of Texas; that the defendant is now doing business as aforesaid, and has an agent for the transaction of its business in the city and county of El Paso, Texas, to wit, W. E. Jessup." The county of Red River is in the Eastern District, and the counties of El Paso and Presidio as well as the county of Bexar in which is the city of San Antonio, are in the Western District of Texas. Act of February 24, 1879, c. 97, §§ 2, 3; 20 Stat. 318.

The defendant, by leave of court, filed "an answer or demurrer," "for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this court," demurring and excepting to the petition, because upon the allegations above quoted "it appears that this suit ought, if maintained at all in the State of Texas, to be brought in the district of the residence of the plaintiff, that is to say, in the Eastern District of Texas; and the defendant prays judgment whether this court has jurisdiction, and it asks to be dismissed with its costs; but, should the court overrule this demurrer and exception, the defendant then asks time

and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

The court overruled the demurrer, and allowed a bill of exceptions tendered by the defendant, which stated that the defendant by the demurrer raised the question of the jurisdiction of the court; "and that the court, having inspected the same, as well as the pleadings of the plaintiff, and it appearing therefrom that the plaintiff is alleged to be a citizen of Texas, residing in Red River County, in the eastern judicial district of said State and that the defendant is a corporation created and existing under and by virtue of the laws of Kentucky, and is a citizen of that State, but operating a line of railway, doing business in and having an agent on whom process may be served in the county and judicial district in which this suit is pending, and the court, being of opinion that the facts alleged show this cause to be in the district of the residence of the defendant, and that it ought to take cognizance of the same, overruled said demurrer."

The defendant, after its demurrer had been overruled, answered to the merits, and a trial by jury was had, resulting in a verdict and judgment for the plaintiff in the sum of $4515. The defendant, on May 10, 1890, sued out this writ of error on the question of jurisdiction only, under the act of February 25, 1889, c. 236; 25 Stat. 693. The plaintiff has now moved to dismiss the writ of error or to affirm the judgment, and the motion has been submitted on briefs under Rules 6 and 32 of this court.

By the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866, "No person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States suits shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 434.

Opinion of the Court.

This is a case "where the jurisdiction is founded only on the fact that the action is between citizens of different States." The question whether under that act the Circuit Court of the United States for the Western District of Texas had jurisdiction of the case is a question involving the jurisdiction of that court, which this court is empowered, by the act of February 25, 1889, c. 236, to review by writ of error, although the judgment below was for less than five thousand dollars.

The allegations made in the petition, and admitted by the demurrer, bearing upon this question, are that the plaintiff was a citizen of Texas and resided in the Eastern District thereof, and that the defendant was a corporation incorporated by the law of Kentucky and a citizen of that State, and was a resident of the Western District of Texas, doing business and having an agent in this district. The necessary legal effect of these allegations is that the defendant was a corporation and a citizen of Kentucky only, doing business in the Western District of Texas; and consequently could not be compelled to answer to an action at law in a Circuit Court of the United States, except either in the State of Kentucky, in which it was incorporated, or in the Eastern District of Texas, in which the plaintiff, a citizen of Texas, resided. It has long been settled that an allegation that a party is a "resident" does not show that he is a "citizen," within the meaning of the Judiciary Acts; and to hold otherwise in this case would be to construe the petition as alleging that the defendant was a citizen of the same State with the plaintiff, and thus utterly defeat the jurisdiction. The case is governed by the decision of this court at the last term, by which it was adjudged that the act of 1887, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires an action at law, the jurisdiction of which is founded only upon its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident; and that a corporation cannot, for this purpose, be considered a citizen or a resident of a State in which it has not been incorporated. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449, 453.

It may be assumed that the exemption from being sued in any other district might be waived by the corporation, by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction. *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593.

But in the present case there was no such waiver. The want of jurisdiction, being apparent on the face of the petition, might be taken advantage of by demurrer, and no plea in abatement was necessary. *Coal Co.* v. *Blatchford*, 11 Wall. 172. The defendant did file a demurrer, for the special and single purpose of objecting to the jurisdiction; and it was only after that demurrer had been overruled, and the defendant had excepted to the overruling thereof, that an answer to the merits was filed. Neither the special appearance for the purpose of objecting to the jurisdiction, nor the answer to the merits after that objection had been overruled, was a waiver of the objection. The case is within the principle of *Harkness* v. *Hyde*, in which Mr. Justice Field, speaking for this court, said: "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived." 98 U. S. 476, 479.

The case at bar is not affected by either of the statutes of Texas on which the counsel for the defendant in error relies.

He contends that the plaintiff in error had consented to be sued in the Western District of Texas by doing business and appointing an agent there under the statute of Texas of 1887, c. 128, requiring a foreign corporation, desiring to transact business in the State, "to file with the Secretary of State a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stock-

holders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act," one of which was that any foreign corporation sued in a court of the State, which should remove the case into a court of the United States held within the State, "for the cause that such corporation is a non-resident of this State or a resident of another State from that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this State." General Laws of Texas of 1887, pp. 116, 117.

But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Texas Land Co.* v. *Worsham*, 76 Texas, 556. Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co.* v. *French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the State — so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co.* v.

Woodworth, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. But such an agreement could not, since Congress (as held in *Shaw* v. *Quincy Mining Co.* above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States.

It is further contended, on behalf of the defendant in error, that the case is controlled by those provisions of the statutes of Texas, which make an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from the jurisdiction by reason of non-residence; and which have been held by this court not to violate the Fourteenth Amendment of the Constitution of the United States, forbidding any State to deprive any person of life, liberty or property without due process of law. Rev. Stats. of Texas of 1879, arts. 1241–1244; *York* v. *State*, 73 Texas, 651; *S. C. nom. York* v. *Texas*, 137 U. S. 15; *Kauffman* v. *Wootters*, 138 U. S. 285; *St. Louis &c. Railway* v. *Whitley*, 77 Texas, 126; *Ætna Ins. Co.* v. *Hanna*, 81 Texas, 487.

But the question in this case is not of the validity of those provisions as applied to actions in the courts of the State, but whether they can be held applicable to actions in the courts of the United States. This depends on the true construction of the act of Congress, by which "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held." Rev. Stats. § 914; act of June 1, 1872, c. 255, § 5; 17 Stat. 197.

In one of the earliest cases that arose under this act, this court said: "The conformity is required to be 'as near as may be' — not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the

duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals." *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 300, 301.

Under this act, the Circuit Courts of the United States follow the practice of the courts of the State in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction, and the question whether objections to the jurisdiction and defences on the merits shall be pleaded successively or together. *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473, 488; *Roberts* v. *Lewis*, 144 U. S. 653. But the jurisdiction of the Circuit Courts of the United States has been defined and limited by the acts of Congress, and can be neither restricted nor enlarged by the statutes of a State. *Toland* v. *Sprague*, 12 Pet. 300, 328; *Cowles* v. *Mercer County*, 7 Wall. 118; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286; *Phelps* v. *Oaks*, 117 U. S. 236, 239. And whenever Congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. *Ex parte Fisk*, 113 U. S. 713, 721; *Whitford* v. *Clark County*, 119 U. S. 522.

The acts of Congress, prescribing in what districts suits between citizens or corporations of different States shall be brought, manifest the intention of Congress that such suits shall be brought and tried in such a district only, and that no person or corporation shall be compelled to answer to such a suit in any other district. Congress cannot have intended that it should be within the power of a State by its statutes to prevent a defendant, sued in a Circuit Court of the United States in a district in which Congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on writ of error. To conform to such statutes of a State would "unwisely encumber the administration of the

law," as well as "tend to defeat the ends of justice," in the national tribunals. The necessary conclusion is that the provisions referred to, in the practice act of the State of Texas, have no application to actions in the courts of the United States.

Judgment reversed, and case remanded with directions to render judgment for the defendant upon the demurrer to the petition.

ROOT *v.* THIRD AVENUE RAILROAD COMPANY.

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

No. 39. Argued November 7, 1892. — Decided November 21, 1892.

An inventor applied, September 3d, 1881, for letters patent for an "improvement in the construction of cable railways," the invention consisting in the employment of a connecting tie for the rails, and supports for the slot irons, by which both are rigidly supported from the tie and united to each other, the ties or frames being embedded in concrete, and the rails, the slot irons and the tube being thus connected in the same structure. The invention was conceived in 1876, and used by the inventor in constructing a cable road, which was put into use in April, 1878, and of which he was superintendent until after he applied for the patent, which was granted in August, 1882; *Held*, on the facts,

(1) The use of the invention was not experimental;
(2) The inventor reserved no future control over it;
(3) He had no expectation of making any material changes in it, and never suggested or made a change after the structure went into use, and never made an examination with a view of seeing whether it was defective, or could be improved;
(4) The use was such a public use as to defeat the patent;
(5) The case of *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, considered, and the present case held not to fall within its principles.

This was a suit in equity, brought July 12, 1886, in the Circuit Court of the United States for the Southern District of New York, by Henry Root against the Third Avenue Rail-

road Company, founded on the alleged infringement of letters patent No. 262,126, granted August 1, 1882, to the plaintiff, for an "improvement in the construction of cable railways," on an application filed September 3, 1881.

The specification of the patent said: "My invention relates to cable railways, and it consists in the employment of a connecting tie for the rails, and supports for the slot irons, by which both are rigidly supported from the tie and united to each other. In combination with this construction I employ a substratum of concrete or equivalent material, which will set or solidify and unite the whole into a continuous rigid structure, no part of which is liable to be displaced from its relation to the other, and also provide a support for the roadway. Previous to my invention all cable railways had been constructed of iron ribs of the form of the tube, set at suitable intervals, to which the slot iron or timber, as the case may be, was bolted and the spaces between these ribs filled with wood, to form a continuous tube. Outside and independent of this tube the rails were laid, supported on short ties or other foundations, and were connected horizontally with the iron ribs by short bolts or rods, but were liable to settle by the undermining of their foundation without regard to the tube or the other rail of the track. This would frequently occur by the renewal of the paving outside of the track, the introduction of house connections with the main sewer, or other disturbances of the street. This settling would cause great inconvenience, as the gripping apparatus, which is carried by the rail through the medium of the car or dummy, must travel in a fixed position in the tube, thus making a frequent adjustment of the rails to the tube necessary. The space between the rails and sides of the tube was filled with sand, which could not be securely confined, as the joints in the tube were liable to open by settling, so as to require a frequent relaying of the paving or planking and making the whole insecure and expensive to maintain. In my invention the whole forms a single rigid structure."

The following were the drawings of the patent, Figure 1 being a cross-section and Figure 2 a perspective view:

Statement of the Case.

Fig. 1.

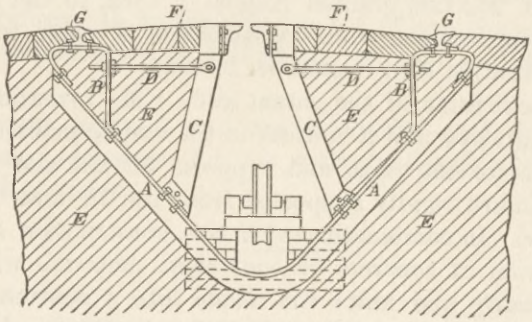
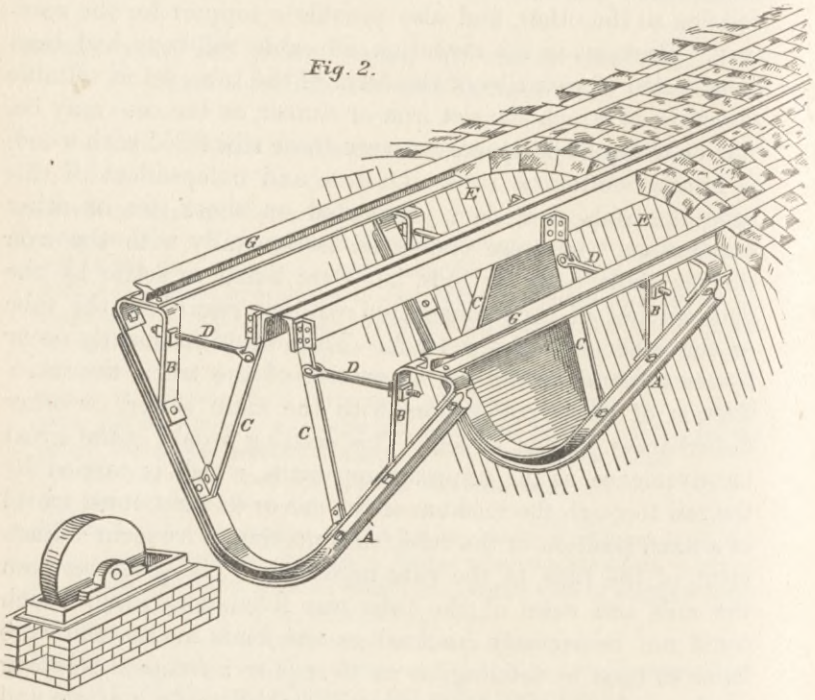


Fig. 2.



The specification said: "A is the main tie, bent so as to embrace the tube, and it has fastened to the ends suitably formed plates or chairs B, to which the rails G are fastened or, if stringers are used, they may be fastened directly to the

ties. The ties may be of various shapes, but in this case I have used old T-rail turned bottom up, with but one curve or bend, as this requires but one heat and is thus cheaper. C are upright supports for the slot irons, having one end secured to the tie at points each side of the bend, sufficiently separated to form the necessary width for the tube. D are tie-rods, connecting said supports with the main ties or frames, through the chairs, rails or stringers, as the case may be. The rods D may be fixed or may be screw-bolts having two nuts at one end for the adjustment of the slot irons to or from each other during construction, or other equivalent means may be employed. E is the concrete, in which the ties or frames are embedded at suitable distances to support the rails and slot irons, which form the top of the tube. This concrete forms a support for the iron-work, the bottom and sides of the tube, and a foundation for the paving F, which fills the space between the rails and slot iron, thus forming an even and durable roadway, which cannot settle below the level of the rails or slot irons or cause a side pressure on the tube, as is the case where the roadway is supported on sand or other independent foundation. As nearly all the weight of the traffic is on the rails, the tendency of the rails to go down is resisted by a deep girder, of which the bent tie forms the top and this continuous mass of concrete forms the bottom. I am aware that concrete, as a material for foundations, underground sewers and conduits, has long been well known, and that concrete, brick-work or ironstone pipe might be used to form the tube between the iron ribs, of the well-known construction, without any particular invention, as these materials are as well known as wood, but it would be still subjected to all the danger of unequal settlement, and the short tie and stringer of wood require frequent renewal and adjustment to the level of the tube. It will be seen that a distinguishing feature of my invention is the connecting of the rails in the same structure as the slot irons and the tube, so that all the parts are maintained in their relative position, and whatever may occur to alter the place of one will have no effect unless the change is sufficient to affect the whole structure." There are seven claims in the patent.

The answer set up in defence a denial of the allegation of the bill that the alleged invention was not in public use or on sale for more than two years prior to the application for the patent; and it alleged that the invention had been in public and profitable use in the United States for more than two years before the date of the application. It also set up want of novelty and non-infringement.

There was a replication to the answer, proofs were taken, and the case was brought to a hearing before the Circuit Court, held by Judge Wallace; and a decree was entered dismissing the bill. From that decree the plaintiff appealed.

The opinion of the Circuit Court, found in 37 Fed. Rep. 673, passed upon a single question. The invention was put into use on the California Street railroad, a cable road in the city of San Francisco, on April 9, 1878, the road having been built by the plaintiff and put into regular operation at that time, and, as constructed, having embodied in it the invention described in the patent. The defendant contended that such use was a public use of the patented invention more than two years before the application, and that, therefore, the patent was invalid. The plaintiff contended, below and here, that such use was an experimental use, and that the application was filed within two years after the plaintiff became satisfied that his invention was a practical success.

Section 4886 of the Revised Statutes, which was in force when this patent was applied for and issued, enacts that a patent may be obtained when the invention has not been "in public use or on sale for more than two years prior to the application"; and § 4920 provides that it may be pleaded and proved as a defence, in a suit at law or in equity on the patent, that the invention "had been in public use or on sale in this country for more than two years before" the application, or had been abandoned to the public.

From the time the cable road mentioned was put into operation, no change or modification was made in its plan or its details. In the summer of 1876, between May and the 1st of September, the plaintiff conceived the invention. Early in that year certain persons in California obtained a franchise for the

construction of a wire cable road on California Street in San Francisco, and the plaintiff was led to believe that he would be called upon, as an engineer, to construct the road. He immediately commenced studying up the matter, to be prepared to recommend a plan of construction, whenever called upon. He testified that he deemed it necessary in a cable road, to get a smooth, even roadway and track, and the tube or tunnel-way for the cable and its carrying machinery strong enough to resist any tendency toward the closing of the slot, to provide for the grip-shank, and to make a structure as a whole so permanent and durable as to stand the wear and jar of heavy street traffic, as well as of the car traffic which it was to carry; and that, for that purpose, he deemed it necessary to have a rib or yoke, with connections to the two rails and the two slot irons, so as to connect them permanently, such yoke to be embedded in and supported by a surrounding mass of concrete to form a support and foundation for the ribs or yokes, the bottom and sides of the cable tube or tunnel, and a foundation for the paving of the roadway. He said that he explained this invention to several persons prior to September 2, 1876, and on that day discussed the subject and explained the invention in a general way at a meeting of the directors of the proposed road. Between that time and January 1, 1877, he made a model containing two of the ribs, with an outside casing and cover, and had the space between filled in with concrete, encasing the skeleton ribs and forming "the shut section" of the completed track and tube.

His invention was adopted by the projectors of the railroad, and active work was commenced upon the structure in July, 1877. The road cost, with the equipment, $418,000, and is about two miles in length, the road-bed and tunnel construction having cost about $225,000. From April 9, 1878, it has been in regular and successful use as a street railroad, carrying passengers for pay. The plaintiff was superintendent of the road from that time until the date of his application for the patent, and afterwards until 1883.

In explanation of his delay in applying for the patent, he testified that before he began the construction of the road, one

of the projectors expressed a doubt in regard to the durability of such a structure, and a fear that the jar of street traffic, as well as that of the cars, would in time loosen the ribs and separate them from the surrounding concrete, and the structure would thus fail; that doubts were expressed also by others; that, while the plaintiff believed that there was more than an even chance of its proving a durable and desirable structure, he still had some doubt in his own mind, which was somewhat increased by the doubts expressed to him by others, in whom he had confidence; that, as causes which would contribute to the destruction of the road, there were (1) the moving of cars over a rail connected to iron-work without the intervention of any wood; (2) the street traffic of trucks and teams, to which such a structure would necessarily be exposed; (3) the changes of temperature; and (4) the effect of time, and the danger of water following down the different members of the iron-work, and the rust separating them from the concrete; and that there was no way of determining these matters but by a trial in a public street through a long period of time.

He was asked whether his own doubts as to the durability of the structure were present at any time after the road was in operation, and if so, when, and by what they were caused. He answered "Yes," and said that during the spring of 1879, the road was extended from Fillmore Street to Central Avenue, by a wooden structure not nearly so durable or costly as the original road; that, in preparing for the extension, he had occasion to dig out and around, so as to expose some of the old structure; that he saw therein some indication of the loosening of the yokes in the concrete; and that he had some little fear at that time that some trouble might arise in that respect. He further testified that the reason he did not apply for the patent within two years from the time when he first put the structure into use, was that, if it proved weak or undesirable, he did not want any patent; and he did not feel certain enough of that fact until the year 1881.

But it did not appear that he expressed his doubts to the projectors of the road, either before its construction was commenced, or during its construction, or while he remained its

superintendent after it was completed; or that he communicated to any one what he noticed during the spring of 1879, or that he entertained any fear arising therefrom.

Mr. Frederic R. Coudert (with whom was *Mr. Charles Frederic Adams* on the brief) for appellant.

The invention was not, within the meaning of the statute, "in public use" for more than two years before Root's application for a patent.

The evidence is unquestionable as to the fact that Root intended this road as an experimental one, and that it was not such a structure as at that time could at once have been known to be a satisfactory construction. It was impossible to test this device except by putting it into practical use. The cost of this practical experiment does not enter the question, as it could not be tested unless a road was actually constructed upon which would be received all the strains due to traffic, etc., by which alone it could be tested. *Elizabeth* v. *Pavement Co.*, 97 U. S. 126.

The respondents have shown in their proof that this patent in suit was involved in an interference. During that interference the question arose which is now taken as defence by respondents, and the Patent Office decided that the use upon the California Street road was an experimental use and such a use as the nature of the invention required.

The "use" of Root's invention in the California Street railroad, upon which the learned judge below rested his decision, was not the sort of "public use" intended by the statute, inasmuch as it was not such a use by the public (as distinguished from a use in public) as is obnoxious to the policy of the statute, implying an abandonment or dedication of the invention to the public, and being therefore likely to mislead the public into assuming that the use of the device was free to all.

"It is settled that a merely experimental use, made in good faith, and not in such wise as to amount to a fraud upon the public, misleading them into a use, in the belief that it is free,

does not destroy the exclusive right of an inventor." *Sisson* v. *Gilbert*, 9 Blatchford, 185. See also *Adams* v. *Edwards*, 1 Fish. Pat. Cas. 1; *Locomotive Truck Co.* v. *Pennsylvania Railroad*, 1 Bann. & Ard. 470.

For the purposes of this question the only "use" of the invention in the California Street road — save in the sense in which it might be said that Root himself was there "using" the device by way of test and experiment — was by the company that owned the road. That that company transported passengers generally, by means of this cable road, does not in any relevant sense constitute those passengers, *i.e.* "the public," the users of the invention itself, as such.

Under the circumstances which here existed nothing can be clearer than that Root's permitting that corporation to use his system as it did in no sense implied or involved a "public use" of the invention, or such an "action or attitude" upon his part with reference thereto, as could fairly be deemed likely to "mislead" the public into supposing that the invention had been abandoned and dedicated, and into acting "on the belief that it was free." For Root, as the regularly employed engineer of the company, in full charge of the construction and at least technical management of its road, was far too closely identified with the company, in respect of the use of his invention, to allow his licensing the employment of his system in that instance to bear even the most remote implication that "the public" was "free to use" the improved device he had originated.

To him, under the circumstances, the California Street corporation was not "the public," or a part of the public, but, on the contrary, a capitalist partner, by whose aid alone he could experimentally test and develop his conception in the only way in which, in view of the nature and uses of the thing invented, such experimental test and development were practicable, *i.e.* by the actual use of the device in an actual road actually carrying such passengers as might offer.

The fact that fares were collected from passengers upon this road (which road we have thus seen to be, in a very relevant and very real sense, an experiment upon the part of

both Root and the company) seems to have been the determining circumstance against us in the mind of the learned Judge. He seems to have assumed that that in itself was proof that the "use" of the California Street road was not a use "substantially for experiment," but a use "substantially for profit"; and, having assumed this, he easily concludes that we are not protected by the principle laid down by this learned court in the *Smith & Griggs Case* (123 U. S. 249), that the receipt of profits is not incompatible with a "substantially experimental" use.

The fact is, of course, that since the principle is that even the regular receipt of profits from the use will not render the invention unpatentable, provided only that the "use" from which such profits are received is "substantially experimental in character," the question whether this proviso is complied with in a given case must be determined by some other (and better) test than that afforded by the receipt of profits. An adequate, effectual trial and testing of Mr. Root's invention practically involved its embodiment and operation in the manner and on the scale in and on which it was embodied and operated in the California Street road; and this being so, and Mr. Root's backers having been willing to risk their capital in the experiment, there was no reason in law or policy why the experiment should not be thus made, or why, when it was so made, the operation of the system which was required for adequately testing it should not have been allowed, at the same time, to secure for the investors the return or "profit" which the passengers who happened to be served by the carrying on of the experiment were willing to pay for the accommodation.

With all respect to the learned Circuit Judge, we submit that the principles recognized by this court in the *Nicholson Pavement Case*, 97 U. S. 126, fully established the patentability of Root's invention, notwithstanding its embodiment in the California Street road.

As to the necessity of complete and public use in experimenting, the cable road is even stronger than the pavement. The latter can be much less in extent than the former. It

would not be possible to experiment with any but a complete cable road. A block or two or three blocks would not answer, for it would not be practicable to run cars regularly and constantly over such a short section, the city would not permit such a road nor such an experiment, nor could any one be induced to undertake it. It becomes evident, therefore, that, conceding a desire to experiment, a full-length, practically operating, cable road upon a public highway would be necessary.

A pavement might well sustain the stress of public traffic for a year or two, or the road-bed support the superstructure of a railroad for a like period; but if, at the end of two or three years, they should fail through inherent weakness, or wear out, they would be of absolutely no commercial value. Durability, of all qualities, is the *sine qua non* of such structures; without it they are worthless, and the same criterion should not be applied to them as to a machine for making a staple article, such, for example, as buckles.

This point should be kept in mind, in comparing this case with the *Smith & Griggs Case*, 23 U. S. 249.

See also the following cases: *Railway Register Co.* v. *Broadway &c. Railroad*, 26 Fed. Rep. 522; *Beedle* v. *Bennett*, 122 U. S. 71; *Graham* v. *McCormick*, 11 Fed. Rep. 859; *S. C.* 10 Bissell, 39; *Campbell* v. *New York City*, 9 Fed. Rep. 500; *Sinclair* v. *Backus*, 4 Fed. Rep. 539; *Campbell* v. *James*, 17 Blatchford, 42; *Birdsell* v. *McDonald*, 1 Bann. & Ard. 165; *Jones* v. *Sewall*, 6 Fish. Pat. Cas. 343; *Winans* v. *N. Y. & Harlem Railroad Co.*, 4 Fish. 1.

Mr. Edmund Wetmore (with whom was *Mr. Herbert Knight* on the brief) for appellee.

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

The Circuit Court truly says, in its opinion: "Manifestly the complainant received a consideration for devising and consenting to the use of an invention which was designed to be a

complete, permanent structure, which was to cost a large sum of money, and which he knew would not meet the expectation of those who had employed him, unless it should prove to be in all respects a practically operative and reasonably durable one. If he had entertained any serious doubts of its adequacy for the purpose for which it was intended, it would seem that he would not have recommended it in view of the considerable sum it was to cost. At all events, he did not treat it as an experimental thing, but allowed it to be appropriated as a complete and perfect invention, fit to be used practically, and just as it was, until it should wear out, or until it should demonstrate its own unsuitableness. He turned it over to the owners without reserving any future control over it, and knowing that, except as a subordinate, he would not be permitted to make any changes in it by way of experiment; and at the time he had no present expectation of making any material changes in it. He never made or suggested a change in it after it went into use, and never made an examination with a view of seeing whether it was defective, or could be improved in any particular."

It is contended by the plaintiff that the principles recognized by this court in *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, establish the patentability of the plaintiff's invention, notwithstanding its embodiment in the California Street railroad. But the Circuit Court held that the proofs in the present case did not show a use of the invention substantially for experiment, but showed such a public use of it as must defeat the patent. The court further said that the facts were in marked contrast with those in *Elizabeth* v. *Pavement Co.*, because there the use was solely for experiment.

In *Elizabeth* v. *Pavement Co.*, the original patent was granted in August, 1854. The invention dated back as early as 1847 or 1848. Nicholson, the inventor of the pavement in question in that case, filed a caveat in the Patent Office in August, 1847, describing the invention. He constructed a pavement, by way of experiment, in June or July, 1848, in a street near Boston, which comprised all the peculiarities afterwards described in his patent, the experiment being successful.

The pavement so put down in Boston in 1848 was publicly used for a space of six years before the patent was applied for; and it was contended that that was a public use within the meaning of the statute. This court, speaking by Mr. Justice Bradley, said that it was perfectly clear from the evidence that Nicholson did not intend to abandon his right to a patent, he having filed a caveat in August, 1847, and having constructed the pavement in Boston by way of experiment, for the purpose of testing its qualities; that he was a stockholder in, and treasurer of, the corporation which owned the road in Boston where the pavement was put down, and which corporation received toll for its use; and that the pavement was constructed by him at his own expense, and was placed by him there in order to see the effect upon it of heavily loaded wagons and of varied and constant use, and also to ascertain its durability and liability to decay. It was shown that he was there almost daily, examining it and its condition, and that he often walked over it, striking it with his cane. This court held that if the invention was in public use or on sale prior to two years before the application for the patent, that would be conclusive evidence of abandonment, and the patent would be void; but that the use of an invention by the inventor, or by any other person under his direction, by way of experiment and in order to bring the invention to perfection, had never been regarded as a public use of it; and it added: "The nature of a street pavement is such that it cannot be experimented upon satisfactorily except on a highway, which is always public. When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet

he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a *bonâ fide* intent of testing the qualities of the machine would be a public use within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. It would not be necessary, in such a case, that the machine should be put up and used only in the inventor's own shop or premises. He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute. Whilst the supposed machine is in such experimental use, the public may be incidentally deriving a benefit from it. If it be a grist-mill, or a carding-machine, customers from the surrounding country may enjoy the use of it by having their grain made into flour, or their wool into rolls, and still it will not be in public use, within the meaning of the law. But if the inventor allows his machine to be used by other persons generally, either with or without compensation, or if it is with his consent put on sale for such use, then it will be in public use and on public sale, within the meaning of the law. If, now, we apply the same principles to this case, the analogy will be seen at once. Nicholson wished to experiment on his pavement. He believed it to be a good thing, but he was not sure; and the only mode in which he could test it, was to place a specimen of it in a public roadway. He did this at his own expense, and with the consent of the owners of the road. Durability was one of the qualities to be attained. He wanted to know whether his pavement would stand, and whether it would resist decay. Its character for durability could not be ascertained without its being subjected to use for a considerable time. He subjected it to such use, in good

faith, for the simple purpose of ascertaining whether it was what he claimed it to be. Did he do anything more than the inventor of the supposed machine might do in testing his invention? The public had the incidental use of the pavement, it is true; but was the invention in public use, within the meaning of the statute? We think not. The proprietors of the road alone used the invention, and used it at Nicholson's request, by way of experiment. The only way in which they could use it was by allowing the public to pass over the pavement. Had the city of Boston, or other parties, used the invention, by laying down the pavement in other streets and places, with Nicholson's consent and allowance, then, indeed, the invention itself would have been in public use, within the meaning of the law; but this was not the case. Nicholson did not sell it, nor allow others to use it or sell it. He did not let it go beyond his control. He did nothing that indicated any intent to do so. He kept it under his own eyes, and never for a moment abandoned the intent to obtain a patent for it. In this connection it is proper to make another remark. It is not a public knowledge of his invention that precludes the inventor from obtaining a patent for it, but a public use or sale of it. In England, formerly, as well as under our Patent Act of 1793, if an inventor did not keep his invention secret; if a knowledge of it became public before his application for a patent, he could not obtain one. To be patentable, an invention must not have been known or used before the application; but this has not been the law of this country since the passage of the act of 1836, and it has been very much qualified in England. *Lewis* v. *Marling*, 10 B. & C. 22. Therefore, if it were true that during the whole period in which the pavement was used, the public knew how it was constructed, it would make no difference in the result. It is sometimes said that an inventor acquires an undue advantage over the public by delaying to take out a patent, inasmuch as he thereby preserves the monopoly to himself for a longer period than is allowed by the policy of the law; but this cannot be said with justice when the delay is occasioned by a *bonâ fide* effort to bring his invention to perfection, or to ascertain whether it

will answer the purpose intended. His monopoly only continues for the allotted period, in any event; and it is the interest of the public, as well as himself, that the invention should be perfect and properly tested, before a patent is granted for it. Any attempt to use it for a profit, and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent."

We think that the present case does not fall within the principles laid down in *Elizabeth* v. *Pavement Co.* The plaintiff did not file a caveat, and there is no evidence that he did not intend to abandon his right to a patent. It does not appear that any part of the structure was made at his own expense, or that he put it down in order to ascertain its durability or its liability to decay, or that what he says he noticed in the spring of 1879 led him to make any further examination in that respect, or to test further the fear which he says he had at that time, or that what he then saw led him to think that the structure was weak or undesirable. It cannot be fairly said from the proofs that the plaintiff was engaged in good faith, from the time the road was put into operation, in testing the working of the structure he afterwards patented. He made no experiments with a view to alterations; and we are of opinion, on the evidence, that sufficient time elapsed to test the durability of the structure, and still permit him to apply for his patent within the two years. He did nothing and said nothing which indicated that he was keeping the invention under his own control.

In *Smith & Griggs Mfg. Co.* v. *Sprague*, 123 U. S. 249, 256, 257, it was said, Mr. Justice Matthews speaking for the court: "A use by the inventor, for the purpose of testing the machine, in order by experiment to devise additional means for perfecting the success of its operation, is admissible; and where, as incident to such use, the product of its operation is disposed of by sale, such profit from its use does not change its character; but where the use is mainly for the purposes of trade and profit, and the experiment is merely incidental to that, the principle and not the incident must give character

to the use. The thing implied as excepted out of the prohibition of the statute is a use which may be properly characterized as substantially for purposes of experiment. Where the substantial use is not for that purpose, but is otherwise public, and for more than two years prior to the application, it comes within the prohibition. The language of § 4886 of the Revised Statutes is that 'any person who has invented or discovered any new and useful . . . machine . . . not in public use or on sale for more than two years prior to his application, . . . may . . . obtain a patent therefor.' A single sale to another of such a machine as that shown to have been in use by the complainant more than two years prior to the date of his application would certainly have defeated his right to a patent; and yet, during that period in which its use by another would have defeated his right, he himself used it, for the same purpose for which it would have been used by a purchaser. Why should the similar use by himself not be counted as strongly against his rights as the use by another to whom he had sold it, unless his use was substantially with the motive and for the purpose, by further experiment, of completing the successful operation of his invention?"

In that case, *Elizabeth* v. *Pavement Co.*, *supra*, was cited with approval, and it was said (p. 264): "In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defence is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal and convincing." The court came to the conclusion that the patentee unduly neglected and delayed to apply for his patent, and deprived himself of the right thereto by the public use of the machine in question; and that the proof fell far short of establishing that the main purpose in view, in the use of the machine by the patentee, prior to his application, was to perfect its mechanism and improve its operation.

So, too, in *Hall* v. *Macneale*, 107 U. S. 90, 96, 97, it was contended that the use there involved was a use for experiment; but the court answered that the invention was complete, and was capable of producing the results sought to be accomplished; that the construction, arrangement, purpose, mode of operation and use of the mechanism involved were necessarily known to the workmen who put it into the safes, which were the articles in question; that, although the mechanism was hidden from view after the safes were completed, and it required a destruction of them to bring it into view, that was no concealment of it or use of it in secret; that it had no more concealment than was inseparable from any legitimate use of it; and that, as to the use being experimental, it was not shown that any attempt was made to expose the mechanism, and thus prove whether or not it was efficient.

In *Egbert* v. *Lippmann*, 104 U. S. 333, 336, the court remarked: "Whether the use of an invention is public or private, does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person."

Without examining any other of the defences raised, we are of opinion that the bill must be dismissed, for the reason stated by the Circuit Court.

Decree affirmed.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 27. Argued and submitted November 10, 11, 1892. — Decided November 21, 1892.

With certain exceptions, within which this case does not fall, the statutes regulating appeals from the Supreme Court of the District of Columbia

Statement of the Case.

only apply to cases where there is a matter in dispute measurable by some sum or value in money.

The appellate jurisdiction of this court, when dependent upon the sum in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties; and this rule applies to a bill in equity to restrain the collection of a specific tax levied under a general and continuing law.

In such a suit the matter in dispute, in its relation to jurisdiction, is the particular tax attacked; and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite jurisdictional amount.

THE Washington and Georgetown Railroad Company filed its bill in the Supreme Court of the District of Columbia, on October 23, 1884, against the District of Columbia and the Commissioners of the District, alleging that it was a corporation duly organized under the act of Congress in that behalf; that under the act of Congress of February 21, 1871, entitled "An act to provide a government for the District of Columbia," (16 Stat. 419,) the legislative assembly of the District passed an act, August 23, 1871, entitled "An act imposing a license on trades, business and professions practised or carried on in the District of Columbia," the twenty-sixth paragraph of the twenty-first section of which was in the words and figures following, to wit:

"The proprietors of hacks, cabs and omnibuses, and street cars and other vehicles for transporting passengers for hire, shall pay annually as follows: Hacks and carriages, ten dollars; one-horse cabs, six dollars; omnibuses, ten dollars; street cars, six dollars, or other vehicles capable of carrying ten passengers or more at one time, ten dollars."

And the fourth section, (omitting a proviso,) was as follows:

"That every person liable for license tax, who, failing to pay the same within thirty days after the same has become due and payable, for such neglect shall, in addition to the license tax imposed, pay a fine or penalty of not less than five nor more than fifty dollars, and a like fine or penalty for every subsequent offence." (Laws Dist. Col. 1871, 1872, 1873, pp. 87, 88, 97.)

The bill further averred that, in pursuance and execution

of the provisions of said act, "the municipal authorities of the District of Columbia have at various times harassed and annoyed, and still continue to harass and annoy the officers and agents of the complainant in the discharge of their duties to the complainant and in their efforts to comply with the peremptory requirements of the charter of the company; and unless the said defendants shall be restrained by the injunction of this court they will probably continue to annoy and harass the said officers and agents."

It was then alleged that at some time prior to August 28, 1877, the Commissioners of the District presented to the police court an information alleging violation of the act or ordinance, and seeking to have fines imposed upon the company for failure to pay the license tax, and the court adjudged the complainant guilty and imposed a fine, from which judgment an appeal was taken to the Criminal Court of the District, where the information was dismissed; that the judgment of the Criminal Court was final, and that no appeal could be taken therefrom; that afterwards, and some time prior to April, 1882, another information with like charges and allegations was presented to the police court, upon which a like judgment was rendered and a like fine imposed; that from this judgment also an appeal was taken to the Criminal Court, and on April 4, 1882, the information was dismissed by the District authorities.

The bill also stated that on September 20, 1884, the municipal authorities caused two informations to be presented to the police court, each containing like charges and allegations as before, one of them being intended to cover the period from July 1, 1883, to July 1, 1884, and the other the period from July 1, 1884, to September 20, 1884, each of the informations complaining of the use by complainant of about one hundred street cars without having paid license therefor; that these two cases are now pending and undecided in the police court, "but the said municipal authorities threaten to proceed to judgment, and the complainant fears that said court will again render judgment against it and impose burdensome and harassing fines upon it and issue harassing and unlawful writs

by way of execution of its judgment." Copies of the informations accompanied and were made parts of the bill.

The bill charged the invalidity of the license tax in question for various reasons therein set forth, and, among others, upon the ground of the repeal of the act of the legislative assembly, so far as stock corporations were concerned, by certain designated acts of Congress.

The bill then alleged: "That the complainant is now and has been during the year 1884 running one hundred and six cars (106), sixty-four (64) of which are two-horse and forty-two (42) of which are one-horse cars. The complainant has always insisted that said tax was unlawful, and has refused to pay it ever since July, 1876, and if it shall be held to be a lawful tax the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of fifty-two hundred dollars, besides interest, fines and penalties."

Complainant thereupon averred that unless the defendants were enjoined, irreparable injury to its business would result; that it was without adequate remedy at law; and that inasmuch as the criminal court had decided adversely to the municipal authorities, "complainant ought to be protected from multiplicity of suits and harassing and annoying writs."

The prayers were for process, and for an injunction "from prosecuting the said actions in the said police court, or either of them, and also from instituting any other like actions for like purposes in said court, and also from attempting in any manner, directly or indirectly, to collect said license tax mentioned and described in the said twenty-sixth (26) paragraph of section twenty-one (21) of the said act of the legislative assembly of the District of Columbia, approved August 23, 1871, and also from charging up or entering upon the books of said municipal corporation against the complainant any sum or sums on account of said license tax," and for general relief.

The defendants demurred, and on November 23, 1886, the Supreme Court in special term rendered judgment sustaining the demurrer and dismissing the bill with costs. The demurrer

was decided by the special term upon the merits, and the validity of the tax sustained. On appeal to the Supreme Court in general term, that court, without considering the merits, affirmed the decree below dismissing the bill upon the ground that it was brought for the purpose of enjoining *quasi* criminal proceedings, and hence was beyond the jurisdiction of a court of equity. 6 Mackey, 570.

From this decree an appeal was allowed to this court.

Mr. Enoch Totten and *Mr. Walter D. Davidge* for appellant.

Mr. George C. Hazelton and *Mr. Sidney T. Thomas* for appellees submitted on their brief.

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

Both sections of the act of March 3, 1885, regulating appeals from the Supreme Court of the District of Columbia, (23 Stat. 443, c. 355,) apply to cases where there is a matter in dispute measurable by some sum or value in money. *Farnsworth* v. *Montana*, 129 U. S. 104, 112; *Cross* v. *Burke*, *ante*, 82. By that act no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars, except that where the case involves the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, jurisdiction may be maintained irrespective of the amount of the sum or value in dispute.

It was not suggested in argument that the present appeal falls within the exception. Manifestly it does not, since the contention that the provision for a license tax contained in the act of the legislative assembly, was repealed by implication by the acts of Congress referred to, involved no question of legislative power, but simply one of judicial construction.

It is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between

the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties. No matter that it may appear that the judgment would be conclusive in a subsequent action, it is the direct effect of the judgment that can alone be considered. *New England Mortgage Security Co.* v. *Gay*, 145 U. S. 123, 130; *Clay Center* v. *Farmers' Loan and Trust Company*, 145 U. S. 224; *Gibson* v. *Shufeldt*, 122 U. S. 27, and cases cited.

The inquiry at once arises in this case, therefore, whether it appears from the record that the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars. And, without confining the scope of the bill to the prosecutions for penalties, we are of opinion that that fact does not appear in any aspect, and that this appeal must be dismissed for want of jurisdiction.

It is true that the bill states that complainant has refused to pay the license tax since July, 1876, and that if it be held to be a lawful tax "the amount which would probably be computed and charged against the complainant by the said municipal authorities would reach nearly, if not quite, the sum of fifty-two hundred dollars, besides interest, fines and penalties," but this averment taken with the other allegations is entirely insufficient, for the number of the company's cars is not shown except for the years 1883 and 1884, and the amount of the tax for the preceding years is not disclosed in any other manner. Nor is the averment of a probable computation and charge by the District officials equivalent to a denial of other defences, than illegality, to taxes in arrears, and a concession that if the tax be lawful the company is liable in the sum stated.

The matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount.

The taxes for 1883 and 1884 and the maximum penalties of the prosecutions referred to do not approach the jurisdictional sum, and in this state of the record the appeal cannot be retained. *Appeal dismissed.*

JUNGE *v.* HEDDEN.

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

No. 44. Argued November 15, 16, 1892. — Decided November 28, 1892.

In construing tariff acts an article may be held to be enumerated, although not specifically mentioned, if it be designated in a way to distinguish it from other articles.

Arthur v. *Butterfield*, 125 U. S. 170, and *Mason* v. *Robertson*, 139 U. S. 624, cited and approved.

The meaning of the term "article," when used in a tariff act, considered.

Dental rubber, imported into the United States in 1885 was subject to a duty of 25 per cent *ad valorem*, as an article composed of india-rubber not specially enumerated.

THIS was an action to recover an alleged excess of duties exacted upon importations of dental rubber into the port of New York in 1885.

The duty was assessed under the paragraph of Schedule N, of section 2502 of the Revised Statutes, as reënacted by the act of March 3, 1883, which reads: "Articles composed of india-rubber, not specially enumerated or provided for in this act, twenty-five per centum ad valorem." 22 Stat. 488, 513, c. 121.

The substance of the protests is stated in the record as follows: "Upon certain 'india-rubber in sheets,' claiming said goods to be entitled to free entry under the provisions in the free list for 'india-rubber' crude, act March 3, 1883; or, second, if deemed not crude, it is nevertheless not a manufactured 'article of rubber' in the meaning of the law, but is entitled to free entry under the proviso of sec. 2499 of said act as crude; or, third, at no more than 20% ad val., as a partially manufactured, non-enumerated article, under sec. 2513, act March 3, 1883, (see sec. 23d, act March 2, 1861, as to rubber in sheets,) and not at 25% ad val. as charged by you."

The proviso of section 2499, and section 2513, thus referred to, are:

"*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." 22 Stat. 491.

"SEC. 2513. There shall be levied, collected and paid on the importation of all raw or unmanufactured articles, not herein enumerated or provided for, a duty of ten per centum ad valorem; and all articles manufactured, in whole or in part, not herein enumerated or provided for, a duty of twenty per centum ad valorem." 22 Stat. 523.

Section 23 of the act of March 2, 1861, (12 Stat. 195, c. 68,) the free list, contains this item: "India-rubber, in bottles, slabs or sheets, unmanufactured."

The paragraph of Schedule N of section 2502 of the act of March 3, 1883, under which the collector proceeded, is one of three, reading as follows:

"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.

"India-rubber boots and shoes, twenty-five per centum ad valorem."

In the free list (section 2503) is to be found: "India-rubber, crude and milk of." p. 519.

Upon the trial various exhibits of crude rubber, washed rubber, dental rubber and dental plates, were put in evidence, and the proofs established that these importations were dental rubber, which was commercially so known and fit for dental purposes only.

It further appeared that dental rubber was crude rubber put through a masticator by which it was torn up and shredded into a state of pulp, sulphur and coloring matter added, and the mass rolled into sheets, cut into proper sizes and backed with linen to prevent the pieces from sticking together; that the heat of the mill, or masticator, was not a vulcanizing heat,

but sufficient to render the rubber elastic. The Circuit Court, Lacombe, J., refused to direct the jury to find for the plaintiff, but on the contrary directed a verdict for the defendant. There was a verdict and judgment accordingly, and plaintiff sued out this writ of error. The opinion of Judge Lacombe will be found in 37 Fed. Rep. 197.

Mr. Edwin B. Smith for plaintiff in error.

The question presented is, whether the court below ought not to have directed a verdict for the plaintiff instead of directing one for the defendant.

The *prima facie* presumption in favor of the collector's assessment is easily overcome by an examination of the phraseology of this statute, comparing it with that employed in other tariffs, and with those facts so generally known as to be of judicial cognizance. It will be perceived that there has always been a distinction maintained as to the condition of the rubber itself, whether crude or otherwise; between "boots and shoes" (and other specified things) and unspecified "articles composed of india-rubber" and "india-rubber fabrics"; this marked difference between the last two being perpetuated — that the "articles" must be composed wholly of rubber, while the "fabrics" might be only in part of that material. 22 Stat. 513; Heyl. A. D. 1884, Paragraphs 453, 454, 455 and 724; *Arthur* v. *Davies*, 96 U. S. 135; *Beard* v. *Nichols*, 120 U. S. 260; *Lawrence* v. *Allen*, 7 How. 792; Act of July 14, 1832, 4 Stat. 583, 590, c. 227, § 3; Act of March 2, 1833, 4 Stat. 632, c. 57; Act of September 11, 1841, 5 Stat. 463; Act of August 30, 1842, 5 Stat. 548, 555, c. 270, § 5; Act of July 30, 1846, 9 Stat. 42, 45, 48, c. 74, Schedules C and G; Act of March 3, 1857, 11 Stat. 192, c. 98; Act of March 2, 1861, 12 Stat. 178, c. 68; Act of August 5, 1861, 12 Stat. 292, c. 45; Act of July 14, 1862, 12 Stat. 543, 552, 556, 557, c. 163; Act of June 6, 1872, 17 Stat. 230, 232, c. 315.

As a result of the comparison of the previous legislation with that under which these duties were assessed, we maintain:

Argument for Plaintiff in Error.

(1) That there is a distinction made in all between raw rubber crude, which is free, and raw rubber purified, which is dutiable as unmanufactured. *Recknagel* v. *Murphy*, 102 U. S. 197.

(2) That a distinction is created, or recognized, between partially india-rubber "fabrics," and those "articles" of which it is the sole component. That the word "articles" might include alike those of a specified substance, manufactured or unmanufactured, may be true (as, in § 2500, it includes everything capable of being imported); but such extended, comprehensive meaning, in the present connection, is negatived by the immediately precedent use of the word "fabrics," which might otherwise be lexicographically included therein.

Neither is it at all pertinent to the construction of this paragraph that, in other parts of the statute, the context requires or indicates the comprehensive meaning. *United States* v. *Fisher*, 2 Cranch, 358, 387. Where lexicographers and common speech affix several meanings to any word, that one must be adopted in construing a statute which best accords with the context, and with its ordinary use with relation to that subject matter. While all fabrics and all manufactures may be "articles," some articles are neither, and many manufactures are not fabrics. *Movius* v. *Arthur*, 95 U. S. 144, 147; *Barber* v. *Schell*, 107 U. S. 617, 621.

Nobody has ever suggested that our importations were "fabrics." We did not so import, nor the Government so duty them. But we have elaborated the distinction in order to show that "articles" in the next clause (wrongly applied to our importations) has not the general, comprehensive meaning assigned to it by the collector and the court. The specific designation of "india-rubber boots and shoes" at the same rate as "articles," shows that it was not deemed possible to classify them as "fabrics," nor to duty them as "articles" when not wholly of rubber — which for many years they have seldom been, although they were so originally. *Lawrence* v. *Allen*, 7 How. 785.

(3) The manipulation and the combination of the several constituents left the resulting article still rubber. Independ-

Counsel for Defendant in Error.

ent patents, for the process and the product have both been declared valid, because the new process resulted in a new and useful article. *Goodyear* v. *Wait*, 5 Blatchford, 468, 470; *Goodyear* v. *Day*, 2 Wall. Jr. C. C. 283, 295.

The cause at bar comes within the principle of *Meyer* v. *Arthur*, 91 U. S. 570, and those in which the admixture has not substantially changed the character of the ingredients. In the Meyer case, lead had, by the mere application of heat, lost its metallic character. In ours, the same mysterious chemical agent conferred upon the rubber and sulphur a metallic character.

We do not assent to the proposition of the court below that the enumeration of "articles of rubber" must not be restricted to those substantially of rubber, though an immaterial addition of some other substance might be inconsequential. An article made of rubber and other ingredients cannot be said to be a manufacture of the one component any more than the other; especially (as already noted) where the other substances fundamentally change the character of the rubber, in its essential qualities. With or without the word "wholly" india-rubber is as much a designation "of quality and material" as is the word "cotton." *Barber* v. *Schell*, 107 U. S. 617, 621.

When Congress does not intend that the import shall be entirely of the specified material, it indicates such intention by use of the words "or of which it is a component," or (as in the clause relating to fabrics of india-rubber) by saying "wholly or in part," or some such equivalent expression. The word "wholly" is superfluous except when used in connection with "or in part."

Our goods were made either of rubber and sulphur, or of these materials with one-fourth value of coloring matter. The rubber (as a raw material) is free. This makes section 2513 of the act of 1883 applicable to our goods upon the reasoning of the court in *Hartranft* v. *Sheppard*, 125 U. S. 337, 338.

Mr. Assistant Attorney General Maury for defendant in error.

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

In *Arthur* v. *Butterfield*, 125 U. S. 70, 76, it was said by Mr. Justice Field, speaking for the court: "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 this language was quoted with approval as defining the general scope of the similitude clause in the customs acts, in *Mason* v. *Robertson*, 139 U. S. 624, 627, in which it was held that bichromate of soda was subject to the duty of twenty-five per centum ad valorem imposed under the act of March 3, 1883, c. 121, upon "all chemical compounds and salts, by whatever name known," and not subject, by virtue of the similitude clause, to the duty of three cents per pound imposed on bichromate of potash.

If these importations should be held as enumerated, within the rule thus laid down, then sections 2499 and 2513 have no application. And this is no more than to inquire whether they came within the paragraph prescribing the tax on "articles composed of india-rubber."

In common usage, "article" is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity.

The learned Circuit Judge was of opinion that the word "articles" was used in this paragraph in a broad sense, and covered equally things manufactured, things unmanufactured and things partially manufactured, and he sustained this view by reference to the use of the word elsewhere in the statute. Thus, in section 2500, relating to reimportations, they are referred to as "articles once exported of the growth, product or manufacture of the United States." Section 2502 commences: "There shall be levied, collected and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty," etc. Section 2503 reads: "The following articles when imported shall be exempt from duty," and then follows the free list, including

"articles imported for the use of the United States," and "articles, the growth, produce and manufacture of the United States." We agree with the Circuit Court that the word must be taken comprehensively and cannot be restricted to articles put in condition for final use, but embraces as well things manufactured only in part, or not at all.

But it is said that this dental rubber is not "composed of india-rubber" within the intent and meaning of the statute, because of the admixture of sulphur and coloring matter, or, in other words, that it is not wholly so composed. The prior tariff act in § 2504 of the Revised Statutes (Rev. Stat. 477) contained the same paragraph as that under consideration, except that it read, "articles composed wholly of india-rubber." The preceding paragraph related to "braces, suspenders, webbing or other fabrics, composed wholly or in part of india-rubber." The act of 1883 retained the words "wholly or in part" as applied to fabrics, but omitted the word "wholly" in connection with articles. It is not to be doubted that this omission was advisedly made. The manifest intention was that articles of india-rubber should not escape the prescribed taxation because of having been subjected to treatment fitting them for a particular use, but not changing their essential character.

Such is the fact with the article in question. It has not lost its identity by a chemical change, and become a new and different species. It is not crude rubber, nor milk of rubber, nor is it a fabric of rubber, but it is rubber rendered elastic and more attractive by coloring.

Nor are we impressed with the argument that, being rubber itself, it must be regarded as a material and not an article composed of rubber, for its adaptation to dental purposes has differentiated it commercially. Washing and scouring wool does not make the resulting wool a manufacture of wool; cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton; but sulphur and coloring matter, when applied as here, make the resulting rubber, while still remaining rubber, an article of rubber as contradistinguished from rubber crude or rubber merely cleansed of impurities. *Judgment affirmed.*

THOMPSON *v.* SAINT NICHOLAS NATIONAL BANK.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

No. 49. Argued November 17, 18, 1892. — Decided November 28, 1892.

Where T. deposited with C., his broker, coupon railroad mortgage bonds, as margin for purchases of stocks, and C. pledged the bonds to a national bank, in 1874, as its customer, as collateral security for any indebtedness he might owe to the bank, and afterwards the bank paid and advanced for C. money on the faith of the bonds, and on like faith certified checks drawn on it by C., when C. had not on deposit in the bank moneys equal in amount to the checks: *Held*, under the act of March 3d, 1869, c. 135, (15 Stat. 335,) now § 5208 of the Revised Statutes, that, although the certifications were unlawful, the checks certified were good and valid obligations against the bank.

The pledge of the bonds with the bank by C. was a valid contract, and entirely aside from the certifications; and the title of the bank to the bonds was not impaired by the certifications.

Where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties.

This was an action brought by John B. Thompson, in the Supreme Court of the State of New York, against the Saint Nicholas National Bank of New York, a national banking association. The complaint alleged that on the 18th of April, 1874, the plaintiff was the owner of 73 mortgage bonds, of $1000 each, of the Jefferson, Madison and Indianapolis Railroad Company, and 20 mortgage bonds, of $1000 each, of the Indianapolis, Bloomington and Western Railroad Company, of the value of $150,000; that on or about that date the defendant became wrongfully and illegally possessed of the bonds; and that, before the suit was brought, the plaintiff demanded from the defendant the possession of them, but the defendant refused to deliver up any portion thereof.

The answer of the defendant set up that, at the time named in the complaint and for a long time before, Capron & Merriam, bankers and brokers in the city of New York, were

customers of, and regular depositors with, the defendant, and kept a large account in its bank; that it was the custom of Capron & Merriam to procure call loans, advances and discounts from the defendant, for the benefit of themselves and also of their customers, and they pledged to the defendant, as collateral security for such loans, advances and discounts, various bonds, stocks and commercial paper, under an agreement on their part that in case they should be at any time indebted to the defendant for money lent or paid to them or for their use, in any sum, the defendant might then sell, in its discretion, at the brokers' board, public auction or private sale, without advertising and without notice, any and all collateral securities and property held by the defendant for securing the payment of such debt, and apply the proceeds to that object; that the bonds specified in the complaint were a part of the securities so pledged by Capron & Merriam to the defendant; that the defendant, at the time of such transactions, did not have any knowledge in respect to any person interested in such loans or in said securities, except Capron & Merriam, and the latter having failed to pay such loans on proper demand, the defendant proceeded to sell and dispose of said securities, pursuant to such agreement, and gave to Capron & Merriam credit for the net proceeds thereof; and that there still remained due to the defendant, on account of such loans and advances, after such credit, a large balance.

The plaintiff having died, and his executors having been substituted as plaintiffs, the case was tried at a circuit of the Supreme Court before a jury, which, under the direction of the court, found a verdict for the defendant. The exceptions of the plaintiffs, taken at the trial, were heard in the first instance at the general term of the Supreme Court, on a case made by the plaintiffs, containing the exceptions. A motion for a new trial was made thereon before the general term, and was denied, with an order that the defendant have judgment against the plaintiffs upon the verdict, with costs. Such judgment was entered, the principal portion of the opinion of the general term being reported in 47 Hun, 621. The plaintiffs then appealed to the Court of Appeals, which affirmed the

judgment and remitted its own judgment to the Supreme Court, where a final judgment was entered against the plaintiffs. The opinion of the Court of Appeals is reported in 113 N. Y. 325. The plaintiffs have brought a writ of error.

The 93 bonds in question were all coupon bonds, payable to bearer. The testator of the plaintiffs delivered them to Capron & Merriam, who were his brokers, as margin for purchases of stocks by them for his account. Capron & Merriam pledged the bonds to the defendant, they being its customers, as collateral security for the repayment of any indebtedness which might exist at any time to it on their part. That pledge was made under a written agreement, dated December 2, 1873, and signed by Capron & Merriam, which read as follows: "We hereby agree with the St. Nicholas National Bank of New York, in the city of New York, that in case we shall become or be at any time indebted to said bank for money lent or paid to us or for our account or use, or for any overdraft, in any sum or amount then due and payable, the said bank may, in its discretion, sell at the broker's board or at public auction or private sale, without advertising the same and without notice to us, all, any and every collateral securities, things in action and property held by said bank for securing the payment of such debt, and apply the proceeds to the payment of such indebtedness, the interest thereon, and the expenses of the sale, holding ourselves responsible and liable for the payment of any deficiency that shall remain unpaid after such application." Afterwards, the defendant paid and advanced for Capron & Merriam large sums of money on the faith of the bonds and of such other securities as it held for their account. They failed in business on April 20, 1874, owing the defendant $71,920.17, for checks certified by it and outstanding, and for money paid by it up to the close of business on April 18, 1874. On April 20, 1874, before the defendant heard of such failure, it paid $210 more, making a total debt of $72,130.17, which remained unpaid. No notice or claim as to the ownership of the 93 bonds by the testator of the plaintiffs came to the defendant until May 5, 1874. The bonds came into the possession of the defendant before it made the

certifications of checks for the account of Capron & Merriam, which were made on April 18, 1874; and the certifications were made on the faith of the deposit of the bonds and of the other securities which the defendant held for the account of Capron & Merriam. The defendant used its best efforts to procure as large a price as possible for all the securities which had been pledged to it by Capron & Merriam, including the 93 bonds; but, after crediting to Capron & Merriam the entire proceeds of sales, there was a deficiency on their debt to the defendant of about $1800. No payment on account of such deficiency, and no tender or offer of any kind in respect to said bonds, was ever made to the defendant by the testator of the plaintiffs. This action was not commenced until April 18, 1880, six years after the bonds came into the possession of the defendant.

At the trial, the plaintiffs asked the court to direct a verdict for them on the ground that the contract of certification of the checks by the defendant was void, because it was unlawful, being a certification of checks drawn by Capron & Merriam when they had no money on deposit to their credit with the defendant, and the defendant could not hold the 93 bonds as against such unlawful certification; and on the further ground that the defendant did not take the bonds in the ordinary course of business.

Mr. Lewis Sanders for plaintiffs in error.

I. A national bank may not, through a contract condemned as unlawful by its organic law, acquire from the fraudulent lienors or bailees of negotiable instruments an indefeasible title thereto as against the true owner.

In *Felt* v. *Heye*, 24 How. (N. Y.) 361, the court held that the real owner of promissory notes which were unlawfully diverted by the pledgee, he placing them as collateral security to an usurious loan, could not attack the loan for usury, not being in privity with the borrower — the pledgee — the lender having no knowledge but that the borrower owned the collateral; but held also that the owner could recover, because an usurious, being an unlawful contract, the lender did not

acquire the promissory notes pledged as collateral in good faith in the ordinary course of business. See also *Clarke* v. *Shee*, 1 Cowp. 197; *Belmont Branch Bank* v. *Hoge*, 7 Bosworth (N. Y.) 543, 556; *Keutgen* v. *Parks*, 2 Sandf. Sup. Ct. (N. Y.) 60; *Bank* v. *Lanier*, 11 Wall. 369. A comparison of this case with the last case cited discloses that it is stronger against the bank than that case was: (1) In the Lanier case, at the time of the bank's loan to Culver, the stock was Culver's. In the case at bar, at the time of defendant's certifications of Capron & Merriam's checks, the bonds belonged to Mr. Thompson. (2) This action, like the Lanier case, does not seek to disturb the contracts made by the bank with either principals, Capron & Merriam, or the holders of the certified checks. Whatever liability Capron & Merriam had to the bank or the bank had to the holders of the checks, will not be affected by this action. (3) The defence in each case, a loan on stock and a loan by certifying checks, is a contract prohibited to the banks under the same penalty. (4) In each case the owner, unconnected with any transactions with the bank, is seeking his property or its value.

A contract of a corporation which is *ultra vires*, in the proper sense — that is to say, outside the object of its creation, as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59, 60; *Pennsylvania Railroad* v. *St. Louis Alton &c. Railroad*, 118 U. S. 240, 317; *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86.

II. The defendant bank is not a holder for value. To be so it must have paid value to Capron & Merriam, from whom it received the bonds.

The bank's certifications of Capron & Merriam's checks being illegal, furnish no consideration for the bonds. The bank parted with no money at the time of the illegal certifying. The only transactions between the bank and Capron & Merriam were the unlawful certifications, and these can furnish no consideration unless an unlawful contract may be the basis for a lawful remedy.

III. These bonds were not transferred in the ordinary course of business or in good faith.

It is a solecism to say that a contract in express terms denounced by statute as "unlawful," is made in the ordinary course of business. However universal the violation of the statute may be by the national banks, daily forfeiting their charters, in a court of justice, administering the law, a contract in violation thereof cannot in law be said to have been made in the ordinary course of business, and if not made in the ordinary course of business, the negotiable quality of the securities did not pass to the bank, and it held them subject to the equities of the true owner. *Felt* v. *Heye*, 23 How. (N. Y.) 359, 361, 362; Daniel on Neg. Instrs. (2d ed.) § 769; *Roberts* v. *Hall*, 37 Connecticut, 205.

IV. Defendant took and claims to hold Mr. Thompson's bonds under a contract condemned by the law; this could not be in the ordinary course of business. The negotiable quality in such securities is an exception grafted upon the general law of property for the convenience of trade — lawful business — and is only available to promote that end. When the contract through which the title of the true owner is sought to be defeated is not of that character, the property has not, in fact, been negotiated, and the rights of the true owner are not affected by such transfer.

V. The defendant cited below the following authorities relating to national banks: *National Bank of Xenia* v. *Stewart*, 107 U. S. 676; *National Bank* v. *Matthews*, 98 U. S. 621; *Gold Mining Co.* v. *National Bank*, 96 U. S. 640; *National Bank* v. *Whitney*, 103 U. S. 99; *Reynolds* v. *Crawfordsville National Bank*, 112 U. S. 405; *Fortier* v. *New Orleans National Bank*, 112 U. S. 439. An examination of these cases will disclose: (1) That the actions were between the parties to the original contract, or their privies; (2) That the party receiving the consideration was, while retaining it, seeking to defeat the bank's recovery, under a penalty, or by the aid of the statute to set aside the contract and recover the collaterals pledged with the bank; (3) That in none of the cases were the rights of third parties involved; (4) That in

none of the cases was Rev. Stat. § 5208 involved; (5) That in none of the cases was the contract condemned by the statute as "unlawful."

In the case at bar no question of forfeiture by the defendant is involved. The obligation of its contracts with Capron & Merriam is not involved: The *status quo* of parties in *pari delicto* is not disturbed; the party receiving the consideration is not availing himself of the statute as both sword and shield. No rescission of the contract is sought.

VI. The prohibition against national banks loaning on the security of their stock was enforced in *National Bank* v. *Lanier*, *supra*. See to the same point *Conklin* v. *Second National Bank of Oswego*, 45 N. Y. 655.

VII. The contracts with national banks which have been sustained by the United States Supreme Court have been, between the parties, executed and simply *ultra vires*, not prohibited.

In *National Bank* v. *Matthews*, 98 U. S. 621, brought to enjoin the foreclosure of a deed of trust assigned to the bank as collateral security for a note, the court decided: (1) that the deed of trust did not come within the letter or spirit of the prohibition; (2) the plaintiff sought the interposition of a court of equity, and was compelled to do equity; the same rule would have been applied to an agreement void for usury; (3) the party seeking to enjoin the foreclosure had received the benefit thereof.

In the case at bar Mr. Thompson was neither a party to nor a recipient of the benefit of the contracts of certification of Capron & Merriam's checks.

VIII. A contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself. The law adjudges it to be so, and courts do not undertake to pass upon the wisdom of the policy of the legislature in enacting prohibitory statutes; *Crocker* v. *Whitney*, 71 N. Y. 161, 170; *Pennington* v. *Townsend*, 7 Wend. 276; *Bank of the United States* v. *Owens*, 2 Pet. 527; *Hallett* v. *Novion*, 14 Johns. 273; *Barton* v. *Port Jackson &c. Plank Road Co.*, 17 Barb. 397.

Mr. William Allen Butler (with whom was *Mr. John A. Taylor* on the brief) for defendant in error.

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

The Federal question involved is the only one which we can consider on this writ of error. It arises under the act of March 3, 1869, 15 Stat. 335, c. 135, which was the statute in force on April 18, 1874, and read as follows: "It shall be unlawful for any officer, clerk or agent of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check; and any check so certified by duly authorized officers shall be a good and valid obligation against such bank; and any officer, clerk or agent of any national bank violating the provisions of this act shall subject such bank to the liabilities and proceedings on the part of the comptroller as provided for in section fifty of the national banking law, approved June third, eighteen hundred and sixty-four." 13 Stat. 114, c. 106. The provisions of that § 50 were that the comptroller of the currency might forthwith appoint a receiver to wind up the affairs of the banking association. The provisions of the act of March 3, 1869, are now embodied in § 5208 of the Revised Statutes.

In regard to the Federal question involved, namely, the certification of checks by the defendant for Capron & Merriam without having on deposit an equivalent amount of money to meet them, and the contention that the defendant did not become a *bonâ fide* holder of the bonds in virtue of payments made in pursuance of the agreement with that firm, the Court of Appeals remarked, in its opinion, given by Ruger, C. J., that the statute of the United States affirmed the validity of the contract of certification, and expressly provided the consequences which should follow its violation; that the penalty incurred was impliedly limited to a forfeiture of the bank's charter and the winding up of its affairs; that it was thus

clearly implied that no other consequences were intended to follow a violation of the statute; and that it would defeat the very policy of an act intended to promote the security and strength of the national banking system, if its provisions should be so construed as to inflict a loss upon the banks and a consequent impairment of their financial responsibility. The court then cited, to support that view, *National Bank* v. *Matthews*, 98 U. S. 621, *National Bank* v. *Whitney*, 103 U. S. 99, and *National Bank of Xenia* v. *Stewart*, 107 U. S. 676.

The Court of Appeals further said that it was of opinion that the statute in question had no application to the question involved in this suit, which concerned only the relations between Capron & Merriam and the defendant; that, by the deposit of the bonds, the former secured the promise of the defendant to protect their checks of a certain day for a specified amount; that the certification of the checks was entirely aside from the agreement between Capron & Merriam and the defendant, and was a contract between the defendant and the anticipated holders of the checks; that Capron & Merriam had received the consideration of their pledge, when the defendant agreed with them to honor their checks, and that would have been equally effectual, between the parties, without any certification; that the certification was simply a promise to such persons as might receive the checks that they should be paid on presentation to the defendant, in accordance with its previous agreement with Capron & Merriam; that the legal effect of the agreement was that the defendant should loan a certain amount to Capron & Merriam, and would pay it out on their checks to the persons holding such checks; that it was entirely legal for the defendant to contract to pay Capron & Merriam's checks, and it did not affect the legality of that transaction that the defendant also represented to third parties that it had made such an agreement and would pay such checks; that Capron & Merriam could not dispute their liability for the amount paid out in pursuance of such agreement, nor could any other party, standing in the shoes of Capron & Merriam; that the fact that the defendant, in connection with the agreement to

pay such checks, had also promised third parties to pay them, could not invalidate the liability previously incurred, or impair the security which had previously been given to the defendant upon a valid consideration; that the fact of the certification was entirely immaterial in respect to the liability incurred by Capron & Merriam to the defendant; that there was no evidence impairing the title to the bonds acquired by the defendant through the transfer of them to it by Capron & Merriam; that the purpose for which the bonds were transferred by the testator of the plaintiffs to Capron & Merriam contemplated their transfer and sale by the latter to third persons; that the defendant acquired a valid title to them by their transfer to it; that the transaction between Capron & Merriam and the defendant was in the ordinary course of business pursued by the latter; that it received the bonds in good faith, for a valuable consideration, and within all the authorities this gave it a good title to the bonds; that it was authorized to deal with them for the purpose of effecting the object for which they were transferred to it; that its right to hold the bonds continued so long as any part of its debt against Capron & Merriam remained unpaid; that the testator of the plaintiffs could at any time have established his equitable right to a return of the bonds, and could have procured their surrender, by paying the amount for which they were pledged, but he refrained from doing so, and impliedly denied any right in the defendant by demanding the unconditional surrender of the bonds; and that he never became entitled to such surrender, and of course was not authorized to recover possession of them. We regard those views as sound, and as covering this case.

The agreement of December 2, 1873, between Capron & Merriam and the defendant, did not call for any act violating the statute. There was nothing illegal in providing that the securities which the bank might hold to secure the debt to it of Capron & Merriam should be available to make good such debt. The statute does not declare void a contract to secure a debt arising on the certifications which it prohibits.

In addition to that, the statute expressly provides that a

check certified by a duly authorized officer of the bank, when the customer has not on deposit an amount of money equal to the amount specified in the check certified, shall nevertheless be a good and valid obligation against the bank; and there is nothing in the statute which, expressly or by implication, prohibits the bank from taking security for the protection of its stockholders against the debt thus created. There is no prohibition against a contract by the bank for security for a debt which the statute contemplates as likely to come into existence, although the unlawful act of the officer of the bank in certifying may aid in creating the debt. In order to adjudge a contract unlawful, as prohibited by a statute, the prohibition must be found in the statute. The subjection of the bank to the penalty prescribed by the statute for its violation cannot operate to destroy the security for the debt created by the forbidden certification.

If the testator of the plaintiffs had pledged the bonds to the defendant, he could not, after receiving the defendant's money, have replevied the bonds; and after possession of the bonds had been given by him to Capron & Merriam, and after they had been subsequently taken by the defendant in good faith, neither he nor his executors can set up the statute to destroy the debt.

This construction of the statute in question is strengthened by the subsequent enactment, on July 12, 1882, of § 13 of the act of that date, c. 288, 22 Stat. 166, making it a criminal offence in an officer, clerk or agent of a national bank to violate the provisions of the act of March 3, 1869. This shows that Congress only intended to impose, as penalties for overcertifying checks, a forfeiture of the franchises of the bank and a punishment of the delinquent officer or clerk, and did not intend to invalidate commercial transactions connected with forbidden certifications. As the defendant was bound to make good the checks to the holders of them, because the act of 1869 declares that the checks shall be good and valid obligations against the defendant, it follows that Capron & Merriam were bound to make good the amounts to the defendant. It necessarily results that the defendant, on paying the checks,

was as much entitled to resort to the securities which Capron & Merriam had put into its hands, as it would have been to apply money which they might have deposited to meet the checks.

Moreover, it has been held repeatedly by this court that where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties. *National Bank* v. *Matthews*, 98 U. S. 621; *National Bank* v. *Whitney*, 103 U. S. 99; *National Bank of Xenia* v. *Stewart*, 107 U. S. 676.

The bonds in question came into the possession of the defendant before it certified the checks. They were not pledged to it under any agreement or knowledge on its part, or in fact on the part of Capron & Merriam, that subsequent certifications would be made. The certifications were made after the pledge, and created a debt of Capron & Merriam to the defendant, which arose after the pledge. The agreement of December 2, 1873, applied and became operative simultaneously with the certifications, but independently of them, as a legal proposition.

In *Logan County Bank* v. *Townsend*, 139 U. S. 67, 77, decided in March, 1891, after the present case was decided by the Court of Appeals of New York, this court approved the decision in *National Bank* v. *Whitney*, 103 U. S. 99, and said that a disregard by a national bank of the provisions of the act of Congress forbidding it to take a mortgage to secure an indebtedness then existing, as well as future advances, could not be taken advantage of by the debtor, but "only laid the institution open to proceedings by the government for exercising powers not conferred by law."

Judgment affirmed.

TOPLITZ *v.* HEDDEN.

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

No. 45. Argued November 16, 1892. — Decided November 28, 1892.

Imported articles, used as head-coverings for men, invoiced as "Scotch bonnets," and entered, some as "worsted knit bonnets," and others as "worsted caps," and made of wool, knitted on frames, were liable to duty as "knit goods made on knitting frames," under "Schedule K, Wool and Woollens," of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, c. 21, (22 Stat. 509,) and not under "Schedule N, — Sundries," of the same section, § 2502, p. 511, as "bonnets, hats and hoods for men, women and children."

Testimony held competent, on the cross-examination of a witness, as affecting his credibility, in view of contradictory statements which he had made.

An exception to a copy of a paper is unavailing, where both sides treated it as a copy, and no ground of objection to it as evidence is set forth.

It was proper, in an action brought by the importer against the collector, to recover duties paid under protest, for the defendant to show that the articles were not known, on or immediately before March 3, 1883, in trade and commerce as "bonnets for men."

It was right on the evidence for the court to direct a verdict for the defendant, especially as the plaintiff refused to go to the jury on the question as to whether on March 3, 1883, the word "bonnet" had in this country a well-known technical, commercial designation such as would cover the goods in question.

THE case is stated in the opinion.

Mr. Edwin B. Smith for plaintiffs in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought by Lippman Toplitz and Herman Schwarz, composing the firm of L. Toplitz & Co., against Edward L. Hedden, late collector of the port of New

York, to recover the sum of $6896.06, as an excess of duties paid under protest by the plaintiffs on 24 importations made into the port of New York from Glasgow, in Scotland, from July, 1885, to December, 1885, both inclusive. The suit was commenced in the Superior Court of the city of New York, in July, 1886, and removed by the defendant, by *certiorari*, into the Circuit Court of the United States for the Southern District of New York. At the trial before Judge Lacombe and a jury, in January, 1888, the court directed a verdict for the defendant, which was rendered, and judgment was entered thereon against the plaintiffs in November, 1888, to review which the plaintiffs have brought a writ of error.

In the invoices of the articles imported, they were described as "Scotch bonnets;" and in the entries thereon at the custom-house they were, in some, described as "worsted knit bonnets," and in others as "worsted caps." The collector assessed duties upon them as "knit goods, made on knitting frames," under the following provisions of "Schedule K. — Wool and Woollens," of § 2502 of the Revised Statutes, as enacted by § 6 of the act of March 3, 1883, 22 Stat. 509, c. 121: "Flannels, blankets, hats of wool, knit goods, and all goods made on knitting frames, balmorals, woollen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat or other animals, (except such as are composed in part of wool,) not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem." The goods were shown to be made of wool, knitted on frames.

The plaintiffs duly protested against the assessment of more

than 30 per cent ad valorem, claiming that the goods were dutiable under the following provision of "Schedule N.— Sundries," of the same § 2502, page 511: "Bonnets, hats and hoods for men, women and children, composed of chip, grass, palm-leaf, willow or straw, or any other vegetable substance, hair, whalebone or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem." They contended that, under that provision, the articles were "bonnets for men." The court, in directing the verdict for the defendant, gave its reasons for doing so, which are reported in 33 Fed. Rep. 617. Various errors are assigned.

(1) One of the plaintiffs, having been examined as a witness for them, testified, on cross-examination, that he had had a suit against the government other than the one on trial, under the old tariff; and he was further asked on cross-examination: "Was the claim then that these goods are caps made on frames?" To this question the plaintiffs objected, on the ground that the record was the best evidence of the claim. The court overruled the objection, and the plaintiffs duly excepted. The witness answered: "Yes; I think that is it. Similar goods were concerned in that."

The plaintiffs contend that the matter of a claim regarding similar goods under the different phraseology of an earlier tariff, was immaterial. We think that the question was a competent one, as affecting the credibility of the witness. He had testified in this case, on his direct examination, that the goods in question were Scotch bonnets, were known in this country as Scotch bonnets, and sold as such, and that they were called bonnets more frequently than caps. It was proper to show, on cross-examination of the witness, that he had made contradictory statements, oral or written, on the subject; and if he wished to appeal to the prior record, to refresh his recollection, he could call for it and do so. But the evidence as offered was competent, irrespectively of the prior record.

(2) The same witness was asked, on cross-examination, whether he remembered that, in the summer of 1882, when a bill was pending before Congress to amend the statutes by

excluding wool goods from the provision for caps and other articles made on frames, his firm addressed a letter to Hon. S. S. Cox, a member of Congress from the city of New York, protesting against the passage of that law. The plaintiffs objected to that question as immaterial, and because the witness had no right to state the contents of the letter, and because the letter itself would be the best evidence. The court overruled the objection, and the plaintiffs duly excepted. The witness answered that his firm wrote such a letter. He was then shown what purported to be a copy of that letter, and asked if it was a copy. This was objected to on the ground that the original was not produced, but the objection was overruled, and the plaintiffs duly excepted. The defendant then offered the copy in evidence, and the plaintiffs objected; but the court overruled the objection, and the plaintiffs duly excepted. The copy was then read in evidence, and is set forth in the record.

The plaintiffs contend that the copy was read in evidence without any proof that it was a copy. What was before said as to the first assignment of error is applicable here also. The objection that there was no proof that the copy was a copy is not taken in the bill of exceptions. The copy was treated by both sides as a copy, and the bill of exceptions merely states that when the defendant offered the copy in evidence, the plaintiffs objected; but no ground of objection is set forth. The exception, therefore, is unavailing. *Camden* v. *Doremus*, 3 How. 515; *United States* v. *McMasters*, 4 Wall. 680; *Burton* v. *Driggs*, 20 Wall. 125; *Evanston* v. *Gunn*, 99 U. S. 660.

It appeared from the letter to Mr. Cox that it was written when the tariff act of 1883 was pending before Congress; that the letter related to woollen knitted caps, worn by men; and that it protested against the existing duty on such articles, and against any increase of duty upon them. It appears by the record that Mr. Schwarz, one of the plaintiffs, appeared before the tariff committee in October, 1882, and made a statement with regard to the duties on those articles, as an importer of "Scotch caps," "to speak in regard to the tariff

on worsted and knitted goods," and stated that L. Toplitz & Co. were importers of "worsted knitted caps," which were "classed as worsted and knitted goods." It also appeared that the sign over the plaintiffs' place of business in New York City was "Importers of Scotch caps."

(3) The defendant called a witness who was asked on direct examination the following question: "Please state by what name, on the 3d of March, 1883, or immediately prior thereto, these goods were known in trade and commerce." The plaintiffs objected to that question on the ground, first, that Congress in the enactment did not have reference to commercial designation; and second, that the time to which the question referred should be stated more definitely. The court overruled the objection and the plaintiffs excepted. The witness answered, "Scotch caps." The following question was then put to him: "Please state whether, on the 3d of March, 1883, or immediately prior thereto, these goods were known in trade and commerce as bonnets for men." The plaintiffs objected to that question as immaterial, and for the same reason as before, the objection was overruled, the plaintiffs excepted, and the witness answered, "No, sir." The same course of examination was pursued in regard to several witnesses introduced by the defendant.

It is contended by the plaintiffs that the phrase, "Bonnets, hats and hoods for men, women and children," is not a commercial designation, but is only descriptive; and the case of *Barber* v. *Schell*, 107 U. S. 617, 621, is cited. But we think no error was committed in admitting the testimony; and that it was important to ascertain the commercial name of the article in question. If no such term as "bonnets," applicable to head coverings for men, was known or used in this country in March, 1883, and if, even though known before, the term was then obsolete, it would follow that it could not have been intended to apply the term to goods which were specifically described elsewhere in the acts as "goods made on knitting frames." If the commercial designation of the article gave it its proper place in the classification of the statute, resort to the common designation was unnecessary and improper.

Arthur v. *Lahey*, 96 U. S. 112, 118; *Barber* v. *Schell*, 107 U. S. 617, 623; *Worthington* v. *Abbott*, 124 U. S. 434, 436; *Arthur* v. *Butterfield*, 125 U. S. 70, 75; *Robertson* v. *Salomon*, 130 U. S. 412, 415.

The evidence shows that the goods in question were known commercially in the United States as "caps," and not as "bonnets," and that "caps" was also the common designation. It cannot be properly said that the statute uses the phrase "bonnets for men." The language is "bonnets, hats and hoods for men, women and children." That expression is fully answered by the words "hats for men."

The Circuit Court, in its opinion, said correctly: "Words used in these tariff statutes, when not technical, either as having a special sense by commercial usage or as having a scientific meaning different from the popular meaning — in other words, when they are words of common speech — are within the judicial knowledge, and their interpretation is a matter of law." The court held, on the evidence set forth in the bill of exceptions, that the word "bonnet" in the act of March 3, 1883, was not sufficiently broad to cover the goods in question, unless it was made so by having affixed to it at the time Congress passed the act some peculiar, technical, trade meaning, which coupled it, in the minds of the legislators, with those particular goods or goods similar to them; and that there was no proof of that.

Moreover, at the close of the trial, both parties asked for the direction of a verdict. The court denied the plaintiffs' motion, and they duly excepted. They then asked the court to submit the case to the jury, but the court refused to do so; but it offered, however, to submit to the jury the sole question whether, at the time of the passage of the tariff act of March 3, 1883, the word "bonnet" had in this country a well-known technical, commercial designation such as would cover goods of this kind. The plaintiffs disclaimed any desire to go to the jury on that question alone, but asked leave of the court to go to the jury generally. The court refused such leave, and the plaintiffs excepted. Thereupon a verdict for the defendant was directed, and the plaintiffs duly excepted. It seems to us

Statement of the Case.

that this action of the court was correct, and that it offered to submit to the jury the only question which the plaintiffs could properly ask to have submitted.

(4) The other assignments of error are either immaterial or are covered by what has been already said.

Judgment affirmed.

HAMILTON GAS LIGHT AND COKE COMPANY *v.* HAMILTON CITY.

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

No. 32. Argued November 2, 3, 1892. — Decided November 21, 1892.

The provision in sec. 2486 of the Revised Statutes of Ohio, authorizing cities and villages in that State to erect gas-works at the expense of the municipality, or to purchase any gas-works therein, do not infringe the contract clause of the Constitution of the United States when exercised by a municipality, within which a gas company has been authorized, under the provisions of the acts of May 1, 1852, and March 11, 1853, to lay down pipes and mains in the public streets and alleys and to supply the inhabitants with gas, and has exercised that power; and with which the municipal authorities have contracted, by contracts which have expired by their own limitation, to supply the public streets, lanes and alleys of the municipality with gas.

A municipal ordinance not passed under legislative authority, is not a law of the State within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts.

Public grants susceptible of two constructions must receive the one most favorable to the public.

Although a legislative grant to a corporation of special privileges may be a contract, when the language of the statute is so explicit as to require such a construction, yet if one of the conditions of the grant be that the legislature may alter or revoke it, a law altering or revoking the exclusive character of the granted privileges cannot be regarded as one impairing the obligation of the contract.

The court stated the case as follows:

The Hamilton Gas Light and Coke Company invokes against a certain ordinance of the city of Hamilton, a municipal cor-

poration of Ohio, the protection of the clause of the Constitution of the United States which forbids the passage by a State of any law impairing the obligation of contracts, as well as the clause declaring that no State shall deprive any person of property without due process of law. By the final judgment a temporary injunction granted against the city was dissolved and the bill dismissed. 37 Fed. Rep. 832.

The appellant became a corporation on the 6th day of July, 1855, under the general statute of Ohio of May 1, 1852, providing for the creation and regulation of incorporated companies. By the 53d section of that statute it was provided that any corporation formed under it should have full powers, if a gas company, to manufacture and sell and to furnish such quantities of gas as might "be required in the city, town or village where located, for public and private buildings, or for other purposes," with authority to lay pipes for conducting gas through the streets, lanes, alleys and squares, in such city, town or village, "with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe." The 54th section gave the municipal authorities power "to contract with any such corporation for lighting . . . the streets, lanes, squares and public places in any such city, town or village." 1 Swan & Critchfield Stats. 271, 300; 50 Ohio Laws, 274.

On the 11th of March, 1853, a supplementary act was passed authorizing the city council to regulate, by ordinance, from time to time, the price which gas light or gas light and coke companies should charge for gas furnished to citizens, or for public buildings, streets, lanes or alleys in such cities; and providing that such companies should in no event charge more than the price specified by ordinance of the city council, and that the city council might, by ordinance, regulate and fix the price for the rent of meters. Other sections of the act were in these words: "Sec. 31. That if such companies shall at any time hereafter be required by any city council as aforesaid to lay pipes and light any street or streets, and shall refuse or neglect for six months after being notified by authority of such city council to lay pipes and light said streets; then and in that case

such city council may lay pipes and erect gas-works for the supply of said streets, and all other streets which are not already lighted; and the said gas companies, gas light and coke companies, shall thereafter be forever precluded from using or occupying any of the streets not already furnished with gas pipes of such companies; and such city council may have the right to open any street for the purpose of conveying gas as aforesaid. Sec. 32. That a neglect to furnish gas to the citizens or other consumers of gas, or to any city by such companies, in conformity to the preceding section of this act, and in accordance with the prices fixed and established by ordinance of such city council, from time to time, shall forfeit all rights of such company under the charter by which it has been established; and any such city council may hereafter proceed to erect, or by ordinance empower any person or persons to erect gas-works for the supply of gas to such city and its citizens as fully as any gas light or gas light and coke company can now do, and as fully as if such companies had never been created." Curwen's Stats. c. 1248, pp. 2153, 2164, 2165; 51 Ohio Laws, 360.

Another act was passed April 5, 1854, empowering the city council to fix, from time to time, by ordinance, the minimum price at which it would require the company to furnish gas, for any period not exceeding ten years; and providing that from and after the assent of the company to such ordinance, by written acceptance thereof, filed in the clerk's office of the city, it should not be lawful for the council to require the company to furnish gas to the citizens, public buildings, public grounds or public lamps of the city at a less price during the period of time agreed on, not exceeding ten years. That act, it was declared, should not operate to impair or affect any contract theretofore made between any city and any gas light or gas light and coke company. It was further provided: "Sec. 2. That the city council of such city may, at any time after the default mentioned in the thirty-first section of the act to which this is supplementary [c. 1248, p. 2164], by ordinance, permit such gas company to use and occupy the streets of such city for the purpose of lighting the same and furnishing the gas to

the citizens and public buildings. Sec. 3. That any temporary failure to furnish gas shall not operate as a forfeiture, under the 32d section of the act to which this is supplementary, unless such failure shall be by neglect or misconduct of such gas light or gas light and coke company: *Provided*, That such company shall, without unnecessary delay, repair the injury, and continue to supply such gas." Curwen Stats. c. 1439, p. 2570; 52 Ohio Laws, 30.

When the municipal laws of Ohio relating to gas companies were revised and codified in 1869, the above provisions were retained without material alteration, and now appear in the Revised Statutes of Ohio. 66 Ohio Laws, Title, Municipal Code, 145, 149, 218, 219, §§ 415 to 423; 1 Rev. Stats. Ohio, Title 12, Div. 8, c. 3, pp. 637 *et seq.* 3d ed. 1890.

But this revision and codification contained a provision not appearing in any previous statute, and now constituting section 2486 of the Revised Statutes of Ohio. That section is in these words:

"Sec. 2486. The council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase any gas-works already erected therein."

By an ordinance of the city of Hamilton, passed July 9, 1855, the appellant was authorized to place pipes in streets, lanes, alleys and public grounds to convey gas for the use of the city and its inhabitants; the company to have "the exclusive privilege of laying pipes for carrying gas in said city and of putting up pipes in dwellings in connection with the street pipes for the term of twenty years from the passage of this ordinance;" but not to charge for gas furnished the city or its inhabitants a price greater than, during the period of the contract, was usually charged in cities of similar size and with like facilities for the making and furnishing of gas. The company, from time to time, as required by the city, placed lamp-posts at the points indicated by resolutions passed by the council.

Written contracts were made, from time to time, between the parties, for lighting the city. The first one was dated

April 10, 1862. The last one was dated July 16, 1883, and expired, by its terms, January 1, 1889.

On the second day of January, 1889, the council passed a resolution reciting the termination of the last contract, and declaring that the city no longer desired the company to furnish gas for lighting streets and public places, and would not, after that date, pay for any lighting furnished or attempted to be furnished by the company, which was forbidden the use of the lamp-posts and other property of the city, and notified to remove without delay any attachment or connection theretofore maintained with the city's lamp-posts and other property. The company having been served with a copy of this resolution, protested against the validity of this action of the city. In a written protest, addressed to the council, it announced that its gas mains, filled with gas, extended throughout all the streets, etc., as theretofore designated and required by the city; "that all said mains are connected with your lamp-posts, lamps, and the burners thereon, and are all ready and fit for the purpose for which they were constructed and connected, and that this company is ready now and at all times to supply all the gas needed for the wants of your city and its inhabitants, and will furnish the same upon notice from you. This company owns the mains through which such gas is furnished and distributed for said public and private lighting; you own the lamp-posts, lamps and burners connected therewith."

The city, January 4, 1889, passed an ordinance looking to the issuing — such issuing being first approved by the popular vote — of bonds for the purpose of itself erecting works to supply the city and its inhabitants with gas.

The present suit was thereupon commenced by the company. The relief asked was a decree perpetually enjoining the city from disconnecting its lamp-posts from the company's mains or from lighting the city by any means or process other than that of the plaintiff's gas, as well as from issuing bonds for the purpose of erecting gas-works or for the purpose of providing gas-works to supply gas light for the streets, lanes, alleys, public buildings and places, and for private consumers.

Argument for Appellant.

Mr. John F. Follett and *Mr. John F. Neilan* (with whom was *Mr. T. H. Kelley* on the brief) for appellant.

I. There is no law of Ohio authorizing the council of any city, in which there are gas-works in full operation and fully performing all the duties required by the laws of the State, to erect gas-works or to levy a tax for that purpose. *Hirn* v. *State*, 1 Ohio St. 15, 20; *State* v. *Franklin County*, 20 Ohio St. 421, 424; *Pancoast* v. *Ruffin*, 1 Ohio, 381, 386; *Allen* v. *Parish*, 3 Ohio, 187; *State* v. *Blake*, 2 Ohio St. 147, 152; *Dodge* v. *Gridley*, 10 Ohio, 173; *State* v. *Darke County*, 43 Ohio St. 311, 315; *Warren* v. *Davis*, 43 Ohio St. 447, 449; *Van Camp* v. *Board of Education*, 9 Ohio St. 406.

While there might be some foundation for the claim that section 2486, if it stood as an independent act, by implication repealed the provisions of sections 2480 and 2482, there is now no foundation whatever for any such claim; for, standing as they do, there is but one inference possible, and that is, that the several sections of the statute were each intended by the legislature to have full force and effect, and that no one should destroy or impair the force and effect of any other one of said sections.

Looking at the history of this legislation in the light of these decisions, the conclusion is irresistible that the several sections of this statute must be so construed as to give force and effect to each of said sections.

Reading the whole statute together, there can be no doubt as to what was the scheme or system of the legislation upon the subject of gas companies, and municipal regulations and control of the same, and that scheme being found, it is the duty of the court to so construe the statute as to make it effective as well as to harmonize each section with every other.

The establishment of a gas company requires the outlay of a considerable sum of money. It is a risk at least depending upon a great many contingencies as to whether it would be a success. While it is thus upon one hand, on the other it is a great advantage to the city. Among other things, it enables the city to enforce with greater security its police power. Its

establishment is for the mutual benefit of both city and gas company. So the legislature in its wisdom has thrown safeguards and protection around both, preserving to the city the power to control, and to the gas company its life and existence subject to this power of control.

If a municipal corporation may at will erect gas-works and operate the same by public funds raised by taxation, how can it be said that the life and existence of a gas company are preserved subject to the control of the city, by the provisions of these statutes?

It is manifest that it is not competition but confiscation that is sought. No gas property can be successfully operated in competition with the municipality in which it is located, and a desire to avoid any such contingency, and to remove every pretext for every such attempt as is here made, was the incentive to the provision in the statutes requiring that in any contract the right should be reserved to the municipality to purchase the works.

II. The appellant company was organized under a law which secured it against interference with its business on the part of the city so long as it faithfully performed the duties undertaken by the acceptance of its charter; and that charter was a contract with the State, which could not be impaired by subsequent legislation. *Fletcher* v. *Peck*, 6 Cranch, 87, 133; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Green* v. *Biddle*, 8 Wheat. 1; *Providence Bank* v. *Billings*, 4 Pet. 514; *Planters' Bank* v. *Sharp*, 6 How. 301; *Vincennes University Trustees* v. *Indiana*, 14 How. 268; *Piqua Bank* v. *Knoop*, 16 How. 369; *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116; *Hawthorne* v. *Calef*, 2 Wall. 10; *The Binghamton Bridge*, 3 Wall. 51; *Miller* v. *State*, 15 Wall. 478; *The Delaware Railroad Tax*, 18 Wall. 206; *Greenwood* v. *Freight Co.* 105 U. S. 13; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674.

III. The power vested by the statutes of Ohio in city councils to provide gas-works is a power conferred for a public benefit and to supply a public want, and when such benefit

has been conferred in a way recognized by the statute as sufficient, and the want does not exist, the power cannot be exercised.

IV. Neither the State, nor the city representing the State, can engage in any public enterprise in competition with a private corporation organized for the same purpose and fully complying with all the stipulations of the contract embodied in its charter.

Giving to the charter of this company the most limited construction in the interest of the company, after inducing the company to make large investments and expend large sums of money in property practically worthless for any other purpose, neither the State nor any of its agencies can engage in the same business at the expense of the people, to the irreparable injury, if not the total destruction of the property of the company.

V. The gas company cannot be deprived of its property without due process of law.

VI. The council of Hamilton has no power to levy a tax to subserve private interests, or for any purpose other than a public purpose, and where the professed purpose is to supply a public want that does not exist, that tax is unauthorized and void.

Mr. Allen Andrews, and *Mr. Israel Williams*, for appellee. *Mr. H. L. Morey*, *Mr. M. O. Burns*, *Mr. James E. Neal*, and *Mr. E. E. Hull* were with them on the brief.

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

The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas-works in full and complete operation, to erect gas-works, or to levy a tax for that purpose. If this were conceded, we should feel obliged — the plaintiff and defendant both being corporations of Ohio — to reverse the judgment, and remand the cause with directions to dismiss the suit for want of jurisdiction in the Circuit Court. The jurisdiction of that court

can be sustained only upon the theory that the suit is one arising under the Constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the State has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the constitutional prohibition against State laws impairing the obligations of contracts. *Murray* v. *Charleston*, 96 U. S. 432, 440; *Williams* v. *Bruffy*, 96 U. S. 176, 183; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392; *N. O. Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31, 38. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the Constitution of the United States. We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas-works of its own, upon that section of the Municipal Code of Ohio, adopted in 1869 (now section 2486 of the Revised Statutes), providing that the city council of any city or village should have power, whenever it was deemed expedient and for the public good, to erect gas-works at the expense of the corporation, or to purchase gas-works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city.

What, then, we must inquire, is the scope and effect of section 2486? This precise question has been determined by the Supreme Court of Ohio in *State* v. *City of Hamilton*, 47 Ohio St. 52, which was an action brought in the name of the State to determine whether the city had authority to erect its own gas-works. It was there contended, both by the Attorney General and the Hamilton Gas Light and Coke Company, that by sections 2480 and 2482 of the Revised Statutes (which are the same as sections 31 and 32 of the act of March 11, 1853), the legislature specified the conditions under which the council might build gas-works; that in the absence of those

conditions, the city was without power to do what it proposed to do; and that such an expression of the legislative will excluded the right of the city to erect gas-works under any circumstances. But the court said: "Those two sections designate what refusal or neglect on the part of gas companies to meet the requirements of law, would work a forfeiture of their rights under their charter, and authorize the council to lay pipes, and erect gas-works, and exclude a gas company already in operation from occupying any streets not already furnished with gas pipes of such companies; but such authority is very different from the general power conferred upon the council by section 2486 to construct gas-works without reference to the manner in which the existing company may use its franchise." "Section 2486," the court proceeds, "in plain language gives the power to the council either to erect gas-works, or to purchase such works already erected. The authority granted is not coupled with any conditions or contingency, but is to be exercised when the council may deem it expedient and for the public good. The language is free from ambiguity. The discretionary power would hardly seem consistent with the limitation sought to be imposed, that the council can build gas-works only where there are no gas-works in the municipality, or where gas companies, already organized, refuse or neglect to comply with the requirements of the law as to lighting or laying pipes, or neglect to furnish gas to citizens. The interest of the city may demand that a gas company established and doing business, although complying with all statutes and ordinances, should not continue to enjoy exclusive possession of the field of operation." Again: "In its present form, section 2486 was passed many years after the two sections which are reproduced in section 2480 and section 2482. Between the earlier and later statutory provisions we discover no repugnancy, and the canons of statutory construction do not require that either should prevail over the other. The authority given to municipalities by the later section is distinct from and independent of the power granted by the two antecedent sections."

Accepting, as we do, this decision of the highest court of

the State as correctly interpreting the legislative will, and, therefore, assuming that the legislature intended by section 2486 to confer authority upon the city of Hamilton to erect gas-works at its expense, whenever deemed by it expedient or for the public good to do so, the next contention of the plaintiff is that such legislation is within the constitutional inhibition of state laws impairing the obligations of contracts. This view is inadmissible. The statutes in force when the plaintiff became a corporation did not compel the city to use the gas-light furnished by the plaintiff. The city was empowered to contract with the company, for lighting streets, lanes, squares, and public places within its limits, but it was under no legal obligation to make a contract of that character, although it could regulate, by ordinance, the price to be charged for gas-light supplied by the plaintiff and used by the city or its inhabitants. It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties. As said by this court in *Curtis* v. *Whitney*, 13 Wall. 68, 70: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation." If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public. Upon this ground it was held in *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 81, that "we are forbidden to hold that a grant, under legislative authority, of an exclusive privilege, for a term of years, of supplying a munici-

pal corporation and its people with water drawn by means of a system of water-works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river." What was said in *Turnpike Company* v. *The State*, 3 Wall. 210, 213, is quite applicable to the present case. The State of Maryland incorporated a company with power to construct a turnpike between Baltimore and Washington; and subsequently incorporated a railroad company, with authority to construct a railroad between the same cities, the line of which ran near to and parallel with the turnpike. One of the questions in the case was, whether the last act impaired the obligation of the contract with the turnpike company, it appearing that the construction of the railroad had rendered it impracticable for the company, out of its diminished income, to maintain the turnpike in proper order. This court said: "The difficulty of the argument in behalf of the turnpike company, and which lies at the foundation of the defence, is, that there is no contract in the charter of the turnpike company that prohibited the legislature from authorizing the construction of the rival railroad. No exclusive privileges had been conferred upon it, either in express terms, or by necessary implication; and hence whatever may have been the general injurious effects and consequences to the company, from the construction and operation of the rival road, they are simply misfortunes which may excite our sympathies, but are not the subject of legal redress." So, it may be said, in the present case, neither in the statutes under which the plaintiff became a corporation, nor in any contract it had with the city, after January 1st, 1889, was there any provision that prevented the State from giving the city authority to erect and maintain gas-works at its own expense, or that prevented the city from executing the power granted by the section of the Code of 1869 to which we have referred.

This conclusion is required by other considerations. By the constitution of Ohio, adopted in 1851, it was declared that "no special privileges or immunities shall ever be granted,

that may not be altered, revoked, or repealed by the general assembly;" that "the general assembly shall pass no special act conferring corporate powers;" and that "corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Sec. 2, Art. 1; Secs. 1, 2, Art. 13. If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gas-light to the city of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation. These views are supported by the decisions of this court. In *Greenwood* v. *Freight Co.*, 105 U. S. 13, 17, the question was as to the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed, after a named day, "shall be subject to amendment, alteration or repeal at the pleasure of the legislature." This court, referring to that clause, said: "Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be

repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it." The words "at the pleasure of the legislature" are not in the clauses of the constitution of Ohio, or in the statutes to which we have referred. But the general reservation of the power to alter, revoke or repeal a grant of special privileges necessarily implies that the power may be exerted at the pleasure of the legislature.

We perceive no error in the record in respect to the Federal question involved, and the judgment must be

Affirmed.

In re CROSS, Petitioner.

ORIGINAL.

No. 10 Original. Submitted November 29, 1892. — Decided December 5, 1892.

The provision in section 845 of the Revised Statutes of the District of Columbia that when the judgment in a criminal case is death or confinement in the penitentiary the court shall, on application of the party condemned, to enable him to apply for a writ of error, "postpone the final execution thereof" etc., relates only to the right of the accused to a postponement of the day of executing his sentence, in case he applies for it in order to have a review of an alleged error; and, with the exception of this restriction, the power of the court was left as it had been at common law.

THIS was a petition for a writ of *habeas corpus*. The application was made by William Douglass Cross, a person indicted and convicted of murder in the District of Columbia. Some

previous movements in this case had been before the court in *Cross* v. *United States*, 145 U. S. 571, and *Cross* v. *Burke*, *ante*, 82. The present application alleged that the petitioner was "unlawfully deprived of his liberty and unlawfully imprisoned, confined and detained in the United States jail in the county of Washington, and District of Columbia." The prayer was that he be discharged and set at liberty.

The allegations respecting the illegality of the imprisonment were as follows:

"1. On the 7th day of July, 1891, at a special term of the supreme court of the District of Columbia, holding a court for criminal business, this petitioner was, by a verdict of a jury, convicted of murder.

"2. That thereafter he filed a motion for a new trial, which was heard and overruled, and on, to wit, the 30th day of July, 1891, judgment and sentence were pronounced against him by the justice presiding, holding said special term for criminal business, in the following words:

"'It is considered that for his said offence the defendant be taken by the warden aforesaid to the jail from whence he came, and there to be kept in close confinement, and that upon Friday, the 22d day of January, in the year of our Lord one thousand eight hundred and ninety-two, he be taken to the place prepared for his execution, within the walls of the said jail, and that there, between the hours of eight o'clock antemeridian and twelve o'clock meridian of the same day, he be hanged by the neck until he be dead, and may God have mercy upon his soul.'

"3. Petitioner further says, as he is informed by his counsel and verily believes, that an appeal was taken from said special term to the general term of the Supreme Court of the District of Columbia, and on January 12, 1882, said Supreme Court in general term affirmed the judgment of the special term in the following words:

"'Because it appears to the court here that there is no error in the record and proceedings, or in the judgment of the special term in this cause, it is considered by the court here that the said judgment be, and the same hereby is, affirmed.'

Statement of the Case.

"4. Petitioner further states, as he is informed by his counsel and verily believes, that a death warrant was, on the 12th day of January, 1892, issued for his execution to take place on the 22d day of January, 1892, and that no return of said warrant has ever been made.

"5. Petitioner further says that, as he is informed by his counsel and verily believes, while he was in jail awaiting execution, the chief justice of the supreme court of the District of Columbia allowed a writ of error to the Supreme Court of the United States.

"6. Petitioner further states, as he is informed by his counsel and verily believes, that on 21st day of January, 1892, the Supreme Court of the District of Columbia in general term, in the absence of the petitioner, postponed the day of his execution as fixed by the presiding justice in the special term, and in his absence resentenced him to be hanged on Friday, the 10th day of June, 1892, between the same hours specified in the said judgment of the said special term.

"7. Petitioner further says, as he is informed by his counsel and verily believes, that on the 16th day of May, 1892, the Supreme Court of the United States refused to entertain the writ of error and dismissed the same, holding that the act of February 6, 1889, did not authorize the issue of the writ, as will more fully appear on reference to the opinion of said court, a copy of which is hereunto annexed marked "A," and forms a part of this petition.

"8. Petitioner further says, as he is informed by his counsel and verily believes, that from the day upon which sentence was pronounced by the presiding justice, to wit, July 30, 1891, until the day fixed for his execution, to wit, January 22, 1892, the warden of the United States jail held and detained him as a prisoner under and by virtue of the said sentence.

"9. Petitioner further says, as he is informed by his counsel and verily believes, that after the day fixed for his execution, to wit, January 22, 1892, said warden has claimed the right to hold and detain this petitioner as a prisoner under and by virtue of an order of the Supreme Court of the District of Columbia, in general term, postponing his execution and resen-

tencing him to be hanged June 10, 1892, in the following words:

"'That the execution of the sentence of death pronounced against the defendant by the special term of this court on the thirtieth day of July, in the year of our Lord one thousand eight hundred and ninety-one, to take place on the twenty-second day of January, 1892, be, and the same is hereby, postponed until the tenth day of June, 1892, between the same hours specified in the said judgment of the said special term.'

"10. Your petitioner further avers, as he is informed by his counsel and verily believes, that section 1040, Revised Statutes U. S., under which the court in general term postponed the execution of the sentence, provides for cases carried to the Supreme Court of the United States, and directs what shall be done in such cases by the court rendering the judgment. It is provided that in case of affirmance the court rendering the judgment shall appoint a day for execution. All this is in cases which are carried to the Supreme Court in pursuance of law. The case of your petitioner has been decided not to have been so carried to the Supreme Court. The result, in contemplation of law, is that it never was in that court. Consequently the case not being such as is contemplated by said section 1040, the Supreme Court of the District of Columbia was without authority to change the date of execution. As the date lawfully fixed, to wit, January 22, 1892, has passed, and a new date was not lawfully fixed, and no other date can be fixed, your petitioner is advised that he is detained and imprisoned without authority of law.

"11. Petitioner further says, as he is informed by his counsel and verily believes, that since the dismissal of the writ of error by the Supreme Court of the United States on the 16th day of May, 1892, and the opinion of that court declaring that the allowance of said writ of error was *ultra vires*, without jurisdiction and null and void; and, as a necessary consequence, that the order of the Supreme Court of the District of Columbia in general term postponing the execution of this petitioner and resentencing him to be hanged at a later day was also *ultra vires*, without jurisdiction, and null and void;

that said warden has, since said decision, unlawfully detained and held this petitioner as a prisoner without any lawful warrant, and still so unlawfully detains and holds him.

"12. Petitioner further says, as he is informed by his counsel and verily believes, that on the 7th day of June, 1892, the Supreme Court of the District of Columbia, in special term and without any authority of law, or power or jurisdiction therein, postponed the execution of this petitioner to the 11th day of November, 1892, between the same hours heretofore specified.

"13. Petitioner further says, as he is informed by his counsel and verily believes, that on the 9th day of November, 1892, the Supreme Court of the District of Columbia, in special term and without any authority of law, or power or jurisdiction therein, again postponed the execution of this petitioner to the 2d day of December, 1892, between the hours heretofore specified.

"14. Petitioner further says, as he is informed by his counsel and verily believes, that there was no power, jurisdiction or authority vested in any court to resentence this petitioner, to postpone said sentence, or to fix another day for his execution beyond the 30th day of January, 1892, and that any and all postponement of the execution of the petitioner after the said 30th day of January, 1892, was null and void, and in violation of section 845 of the Revised Statutes of the United States relating to the District of Columbia, which said section governs the time of execution within the District of Columbia in all cases of appeal.

"15. Petitioner further says, as he is informed by his counsel and verily believes, that the authority of the warden of the United States jail to detain him as a prisoner expired January 22, 1892, and that since that day said warden has unlawfully kept and detained this petitioner as a prisoner without due process of law, and in violation of the Constitution of the United States."

Mr. Charles Maurice Smith and *Mr. Joseph Shillington* for petitioner.

Argument for Petitioner.

The petitioner, through his counsel, desires to submit to this honorable court the following points and decisions as to the rights, the power, and the authority of this court to issue these writs of *habeas corpus* and certiorari.

In *Ex parte Lange*, 18 Wall. 163, 166, Mr. Justice Miller, in delivering the opinion of the court as to its power to direct the writ of *habeas corpus* to issue, accompanied also by a writ of certiorari, said: "The authority of this court in such case, under the Constitution of the United States, and the fourteenth section of the Judiciary Act of 1789, 1 Stat. 73, to issue this writ and examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer open to question," citing *United States* v. *Hamilton*, 3 Dall. 17; *Ex parte Burford*, 3 Cranch, 448; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Metzger*, 5 How. 176; *Ex parte Kaine*, 14 How. 103; *Ex parte Wells*, 18 How. 307; *Ex parte Milligan*, 4 Wall. 2; *Ex parte McCardle*, 6 Wall. 318; *Ex parte Yerger*, 8 Wall. 85.

In *Ex parte Virginia*, 100 U. S. 339, 343, Mr. Justice Strong, in delivering the opinion of the court, said: "While, therefore, it is true that a writ of *habeas corpus* cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior Federal Court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all." And in that case, as in many others cited, the case of *Ex parte Lange* was referred to and approved.

In the following cases likewise, the opinion of the court in *The Lange Case* was approved and the writs of *habeas corpus* and certiorari were allowed to issue. *Ex parte Rowland*, 104 U. S. 604; *Roberts* v. *Reilly*, 116 U. S. 80, 85; *Ex parte Snow*, 120 U. S. 274; *Ex parte Bain*, 121 U. S. 1; *Ex parte Ayers*, 123 U. S. 443, 486.

Counsel for petitioner further say that the order of the general term of the Supreme Court of the District of Columbia, made in this case, postponing the execution of the sentence

of petitioner to June 10, 1892, was contrary to the provisions of section 845, Rev. Stat. of the District of Columbia, and was null and void, and that all subsequent orders made by such Court subsequent thereto are likewise null and void, and counsel thereupon ask that such writ of *habeas corpus* may issue and that it may be accompanied by a writ of certiorari in order that the illegal action of the Supreme Court of the District of Columbia may be clearly shown to your honorable court.

No one opposing.

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

This is a petition for writs of *habeas corpus* and certiorari. The matters set up will be found sufficiently reported in *Cross* v. *Burke*, *ante*, 82, and *Cross* v. *United States*, 145 U. S. 571. The application to us is in effect the same as that made to the Supreme Court of the District of Columbia, whose judgment denying the writ of *habeas corpus* was brought to this court by appeal, upon the hearing of which the merits were fully argued, although we were obliged to decline jurisdiction. Petitioner contends that the postponement of the execution of the sentence of death pronounced against him, by virtue of an order of the Supreme Court of the District in general term on January 21, 1892, and subsequent postponements by that court in special term, were without authority of law and in violation of section 845 of the Revised Statutes of the District, and that, therefore, he is unlawfully kept and detained without due process of law and in violation of the Constitution of the United States.

Conceding that the time of execution is not part of the sentence of death unless made so by statute, it is insisted that in the District the time has been made a part of the sentence by section 845, which provides that when the judgment is death or confinement in the penitentiary the court shall on the application of the party condemned, to enable him to apply for a writ of error, "postpone the final execution thereof to a reasonable time beyond the next term of the court, not exceeding in any case thirty days after the end of such term."

The argument is that the time fixed by such a postponement is to be regarded as a time fixed by statute, and that the power of the court to set a day for execution is thereby exhausted.

The Supreme Court of the District, upon the prior application, held that this provision related simply to the right of the accused to a postponement of the day of executing his sentence in case he should apply for it in order to have a review of an alleged error, and that with the exception of this restriction in the matter of fixing a day for execution, the power of the court was not made the subject of legislation, but was left as it had been at common law.

We concur with the views expressed by that court, and in the conclusion reached, that if the time for execution had passed in any case, the court could make a new order.

Unquestionably, Congress did not intend that the execution of a sentence should not be carried out, if judgment were affirmed on writ of error, except where the appellate court was able to announce a result within the time allowed for the application for the writ to be made. The postponements were rendered necessary by reason of delays occasioned by the acts of the condemned in his own interest, and the position that he thereby became entitled to be set at large cannot be sustained. *McElvaine* v. *Brush*, 142 U. S. 155, 159; *People* v. *Brush*, 128 N. Y. 529, 536.

It may be admitted that section 1040 of the Revised Statutes applies only to cases which can be brought to this court; but, apart from the fact that, as pointed out in *Cross* v. *United States*, *ubi supra*, the Supreme Court of the District, whether sitting in general or in special term, is still the Supreme Court, it is unnecessary to consider the validity of the postponements, since section 845 of the Revised Statutes of the District has not the effect contended for. Without reference to the state of case when a statute fixes or limits the time, the sentence of death remained in force, and was sufficient authority for holding the convict in confinement after the day fixed had passed, when it became the duty of the court to assign, if there had been no other disposition of the case, a new time for exe-

cution. *Rex* v. *Harris*, 1 Ld. Raym. 482; *Rex* v. *Rogers*, 3 Burrow, 1809, 1812; *Rex* v. *Wyatt*, Russ. & Ry. 230; *Ex parte Howard*, 17 N. H. 545; *State* v. *Kitchens*, 2 Hill (S. C.) 612; *Bland* v. *State*, 2 Carter (2 Indiana), 608; *Lowenberg* v. *People*, 27 N. Y. 336; *State* v. *Oscar*, 13 La. Ann. 297; *State* v. *Cardwell*, 95 N. Car. 643; *Ex parte Nixon*, 2 S. Car. 4.

The application for the writs must be denied.

WILMINGTON AND WELDON RAILROAD COMPANY *v.* ALSBROOK.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 1074. Argued November 17, 1892. — Decided December 5, 1892.

The general rule that a valid grant to a corporation, by a statute of a State, of the right of exemption from state taxation, given without reservation of the right of appeal, is a contract between the State and the corporation, protected by the Constitution of the United States against state legislative impairment, is not qualified by *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679; nor by *St. Paul, Minneapolis &c. Railway* v. *Todd County*, 142 U. S. 282.

The surrender of the power of taxation by a State cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power.

The exemption from taxation conferred upon the Wilmington & Raleigh Railroad Company by the act of January 3, 1834, incorporating it, was not conferred by that act upon the branch roads which the company was thereby authorized to construct.

Exemption from taxation may or may not be a "privilege" within the sense in which that word is used in a statute; and in the act of North Carolina referred to, the word "privileges" does not include such exemption.

The portion of the Wilmington and Weldon Railroad which lies between Halifax and Weldon, having been constructed by the Halifax & Weldon Railroad Company, and not under the charter of the Wilmington & Raleigh Railroad Company, is not exempt from state taxation.

The proceedings in *Wilmington Railroad* v. *Reid*, 13 Wall. 264, and in the same case in the state courts of North Carolina, do not operate as an estoppel so far as the road from Halifax to Weldon is concerned, nor as controlling authority in the premises.

Statement of the Case.

THIS was an action brought in the Superior Court of Halifax County, North Carolina, by the Wilmington and Weldon Railroad Company, to restrain the sheriff of that county from collecting certain taxes assessed on so much of a branch road of the plaintiff, known as the Scotland Neck branch, as lay therein, and on that part of the plaintiff's road which formerly constituted the Halifax and Weldon Railroad, and the rolling stock used with said roads. The plaintiff was incorporated under an act of the general assembly of North Carolina, approved January 3, 1834, entitled "An act to incorporate the Wilmington and Raleigh Railroad Company." 2 Rev. Stats. N. Car. (1837), 335, 347. By the first section of this act, commissioners were designated "for the purpose of receiving subscriptions to an amount not exceeding eight hundred thousand dollars, in shares of one hundred dollars each, to constitute a joint capital stock, for the purpose of effecting a communication by a railroad, from some point within the town of Wilmington, or in the immediate neighborhood of the said town, to the city of Raleigh, or in the immediate neighborhood of the said city, the route of which road shall be determined on by the company hereby incorporated." The first twenty sections of the act relate to the main line thus described.

The nineteenth section is as follows:

"That it shall and may be lawful for the said president and directors to determine from time to time what instalments shall be paid on the stock subscribed; to purchase with the funds of the company, and place on the said railroad constructed by them, all machines, wagons, vehicles, carriages and teams of any description whatsoever, which may be deemed necessary and proper for the purposes of transportation; and all the property purchased by the said president and directors, and that which may be given to the company, and the works constructed under the authority of this act, and all profits accruing on the said works, and the said property shall be vested in the respective shareholders of the company, and their successors and assigns forever, in proportion to their respective shares; and the shares shall be deemed personal property, and the property of said company; and the shares

therein shall be exempt from any public charge or tax whatsoever."

The twenty-first, twenty-second, twenty-third, and twenty-fifth sections read thus:

"SEC. 21. That the stockholders in general meeting, may, if they think fit, resolve to construct a branch or branches to the main road, to be connected with the main road at such point or points as they may determine on, and to lead in such direction, and to such a point or points as they may think best; and in order that they may do so, the said stockholders are fully authorized to cause books to be opened for subscriptions to the said lateral road or branch of the main road, and the subscribers for stock shall be subject to all the rules previously made by the company, and become members of the company with this exception only, viz.: that the stock subscribed by them shall be faithfully and honestly applied to the construction of that branch of the road for which they subscribed it; but the subscribers for the main road and the branches shall constitute but one company; and their rights of property and estate shall be in common, and not separate: *Provided, however*, That the whole capital of subscribed stock shall not exceed one million of dollars.

"SEC. 22. That all the powers, rights and privileges conferred by the preceding sections upon the said company, in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said company, and the president and directors thereof, in the laying out, in the construction, and in the use and preservation of said lateral or branch roads.

"SEC. 23. That it shall and may be lawful for the said company to construct a branch to the main road as aforesaid, under the restrictions aforesaid, so soon as the main road has reached the point at which the branch road is intended to be joined with the main road; but they shall not, under any pretence whatever, apply the funds of the company to the construction of a lateral or branch road, until the main road is completed, except they be subscriptions specifically made for the branch or lateral road."

"SEC. 25. That where a branch or lateral road to the main road is shorter than twenty miles, no other person or company shall be authorized and empowered to build a railroad from any point near its termination, so as to intersect with this main road in order to injure this company."

Section 24 refers to the right to connect or intersect with "said railroad or any of its branches," and these five sections, out of thirty-eight in all, relate to branch roads.

On December 15, 1835, an act of the general assembly was approved, entitled "An act to amend an act passed in the year one thousand eight hundred and thirty-three, entitled 'An act to incorporate the Wilmington and Raleigh Railroad Company.'" 2 Rev. Stats. N. Car., (1837,) p. 347. This act authorized the capital stock of the company to be increased to any sum not exceeding $1,500,000, and provided "that the stockholders of said company shall and may be at liberty to run the main road from some point within or near the town of Wilmington to some point in the city of Raleigh, or in the immediate neighborhood thereof, or from Wilmington, or near it as aforesaid to some point at or near the river Roanoke in this State, at the election of said stockholders, with the view of connecting with the Petersburg and Norfolk railroads;" "that the said company may be at liberty to lay off and construct any lateral road, under the rules and regulations, provided in the aforesaid act, before or after they have completed the main railroad aforesaid;" "that it shall and may be lawful for the said company to purchase, own and possess steamboats, and other vessels to ply and sail from the port of Wilmington to Charleston, or elsewhere; and to take and receive for the use of said company, over and besides the profits allowed in the said original act, such sums of money or other property for freight, passengers or other accommodation on said boats and vessels, as they may be able to make by contracts with their customers, and according to such rates as they may from time to time establish;" and enlarged the time for commencing the road to three years from January 1, 1836.

At the session of 1833 of the general assembly an act was

passed, entitled "An act to incorporate the Halifax and Weldon Railroad Company." 2 Rev. Stats. N. Car., (1837,) 325, 334. This act contained no exemption from taxation, and was subject to be altered, amended or modified by future legislatures. Under its provisions, the Halifax and Weldon Railroad Company procured its right of way, and laid out and constructed the road-bed and road from Weldon to Halifax, a distance of some eight miles, and entirely in the county of Halifax. The corporation had no rolling stock, but permitted the Portsmouth Railroad Company during the year 1836 to run its cars over its road-bed and track. In 1836 an act was passed, entitled "An act empowering the Halifax and Weldon Railroad Company to subscribe their stock to the Wilmington and Raleigh Railroad Company." 2 Rev. Stats. N. Car., (1837,) 334, 335. Pursuant to the provisions of this act the Halifax and Weldon Railroad Company and the Wilmington and Raleigh Railroad Company entered into an agreement, February 14, 1837, which agreement was in all respects executed and carried into effect by those corporations. The act authorized the stockholders of the Halifax Company to subscribe its stock on the books of the Wilmington Company, and sections two and three were as follows:

"Sec. 2. Upon the subscription of the stock held by the stockholders in the Halifax and Weldon Railroad Company, in the books of the Wilmington and Raleigh Railroad Company, all the property, real and personal, owned and held by the Halifax and Weldon Railroad Company, shall vest in and be owned and possessed by the Wilmington and Raleigh Railroad Company aforesaid, and be owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company is owned, held and possessed; and the road which may have been built, or partly built, by the Halifax and Weldon Railroad Company, shall thenceforward be deemed to all intents, as well criminal as civil, a part of the Wilmington and Raleigh Road.

"Sec. 3. So soon as the subscription hereby authorized shall have been made, all the rights and privileges acquired

under the before recited act of assembly, passed in the year one thousand eight hundred and thirty-three, entitled 'An act to incorporate the Halifax and Weldon Railroad Company,' shall cease and the corporate existence of said company be determined."

The terms of the agreement between the two companies were that the Wilmington Company should receive the assets of the Halifax Company and pay its debts, and the stockholders in the Halifax Company should be entitled to their respective number of shares of stock in the Wilmington Company.

The complaint alleged that "in the year 1840, the plaintiff completed the construction of its main road from the town of Wilmington through the town of Halifax to the town of Weldon on the Roanoke River, in said State, and thereby connected its main line with the Portsmouth and Norfolk Railroad and has had the same in use or operation ever since." The defendant denied the averment as made, and said that the part of the road between Halifax and Weldon was built by the Halifax Company, under its charter, and acquired by the plaintiff in 1837 in pursuance of the act of 1836. The plaintiff in reply averred that the Halifax road was only partially completed, and that the Halifax Company owned no rolling stock or other property of any description except its road-bed and right of way, and referred to the agreement of February, 1837. Plaintiff also, for further reply, set up the proceedings and judgment in an action commenced by plaintiff in 1869 in the Superior Court of Halifax County against the sheriff of that county, to enjoin the sale of property for taxes, partly assessed, as alleged, upon a portion of the road-bed and right of way acquired from the Halifax Company, and pleaded the same as an estoppel. It appeared that the agreement between the two companies above referred to was not registered as required by the act of 1836, but that this was subsequently done under an act approved February 5, 1875. It further appeared that after the execution of the agreement of February 14, 1837, the Halifax Company ceased to exercise any corporate acts or maintain any corporate existence or organi-

zation, and its road-bed, track and right of way passed under the control of the Wilmington Company, and has ever since been under its control as a part of its main line of road. Another act amending the charter was approved January 24, 1851, which authorized the capital stock to be increased to $2,500,000, and the issue of scrip to the extent of the increase. By the third section it was provided: "That said scrip shall represent shares in the capital stock of said company as though the said shares had been originally subscribed for by the holders thereof; and the said holders of the scrip thus issued under the provisions of this act shall be members of the said corporation, with the same privileges, rights, and immunities, and subject to the same rules and regulations as the original stockholders of said company." By an act approved February 15, 1855, the name of the Wilmington and Raleigh Railroad Company was changed to the name of the Wilmington and Weldon Railroad Company. At the session of 1867 of the General Assembly, an act was passed amending the act incorporating the Wilmington Company, which was duly accepted by its stockholders November 13, 1867. This act provided for the opening of books for subscriptions, to any amount deemed necessary, but not to exceed $25,000 per mile, for the construction of any branch to the main line, which stock was to be separate and independent of the stock of the main road, and to be applied exclusively to the branch road for which it was subscribed.

The case came on in the Superior Court before Connor, J., who, from the pleadings, affidavits and exhibits, made and filed findings, in substance as heretofore stated, and further therein found that during the year 1882, the plaintiff began and completed a branch road connecting with its main road at a point near the town of Halifax, in Halifax County, and running to the town of Scotland Neck, in that county, which branch was extended to the town of Greenville, in Pitt County, during 1890, and in 1891 to the town of Kinston, in Lenoir County, being in all a distance of eighty-five miles; that the branch road ran through the county of Halifax for twenty-three and one-half miles; that it was not shown that the said

branch was built pursuant to the provisions of the original charter or amendments thereto; that the branch road was operated and managed by the officers of the plaintiff company, and known as the Scotland Neck branch of the Wilmington and Weldon Railroad; that in addition to the said Scotland Neck branch the plaintiff company owned and operated in the same manner the following other branch roads in the State: The Clinton and Warsaw branch, 13 miles in length; the Nashville or Spring Hope branch, 18 miles in length; the Wilson and Fayetteville branch, 73.6 miles in length; the Tarboro branch, 17 miles in length, making a total of 206.6 miles, the main road being 162 miles in length; that the said branch roads, except the Tarboro branch, had been built within the past ten years; and that the plaintiff company also owned other investments in railroads and other properties.

A transcript of the proceedings and judgment roll, in the case of "*Wilmington and Weldon Railroad Company* v. *John H. Reid*," was attached to the findings.

The railroad commission of North Carolina, pursuant to the provisions of the revenue act of 1891 of that State, (Acts 1891, c. 323,) assessed for taxation the portion of plaintiff's main road and rolling stock from Halifax to Weldon, being the portion acquired from the Halifax Company, and also that part of the Scotland Neck branch in Halifax County, and directed the commissioners of Halifax County to place the same upon the tax list of the county for the year 1891, which was done by the county commissioners, and taxes were levied by them thereon accordingly. The tax list was duly placed in the hands of the defendant, the sheriff of the county, and he demanded payment of the taxes, which, being refused, he threatened to collect the same by distraint.

The Superior Court was of opinion that the tax upon the road-bed and rolling stock between Halifax and Weldon was void, and enjoined the defendant from enforcing its payment; but that the tax levied upon the Scotland Neck branch was valid, and vacated the preliminary restraining order against its collection. Both parties appealed to the Supreme Court, which held that the Superior Court had decided correctly as

to the branch line, but should have also decided the road-bed and rolling stock between Halifax and Weldon to be taxable; and, therefore, in that respect reversed the judgment of that court. Final judgment having been afterward entered in the Superior Court in accordance with the opinion and judgment of the Supreme Court the case was again taken by plaintiff to the Supreme Court and the judgment affirmed, whereupon this writ of error was sued out. The opinions of the Supreme Court, by Clark, J., which discuss the questions involved in all their aspects, will be found reported in 110 N. Car. 137.

Mr. Samuel Field Phillips, (with whom was *Mr. Frederic D. McKenney* and *Mr. George Davis* on the brief,) for plaintiff in error.

I. The court below erred in holding that property of the plaintiff appropriate to that part of the main route in question — *i.e.*, from Halifax to Weldon — was not exempt from taxation.

The power of the Wilmington and Raleigh Railroad Company under the amendment of December, 1835, to select Weldon as the "point on the Roanoke" is not only undeniable, but its exercise seems also to have been contemplated by the legislature.

In December, 1835, a company with a capital of $50,000, was constructing a railroad betwixt Halifax and Weldon. It had been charted at the same session as the Wilmington and Raleigh Railroad Company. The amended charter of the latter of that date did not refer, as is to be observed, to any "view of connecting with" the Halifax and Weldon railroad, but only "with the Petersburg and Norfolk railroads," which latter, as has been seen, were then contemplating a common terminus on the Roanoke about Weldon — *i.e.*, about the northern end of the Halifax and Weldon. In other words, the amended charter of the Wilmington and Raleigh Railroad Company suggested that its road for some dozen miles at its northern end might, and probably would run parallel with, and, of course, at a short distance from, that of the Halifax and Weldon. The latter was, on its face, to be a mere neigh-

borhood railroad company, and was regarded as too little a matter of public concern to receive, or probably even to solicit the privilege of exemption from taxation. At all events its property was not so exempt; and after December, 1835, it became confronted imminently, as above, with competition by a railroad company whose road might run immediately by the side of its own, and whose property was to be exempt. About a year afterwards an act was passed making it "lawful" for its stockholders to "subscribe their stock upon the books of" the Wilmington and Raleigh Railroad Company "upon such terms as may be stipulated between the stockholders in the Halifax and Weldon Railroad Company and the president and directors of the Wilmington and Raleigh Railroad Company;" whereupon "all the property, real and personal, owned and held by the Halifax and Weldon Railroad Company shall vest in and be owned and possessed by the Wilmington and Raleigh Railroad Company aforesaid, and be owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company is owned, held and possessed; and the road which may have been built or partly built by the Halifax and Weldon Railroad Company shall thenceforward be deemed to all intents, as well criminal as civil, a part of the Wilmington and Raleigh Railroad;" and, finally, "so soon as the subscription hereby authorized shall have been made all the rights and privileges acquired under the before-cited act of Assembly passed in the year 1833, entitled 'An act to incorporate the Halifax and Weldon Railroad Company,' shall cease, and the corporate existence of the said company be determined."

Can the circumstance that it was thought to be bad private economy, and also bad public policy, to require citizens to pay twice $50,000 and maintain two parallel roads, where one $50,000 and one road were sufficient, and that thereupon a device was resorted to by which the subscription already made and partially or completely paid for to one company should be transferred to another upon terms to be agreed upon by the parties thereto, and that then the former company should

cease to exist; can this circumstance, we ask, affect the question whether the property so obtained by the second company would participate in a statutory exemption which covered its property in general? If property which it would have acquired by the working out of their subscriptions by stockholders, under the supposition first named above, would have been exempt, why not equally under the latter?

There was to be no consolidation of the respective companies, nor any union of them, but only a succession. It is only by confounding the Halifax and Weldon road with the Halifax and Weldon Company that any survivorship of that company after the new subscription by its stockholders, or any survivorship of its privileges or of its disabilities or transfers of these, can be argued. Its brains were out; and in the meanwhile the Wilmington and Raleigh Company was not affected in respect to its previous identity, nor as regards any unlimited statutory immunity as to the property which it might require for its purposes. As was said by Coke when arguing a celebrated question it is not under the caps of our learned friends successfully to contradict this.

Inasmuch as the interpretation of charters must depend very much upon the special wording of each, we will confine our citation of authorities from amongst the numerous decisions of the court upon this general topic, to such as seem most nearly related to the present case. See *Philadelphia, Wilmington & Baltimore Railroad* v. *Maryland*, 10 How. 376; *Branch* v. *Tomlinson*, 15 Wall. 460, 464; *Charleston* v. *Branch*, 15 Wall. 470; *S. C.* 92 U. S. 677; *Green County* v. *Conness*, 109 U. S. 104; *Southwestern Railroad* v. *Wright*, 116 U. S. 231; *Chicago, Burlington &c. Railroad* v. *Guffie*, 120 U. S. 569, 573. As a result of these cases we find that two different sorts of statutory modification of the existence or the nature of corporations already existing have in connection with exemptions, etc. been recognized by this court: (1) where the privileges, etc., of several have been consolidated into one; — there the resulting corporation is a new one, the existence of which dates only from such consolidation; and (2), where the privileges of one or more already existing have

been merged into the hands of another already existing, — and there the existence of the latter is held to continue as before, its nature, however, being modified and its added property being received *cum onere* attached to the privileges so merged, in the very way that these had borne such burden previously.

The present is a third and very different case, in which one of two previous companies had been destroyed by legislative action consented to by its stockholders, as completely as if by judicial action under *quo warranto;* whilst such stockholders had concurrently been authorized to invest their old stock in the other company, which, however, was to receive no additional "privileges," and was left as free to fix by stipulation the value of the stocks so offered for its acceptance as it would have been in regard to any other consideration in kind that might have been offered by any one else in satisfaction of a subscription for its shares.

We therefore submit that the transaction in 1837 with the stockholders of the Halifax and Weldon Railroad Company was in substance a mere subscription by these persons of means of their own to forward purposes of the plaintiff that were already within the provisions of its charter — a transaction in no respect essentially different from ordinary subscriptions to the same purposes when the subsequent work, or the fruits of previous work, or other values are received by a company in satisfaction therefor; and consequently that such assignment is well founded.

II. The court below erred in holding that the property of the plaintiff appropriate to its Scotland Neck branch was not exempt from taxation.

The first provision for branches of the complainant's road occurs in section 21 of the charter of 1834, and this is continued in sections 22, 23 and 25. The only other provision about branches is that contained in the amendment of December, 1835, being the amendment which also authorized a change of the Raleigh terminus to one on the Roanoke River, viz.: Sec. 3. "That the said company may be at liberty to lay off and construct any lateral road, under the rules and regulations, provided in the aforesaid act, before or after they have com-

pleted the main railroad aforesaid, anything in the before-recited act to the contrary notwithstanding."

Under these provisions it has plainly been competent, as is submitted, for the complainant at its own discretion, and at any time, to construct branches from any point whatsoever upon its main road, in any direction whatsoever therefrom, and to any point whatsoever, within the State. The limitations upon the time for beginning and for completing the main road do not apply to the branches. The charter imposed upon those who should accept it a duty to construct the main road. The legislature might, therefore, well limit a period within which that duty should be performed. But as to branches there was no such duty, but only a license. The duty imposed by the charter was to be entered upon and performed at once; but this license was left to be made avail of according as developments might thereafter suggest.

But it is objected on behalf of the defendant that this reasoning disregards the important provisions of section 22, and that these qualify in respect to branches the previous provisions of the charter, so as to limit the "powers, rights and privileges" conferred by these "in respect to the main road and the lands through which it passes" — to matters connected with "the laying out, construction and use, and preservation of said lateral or branch road." From these words it is argued that the provisions of section 19 for exemption do not apply to the branches.

In reply, it is submitted that section 22 is, in both form and substance, a provision to "extend" to the branches only the previous provisions of the charter as to eminent domain for the main road, and that it has no operation upon the previous provision for exemption, which latter, as has been seen, already covered all "the property of said company," part of which property the section immediately preceding this had already *ex industria* pronounced such branches to be, vesting these (even should they be constructed by means of separate subscriptions) in the subscribers to the main road and the branches, as one company in common and not separately.

In the first place, the word "extend" of itself obviously

gives notice that what follows purports to be an enlargement of some previous grant, instead of a restriction thereupon. If section 22 had never been inserted in the charter or were now stricken out, there could be no doubt, after reading sections 19 and 21, that the property of the complainant appropriate to its branches is exempt from taxation, whilst, at the same time, it might in such case be seriously doubted whether a right of eminent domain in respect to such branches had been conferred.

The mere words of the first twenty sections of the charter of 1834 appeared not to confer upon the plaintiff a right of eminent domain in respect of its branch roads. Whether, upon the whole matter and general consideration (in the absence of section 22), a court might have so "construed" those sections as to allow to them in this respect an extension of meaning in behalf of branches, it is not necessary to consider and may even be conceded; for no draughtsman of a statute would unnecessarily incur the risks of litigation thereabout, when a few words would take these away. The draughtsmen here were acting in the year 1834, when railroad law (and indeed the American law of eminent domain as well) was in its infancy. They had before their eyes the limitation put upon the previous grant of eminent domain by its words, and could not then be sure as to the effect of a construction based upon general railroad policy, a matter which had then to be foreseen and guessed at. Naturally, therefore, they would exclude all conclusions and by positive terms "extend" to branches a gift already made, and perhaps only in respect to the main road, and we submit that such naturally suggested extension could argue nothing in favor of a restriction upon the provisions of section 19 for an exemption from taxation.

Mr. R. O. Burton (with whom was *Mr. Theodore F. Davidson*, Attorney General of the State of North Carolina, on the brief) argued for defendant in error. On the question of the jurisdiction of this court he said:

The decision of the state court is based upon a construction of the contract itself. It concedes its validity, but denies that

a certain class of property is within its terms. Hence the writ of error should be dismissed. *St. Paul, Minneapolis &c. Railway* v. *Todd County*, 142 U. S. 282.

If the case in the state court was decided on grounds not involving a Federal question, but broad enough to sustain the decision, this court will refuse to entertain jurisdiction. *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, 688.

Mr. Thomas N. Hill (with whom was *Mr. W. H. Day* on the brief), closed for plaintiff in error.

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

The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.

In arriving at its conclusions, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38.

We do not regard *Henderson Bridge Co.* v. *Henderson City*, 141 U. S. 679, and *St. Paul, Minneapolis &c. Railway Co.* v. *Todd County*, 142 U. S. 282, cited by defendant in error, as qualifying the rule upon this subject.

In *Henderson Bridge Co.* v. *Henderson City*, it was held by the Court of Appeals of Kentucky that the city of Henderson under a certain city ordinance accepted by the Bridge Company had acquired a contract right to tax that part of the bridge within the city limits in consideration of rights and privileges granted the company by the ordinance, and as this

interpretation justified the municipal taxation in question, and could not be reviewed by us, we declined to maintain jurisdiction.

In *St. Paul, Minneapolis &c. Railway Co.* v. *Todd County*, certain lands were considered by the state court as not within the exemption claimed, under the revenue law existing at its date.

But in the case in hand the court passed upon the action of the authorities in virtue of a legislative act approved more than fifty years after the making of the supposed contract, and explicitly upheld the law.

We are obliged, then, to consider the legality of this taxation in respect of the branch road proper and of the road from Halifax to Weldon.

The inquiry is limited to taxation on corporate property only, though the original exemption also covered the shares of the capital stock in the hands of its shareholders. The legislature recognized the distinction between the one class and the other; and if it were conceded that all the shares should be treated as exempt, as contended, in respect of which we are called upon to express no opinion, yet the entire property of the company might or might not be exempt in the light of all the provisions of the charter with its amendments, and the terms of the authority under which it may have been acquired.

The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power.

By its charter the Wilmington and Raleigh Railroad Company, with a capital stock of eight hundred thousand dollars, was empowered to construct, repair and maintain a railroad from Wilmington to Raleigh, and by its nineteenth section it was provided (the punctuation being corrected) that "the

property of said company and the shares therein shall be exempt from any public charge or tax whatsoever."

By section 21 branch roads were authorized, the whole capital of subscribed stock not to exceed one million of dollars, and by section 22 it was provided "that all the powers, rights and privileges conferred by the preceding sections upon the said company, in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said company, and the president and directors thereof, in the laying out, in the construction and in the use and preservation of said lateral or branch road."

So far from it plainly appearing from this language that the exemption from taxation was thereby extended to branch roads, it seems to us entirely clear that the words used were words of limitation, and in terms confined the powers, rights and privileges granted to those relating to the laying out, the construction, the repair and the operation of the branches.

The powers, rights and privileges conferred by the preceding sections upon the company in respect to the main road, and the lands through which it might pass, embraced the rights and powers necessary for the laying out, construction, repair, maintenance and operation of a railroad, including the power of eminent domain in the various forms of its exercise; in short, the positive rights or privileges, without which the branch roads could not be constructed or successfully worked, but which did not in themselves include immunity from taxation, a privilege having no relation to the laying out, construction, use or preservation of the road.

In *Railroad Company* v. *Commissioners*, 103 U. S. 1, the Annapolis and Elk Ridge Railroad Company was "invested with all the rights and powers necessary to the construction and repair" of its railroad, and for that purpose was to "have and use all the powers and privileges" and be subject to the obligations contained in certain enumerated sections of the charter of the Baltimore and Ohio Railroad Company. Among these sections was one containing this provision: "And the shares of the capital stock of the said company shall be deemed and considered personal estate, and shall be exempt

from the imposition of any tax or burthen by the States assenting to this law." It was held that exemption from taxation was not one of the privileges of the Baltimore and Ohio Company, which the new company was permitted "to have and use," since the powers and privileges conferred were only such as were necessary to the construction, repair and use of the railroad. And *Railroad Companies* v. *Gaines*, 97 U. S. 697, and *Morgan* v. *Louisiana*, 93 U. S. 217, where similar rulings were made, were cited and approved.

The language of the section under consideration requires the same construction, although the section relates to branch roads of the same company and not to the roads of different companies. The fact that the branches may be component parts of an organic whole; that "the subscribers for the main road and the branches shall constitute but one company, and their rights of property and estate shall be in common, and not separate," (§ 21), does not change the rule, for restrictive words cannot be wrested from their apparent meaning because used in the same charter and with regard to the creation of certain parts of one system, if those subdivisions as authorized have a separate physical existence and constitute in themselves a certain class of property. If other companies had been chartered in the language employed in these sections there could be no question that their property would be liable to taxation, and no reason is perceived for treating these branches as differently situated in this regard.

We cannot accede to the ingenious suggestion of counsel that section 22 was simply a provision for extending to the branches the previous provisions of the charter as to eminent domain only. The powers, rights and privileges were those pertaining to the use as well as the construction of the branches. And if a necessity appeared to exist of specifically conferring upon the company the power of eminent domain in respect of its branch roads, because of the character of the power, it is difficult to see why exemption from taxation should not have been mentioned, for the same reason, if it had been intended to extend that also to the branches. Nor by a play upon the word "extend" can the section be regarded as an enlargement

to the exclusion of restriction. To extend the powers, rights and privileges of the company existing as to the main road so as to comprehend the branches, may, it is true, be said to have enlarged their application, but only in the particulars named, and as restricted by the enumeration.

We do not deny that exemption from taxation may be construed as included in the word "privileges," if there are other provisions removing all doubt of the intention of the legislature in that respect, *Picard* v. *East Tennessee &c. Railroad Co.*, 130 U. S. 637, 642; but we have none such here.

And in this connection, some further observations may properly be made. As pointed out by the Supreme Court, the charter as originally granted was for the construction of a railroad from Wilmington to Raleigh, a distance of something over one hundred miles, with a capital stock of $800,000; and branches were authorized under the sections referred to, interjected into the body of the act, the capital being, however, limited to $1,000,000. The act of 1835 authorized a change of terminus "to some point at or near the river Roanoke," and an increase of the capital stock to $1,500,000, and the company was also empowered to purchase, own and possess steamboats and other vessels to ply from Wilmington to Charleston, or elsewhere. The act of 1851 permitted an increase of the capital stock to $2,500,000. These acts contained no exemption of property from taxation, nor did the act of 1867, which authorized the company to open books for subscription to build branch roads to the amount of $25,000 per mile, nor any other amendatory act availed of by the company.

Under the act of 1835 the road was built to Halifax, one hundred and fifty-four miles, and by the acquisition of the Halifax and Weldon Railroad was extended to Weldon, making a distance of one hundred and sixty-two miles. The findings show over two hundred miles in branch roads. Doubtless these, or some of them, might be treated as constituting parts of the main line in fact, but under the charter that term is applicable to the line from Wilmington to Halifax, or to Weldon, a consideration involved in another aspect of the case.

By section 33 of the act of 1834, the completion of "the

main line from Wilmington to Raleigh within twelve years" was required, but it is insisted that this limitation had no application to the branches; that as to the main line its construction was a duty, but as to the branches, their construction was simply licensed; and that under the acts of 1834 and 1835 it was competent for the company, at discretion and at any time, to construct branches from any point on its main road in any direction and to any point within the State. None of the branch roads were either commenced or finished within the twelve years. The Tarboro branch, it is said, was built in 1860, and the others, according to the findings, within ten years prior to December, 1891. We find nothing in the record to indicate that if the legislature intended to empower this company to tessellate the State with branch roads, it was designed that they should be exempted from the payment of taxes. Whatever effect the acceptance of the amendments and the delay in building the branches may have had, it is quite clear that their immunity from taxation cannot be successfully asserted under the circumstances.

It remains to examine the case as respects the road from Halifax to Weldon.

Under the amendment of 1835 the Wilmington Company was at liberty to run its main road from Wilmington to Raleigh, or from Wilmington "to some point at or near the river Roanoke."

The Supreme Court held that Halifax was the point on the Roanoke River which, by election of the company, was made the terminus of the main road as authorized, instead of Raleigh. This followed from the fact that the company only built its road to Halifax under its charter, and that Weldon was reached by the acquisition of the road of the Halifax Company under the act of 1836, passed for that purpose.

The main road of the Wilmington Company was exempt, but if the Halifax road after its transfer be regarded as a branch or connecting road, and, at all events, as in law not a part of the main road, then it was not within the exemption of the charter, and the taxation complained of was not illegal. It must be borne in mind that the Halifax road was con-

structed under an act of incorporation which did not withdraw the property of the Halifax Company from taxation. The legislature apparently did not consider it necessary to hold out that inducement to the building of a line between Halifax and Weldon, and when, for the benefit of these railroad companies, it authorized the transaction in question, it must be assumed to have done this as a matter of favor, and not upon the consideration of benefit to the public by the creation of what had already been brought into existence without any special release from common burdens.

The act of 1836 was an act, as its title stated, "empowering the Halifax and Weldon Railroad Company to subscribe their stock to the Wilmington and Raleigh Railroad Company." This was to be done upon such terms as might be stipulated between the two companies, and the terms agreed on were the payment of the Halifax Company's debts, the transfer of its assets, and the issue of certificates to its stockholders of their respective number of shares in the Wilmington Company. Upon that subscription being effected, the act provided that "all the property, real and personal, owned and held" by the Halifax Company should become vested in and be owned and possessed by the Wilmington Company, and be "owned and held and possessed by the said company in the same manner that all the other property, real and personal, which has been acquired by the said company, is owned, held and possessed;" and that the road of the Halifax Company shall "thenceforward be deemed, to all intents, as well criminal as civil, a part of the Wilmington and Raleigh Railroad." The rights and privileges of the Halifax Company thereupon ceased, and its corporate existence was determined. The legal identity of the Wilmington Company remained, while that of the Halifax Company was destroyed; and although the transaction was described by the legislature, in the act of 1875, as a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation. But it by no means follows that the transfer of the road of the one company to the other made it in law such an extension of the main road of the latter as to bring it within the exemption

from taxation which, as we have seen, was confined to the main road alone. The main road built by the Wilmington Company under its charter terminated at Halifax. The prolongation of the line to Weldon was the result of acquisition under another and different act required to be passed in order to allow this to be done, and not conferring any exemption. As already indicated, if the construction of the main road could be presumed to have been partially induced by the promise of exemption, no such presumption arose from the mere legislative concession of authority to obtain an existing road.

The property acquired was, indeed, to be owned, held and possessed by the Wilmington Company in the same manner as its other property, the real estate as in fee simple and the personality as used and enjoyed, but the way in which property is owned and handled has no necessary relation to an exemption. The branch roads are owned, held and possessed in the same manner as the main road, but the extent of the exemption is limited by the charter. And that limitation was neither explicitly nor by fair implication removed by the language of the act of 1836.

Central Railroad &c. Co. v. *Georgia*, 92 U. S. 665, is much in point. There the Central Company and the Macon Company were authorized to unite and consolidate their stocks and all their rights, privileges, immunities, property and franchises, under the name and charter of the Central Company, and thereupon the holders of the shares of the stock of the Macon Company became entitled to receive a like number of shares of stock in the Central Company, upon surrendering their certificates of stock in the Macon Company. It was held that the consolidation did not amount to a surrender of the existing charters of both companies, and the creation of a new company; that the purpose and effect of the consolidation act were to provide for a merger of the Macon Company into the Central Company, and to vest in the latter the rights and immunities of the former, but not to enlarge them; and that as the Macon Company held its franchises and property subject to taxation, the Central Company, succeeding to the ownership, held them alike subject. It was not doubted that

the Macon Company was intended to go out of existence, for, as said by the court through Mr. Justice Strong, provision was made for the surrender of all the shares of its capital stock, and without stockholders it could not exist. The Central Company absorbed the Macon Company, and it ceased to be, just as in the case at bar the merger was to result and did result in the determination of the corporate existence of the Halifax Company.

In *Southwestern Railroad Co.* v. *Wright*, 116 U. S. 231, 236, the question related to the liability of the railroad company for taxes on different parts of its road. The original charter contained an exemption from taxation, and as to two of the parts acquired or built under subsequent legislation, there was a reservation of the right to tax. A third division was constructed under an amendatory act giving authority so to do, "under the rules and restrictions" originally prescribed, but containing nothing about taxation. As the original charter was not the source of power to build the division, it was decided that the exemption therein contained did not extend to the latter. Mr. Chief Justice Waite, delivering the opinion of the court, said: "In building this extension or branch the company was placed 'under the rules and restrictions' they were subjected to in building the original road; but that did not necessarily imply an exemption of this line from taxation to the same extent that the old road was exempted. That exemption was only for that road, and as the amending act does not in terms or by fair implication apply the exemption to the additional road, which was to be built under it, we must presume that nothing of the kind was intended, and that the state was left free to tax that road like other property."

We concur with the state court in the conclusions reached, as sustained by reason and authority.

It appears from the record of the case of *Wilmington and Weldon Railroad Company* v. *John A. Reid*, that certain taxes were imposed in 1869 upon the franchise and rolling stock of the Wilmington Company and upon certain lots of land situated in the county of Halifax, forming part of the property of the company and necessary to be used in the

operation of its business; and that the defendant Reid, sheriff of the county, had seized an engine and tender belonging to the plaintiff in the effort to collect the tax. A demand was made on the county commissioners to correct the tax list in the particular of the levy against the franchise and rolling stock, and subsequently a complaint was filed by the company against the sheriff, the county commissioners not being made parties, setting up that neither the lots nor the franchise or rolling stock were liable to be taxed, because exempt under section 19 of the company's charter. The facts being admitted, judgment was entered sustaining the exemption claimed, and the sheriff was enjoined.

The case was then taken to the Supreme Court of the State, where it was held that the franchise was liable to taxation, and the order of the Superior Court was reversed. 64 N. C. 226. To review this judgment a writ of error was sued out from this court, and it was thereon decided that a statute exempting all the property of a railroad company from taxation exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also, and the judgment of the Supreme Court was in turn reversed. *Wilmington Railroad* v. *Reid*, 13 Wall. 264. These proceedings are relied on as an estoppel so far as the road from Halifax to Weldon is concerned, or as controlling authority in the premises. We think they cannot be so regarded. The causes of action are not identical and the points or questions actually litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax was not adverted to; and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been, but was not brought in issue and passed upon. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610.

It is quite evident that the former action was simply availed of in order to obtain a decision as to the power to tax the main line, and that no other point was controverted.

Judgment affirmed.

Counsel for Plaintiff in Error.

BUTLER *v.* GORELEY.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 20. Argued November 21, 22, 1892. — Decided December 5, 1892.

One T., of Boston, went into insolvency in Massachusetts, in June, 1883, and a deed of assignment was made to his assignee in July, 1883. In June, 1863, T. was on board an American vessel, which was captured and burned by the Georgia, a tender of the Confederate cruiser Alabama, and thereby lost his personal effects and sustained other losses. Under the act of Congress of June 5, 1882, c. 195 (22 Stat. 98), T., in January, 1883, filed a claim, in the Court of Commissioners of Alabama Claims, claiming compensation for his losses, and the court gave a judgment in his favor. In February, 1885, a draft for the amount was issued by the Treasury, payable to the order of T. and was sent to, and received at Boston. T. died at Boston four days later, intestate. In March, 1885, T.'s widow was appointed his administratrix by the Probate Court of the District of Columbia. In April, 1885, she gave a power of attorney to one B. to endorse the draft. He did so and collected the amount, which he retained. The assignee in insolvency sued B. in a state court of Massachusetts, to recover the amount and had judgment. On a writ of error from this Court, *held*,

(1.) The decision and award of the Court of Commissioners of Alabama Claims was conclusive as to the amount to be paid on the claim, but not as to the party entitled to receive it; and the claim was property which passed to the assignee in insolvency, under the assignment to him, although it was made prior to the decision of the Court of Commissioners;

(2.) The claim and its proceeds were assets within the jurisdiction of Massachusetts;

(3.) B. was liable to the assignee in insolvency;

(4.) § 3477 of the Revised Statutes did not apply to the assignment in insolvency;

(5.) The insolvency law of Massachusetts was not unconstitutional;

(6.) It was not necessary, after the repeal of the bankruptcy act of 1867, that the insolvency statute of Massachusetts should have been reënacted in order to become operative.

THE case is stated in the opinion.

Mr. Benjamin F. Butler for plaintiff in error.

Mr. George E. Jacobs and *Mr. Charles Levi Woodbury* for defendant in error. *Mr. W. H. H. Andrews* was with *Mr. Woodbury* on the brief.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action of contract, brought in the Superior Court for Suffolk County, Massachusetts, by writ, dated October 20, 1886, returnable on the first Monday of November, 1886, by Charles P. Goreley, assignee in insolvency of the estate of Isaac H. Taylor, an insolvent debtor, against Benjamin F. Butler, to recover the sum of $5874.15, and interest thereon from April 6, 1885. The particulars of the plaintiff's demand, as set forth in the writ, are to the purport and effect contained in the agreed facts hereinafter set forth. The defendant appeared in the suit, and filed an answer denying all the allegations in the writ and declaration. A jury trial was waived by a written agreement, and the parties filed the following statement of agreed facts:

"Isaac H. Taylor, of Boston, in said county, mentioned in the declaration, filed his voluntary petition in insolvency, in said county, June 20, 1883, on which he was duly adjudged an insolvent debtor, and his assignee was appointed on the 20th day of July in the same year, and his deed of assignment was thereupon issued to him on the same day, a copy of which is annexed and made a part hereof and is marked 'A,' and the plaintiff accepted the same, proceeded to the discharge of his duties, and published due notice of his appointment in the Boston Post in September, 1883, a newspaper published at Boston, Mass.

"The second and third meetings of the creditors were duly held and due notice thereof published in newspapers at said Boston, at which claims were proved, but no discharge was granted to the insolvent. The schedule of assets of said Taylor did not disclose the claim hereinafter mentioned. Prior to said insolvency said Isaac H. Taylor, on or about the 14th day of June, 1863, in or near latitude 23 degrees south, longitude 43 degrees west, was a passenger on board the bark

Good Hope, which was captured and burned by a tender of the Confederate cruiser Alabama named the Georgia; and said Isaac H. Taylor, being a passenger lawfully on board said bark Good Hope, an American vessel, by reason of said capture and burning of said bark, became the loser of his personal effects, expenses and other losses, amounting in all, as he claimed, to five thousand three hundred and fifty dollars, with interest thereon.

"Whereupon, after Congress had passed an act known as an act in regard to Alabama Claims, by which citizens of the United States proving their losses should be indemnified out of the Treasury of the United States, from the proceeds of the money paid to the United States by Great Britain under the Geneva award appointed under the treaty of Washington, which was then in the Treasury of the United States, said Taylor filed his claim on the 13th day of January, 1883, which claim was duly prosecuted and heard, and was adjudicated in favor of Isaac H. Taylor by the Court of Commissioners of Alabama Claims, in the sum of three thousand seven hundred and eighty-five dollars and twenty-five cents, actual loss and damage sustained by him, with interest thereon at the rate of four per cent per annum from June 14, 1863, to March 31, 1877, which interest amounted to the sum of two thousand and eighty-eight dollars and ninety cents, making a total sum adjudicated to him of five thousand eight hundred and seventy-four dollars and fifteen cents. No other assets of value came to the hands of the plaintiff as assignee aforesaid.

"That on the 20th of February, 1885, a draft issued from the Treasury, a copy whereof, with the endorsements thereon, is hereto annexed and made a part hereof and is marked 'B,' payable to the order of Isaac H. Taylor, for said sum, and was thereupon duly mailed to the care of Benjamin F. Butler, the defendant, E. J. Hadley and E. L. Barney, attorneys of record, at 16 Pemberton Square, Boston, which was received by them in due course of mail.

"On February 24, 1885, Isaac H. Taylor died at said Boston intestate. On March 31, 1885, Sallie B. Taylor, of Duxbury, Massachusetts, the widow of said Isaac H. Taylor, upon her

petition filed March 7, 1885, and on giving bond with sureties, was duly appointed by the Probate Court of the District of Columbia administratrix of the personal estate of said Isaac H. Taylor. There has been no appraisal, nor has she as administratrix filed any inventory nor done any act, so far as the records show, since the letters of administration issued to her.

"That on April 4, 1885, said Sallie B. Taylor executed a power of attorney, a copy of which is annexed and made a part hereof, and is marked 'C,' to said Butler, the defendant, to endorse said draft and receive payment thereon from the Treasury of the United States, and thereupon said Butler received said sum of five thousand eight hundred and seventy-four dollars and fifteen cents; that said Butler thereafterwards paid, before the commencement of this suit, the attorney's fees upon said draft, amounting to $1087, and on the 26th day of July, 1886, he paid the sum of one hundred and twenty-six dollars for undertaker's services, but without the knowledge of the plaintiff.

"It is further agreed, that the acts passed June 23, 1874, and June 5, 1882, made provision for the payment of losses suffered through certain cruisers called the inculpated cruisers, among which were the Alabama and her tenders, of which said Georgia was one.

"That when said Sallie B. Taylor, the widow, applied to said Butler to have said money paid to her, he advised her that that could not be done unless she took out administration in the District of Columbia, and she accompanied him to Washington, and there applied to the court for such letters of administration, and said Butler, the defendant, signed her bond as such administratrix, she having no property in the District of Columbia, and made an agreement with her to retain the draft and the moneys received thereon as security for his becoming surety on said bond. Owing to the claim made in this suit said administration has not yet been settled and concluded in said District, but awaits the determination thereof.

"That demand was made upon the defendant for said draft

by the plaintiff in person, at Boston, before the filing of said petition for administration by said Sallie B. Taylor, and defendant was at the same time notified by the plaintiff that he was assignee, as aforesaid, of the estate of said Taylor, and that as such assignee he was entitled to the amount of said draft and the proceeds thereon. The treaty of Washington, the award of the arbitrators thereunder, and the acts of Congress of June 23, 1874, and June 5, 1882, the laws of Maryland as continued in force by the laws of the District of Columbia, and the laws of the District of Columbia may be referred to and are made a part hereof.

"If the court find that the plaintiff is entitled to recover, judgment shall be entered for the plaintiff for the sum of forty-six hundred and sixty-one and $\frac{15}{100}$ dollars, and interest thereon from June 1st, 1887; otherwise, plaintiff to become nonsuit."

The deed of assignment annexed to the agreed facts, and marked "A," set forth that Charles P. Goreley had been duly appointed assignee in the case of Isaac H. Taylor, insolvent debtor, by the court of insolvency of Suffolk County, and that the judge of that court, by virtue of the authority vested in him by the laws of Massachusetts, thereby conveyed and assigned to said assignee all the estate, real and personal, of Taylor, including all the property of which he was possessed, or which he was interested in or entitled to, on June 20, 1883, excepting property exempt from attachment, in trust for the uses and purposes, with the powers and subject to the conditions and limitations, set forth in said laws. The deed was executed by the judge of the court of insolvency on July 20, 1883.

The draft referred to in the agreed facts, and marked "B," was dated February 20, 1885, and was drawn by the Treasurer of the United States on the Assistant Treasurer at Boston, Massachusetts, payable to the order of Isaac H. Taylor, for $5874.15, and was endorsed on the back as follows: "Sallie B. Taylor, adm'x of Isaac H. Taylor, by her attorney-in-fact, Benj. F. Butler. Payable to Benj. F. Butler, attorney. Authority on file. J. R. Garrison, Dep'ty First Comptroller." It was paid by the Treasurer of the United States on April 6, 1885, and was accompanied by a power of attorney, marked

"C," dated April 4, 1885, executed by Sallie B. Taylor, appointing Benjamin F. Butler her attorney to endorse her name on said draft, and to receive and receipt for the money. This power of attorney was duly acknowledged before a notary public of the county of Suffolk, Massachusetts, on April 4, 1885.

On November 15, 1887, the case was heard on the agreed facts, by the Superior Court, which on that day entered a judgment for the plaintiff in the sum of $4789.33. The defendant appealed to the Supreme Judicial Court of Massachusetts, which, on May 4, 1888, transmitted a rescript to the Superior Court, directing its clerk to enter a judgment for the plaintiff for $4661.15 and interest thereon from June 1, 1887. The Superior Court, on June 4, 1888, entered a judgment in favor of the plaintiff, against the defendant, for $4943.14 damages, and $34.41 costs. The defendant has brought the case to this court by a writ of error.

The opinion of the Supreme Judicial Court of Massachusetts is reported in 147 Mass. 8. That court held that, under the insolvent law of the State, (Public Statutes, c. 157, § 46,) which provided that "the assignment shall vest in the assignee all the property of the debtor, real and personal," the claim in question was "property;" that under the act of Congress of June 5, 1882, c. 195, 22 Stat. 98, proceedings under which had been begun by Taylor, on January 13, 1883, before his petition in insolvency was filed on June 20, 1883, the claim was property which passed by the assignment; that there was no force in the objection that the claim could not be assigned in insolvency before it was allowed by the Court of Commissioners of Alabama Claims; and that the claim was clearly within the general intent of the Public Statutes, c. 157, §§ 44 to 46, and the specific words, "rights of action for goods or estate, real or personal."

The court refused to consider the question of the constitutionality of the state insolvent law, holding that the question was settled affirmatively by the decision in *Ogden* v. *Saunders*, 12 Wheat. 213, and the cases which had followed it. The court further held that the action could be maintained against

the defendant; that the plaintiff had no notice of the proceeding instituted by Taylor in the Court of Commissioners of Alabama Claims until Taylor had got his judgment and a draft for the amount was in the defendant's hands; that then the plaintiff demanded the draft, and was entitled to receive it; that the fact that the defendant subsequently advised the widow of Taylor to take out administration at Washington, that she did so, and that he signed her bond, with an agreement that he should retain the draft as security, could not better his case; that the effect of the judgment of the Court of Commissioners of Alabama Claims was to appropriate a fund to the claim, and to transfer the claim to that fund, leaving the question of title open to subsequent litigation in the ordinary courts; and that the statute did not leave the United States subject to be charged a second time, notwithstanding a payment by the United States to the wrong person, any more than, on the other hand, it made the decision of the Commissioners' Court conclusive as to the person entitled to the bounty of the United States.

The assignments of error made in this court by the defendant are as follows: "1. That the state court, against the contention of the defendant, held and declared that the laws of insolvency of the State could and did affect, assign and transfer the claim of Isaac H. Taylor against the United States, being in the form of an adjudication of the Court of Alabama Claims, as against his widow, his administratrix in the District of Columbia. 2. That the state court decided against the contention of the defendant, that the insolvent law of Massachusetts transferred the property of said Isaac H. Taylor, to wit, a claim against the United States, evidenced by an award of the Court of Commissioners of Alabama Claims. 3. That the state court decided against the contention of the defendant, that the insolvent laws of Massachusetts, as enforced, took effect upon the person and property of said Isaac H. Taylor, as a system of bankruptcy, in contravention of the Constitution and laws of the United States."

We regard this case as controlled by the decision of this court in *Williams* v. *Heard*, 140 U. S. 529. In that case, it

was held that the decisions and awards of the Court of Commissioners of Alabama Claims, under the statutes of the United States, were conclusive as to the amount to be paid on each claim adjudged to be valid, but not as to the party entitled to receive it; and that a claim decided by that court to be a valid claim against the United States was property which passed to the assignee of a bankrupt, under an assignment made prior to the decision of the Commissioners' Court.

Both parties to the present suit were citizens of Massachusetts, and Taylor, at the time of his insolvency and to the time of his death, resided at Boston. His wife, who became his widow, resided at Duxbury, in Massachusetts. The proceeds of Taylor's claim were in Massachusetts, in the shape of the draft of the Treasurer of the United States, dated February 20, 1885. It was mailed that day to the defendant at Boston, and received there in due course of mail, previous to the death of Taylor, and was payable to Taylor's order by the Assistant Treasurer of the United States at Boston; and, after the death of Taylor, the proceeds of the draft were in the hands of the defendant at Boston. Taylor's claim and its proceeds became assets within the jurisdiction of Massachusetts, and the right to them had there vested in the plaintiff, before the death of Taylor. No person had a right to take the draft or its proceeds out of the jurisdiction of that State, on the facts of this case. *Cole* v. *Cunningham*, 133 U. S. 107.

The plaintiff having demanded the draft from the defendant at Boston, before Mrs. Taylor applied for letters of administration in the District of Columbia, and then notified him that the plaintiff was assignee in insolvency of Taylor, and entitled to the proceeds of the draft, Mrs. Taylor had no right to them as against the plaintiff; and the defendant became liable to the plaintiff for them. The defendant had no right to withdraw the draft from administration in Massachusetts, and transfer its proceeds to the District of Columbia for ancillary administration. On the death of Taylor, the attorneyship of the defendant for him became extinct. The title of the plaintiff, as assignee in insolvency, accrued before the recovery of judgment by Taylor against the United States in the Court of

Commissioners of Alabama Claims, and before the death of Taylor.

The defendant raises the point that if there was any claim against the United States due to Taylor at the time of the assignment in insolvency, such assignment of it was prohibited by § 3477 of the Revised Statutes of the United States, which provides as follows: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same."

As to this point, the Supreme Judicial Court of Massachusetts said, that § 3477 did not apply to assignments in bankruptcy, although upon a voluntary petition, *Erwin* v. *United States*, 97 U. S. 392, and, by parity of reasoning, did not apply to assignments in insolvency. Sections 44, 46 and 51 of chapter 157 of the Public Statutes of Massachusetts read as follows: "Sect. 44. The judge shall, by an instrument under his hand, assign and convey to the assignee all the estate real and personal of the debtor, except such as is by law exempt from attachment, and all his deeds, books and papers relating thereto." "Sect. 46. The assignment shall vest in the assignee all the property of the debtor, real and personal, which he could have lawfully sold, assigned or conveyed, . . . all debts due to the debtor or any person for his use, and all liens

and securities therefor, and all his rights of action for goods or estate, real or personal, and all his rights of redeeming such goods or estate." "Sect. 51. He" [the assignee] "shall have the like remedy to recover all the estate, debts and effects in his own name, as the debtor might have had if no assignment had been made." The Supreme Judicial Court said, in the present case, that, if it should be suggested that, although the claim was property of the insolvent, it was not property which he could have lawfully assigned in person, and therefore was not within the words of the statute of the State, the answer was that it was clearly within the general intent of §§ 44 and 46, and within the specific words, "rights of action for goods or estate, real or personal." Taylor's right vested before it was assigned to the plaintiff, and the plaintiff took it in the lifetime of Taylor.

In *United States* v. *Gillis*, 95 U. S. 407, 416, this court, speaking of § 1 of the act of February 26, 1853, c. 81, (10 Stat. 170), now embodied in § 3477 of the Revised Statutes, said, that there might be assignable claims against the United States, which could be sued on in the Court of Claims, in the name of the assignee; and that "there are devolutions of title by force of law, without any act of parties, or involuntary assignments compelled by law, which may have been in view."

In *Erwin* v. *United States*, 97 U. S. 392, 397, this court said, speaking of the act of 1853, that it applied only to cases of voluntary assignment of demands against the government, and also: "It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims."

In *Goodman* v. *Niblack*, 102 U. S. 556, the act of 1853 was under consideration. A person had made an assignment, in 1860, for the benefit of his creditors, which included all his rights, effects, credits and property of every description; and this court held that the assignment, although it covered whatever might be due to him under a contract which he had with

the United States for the transportation of the mails in steam vessels, was not within the prohibition of the act of 1853, nor in violation of public policy. It said (p. 560): "In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor, *of all his effects*, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? . . . We cannot believe that such a meritorious act as this comes within the evil which Congress sought to suppress by the act of 1853." See, also, *Wyman* v. *Halstead*, 109 U. S. 654; *Taylor* v. *Bemiss*, 110 U. S. 42; *Williams* v. *Heard*, 140 U. S. 529, 540.

In *Bailey* v. *United States*, 109 U. S. 432, 438, the cases of *Erwin* v. *United States* and *Goodman* v. *Niblack*, were cited as showing that there might be assignments or transfers of claims against the government, such as, for instance, those passed upon in those two cases, which were not forbidden by the act of 1853.

In *St. Paul & Duluth Railroad* v. *United States*, 112 U. S. 733, 736, this court cited *Erwin* v. *United States*, as holding that the assignment by operation of law to an assignee in bankruptcy was not within the prohibition of § 3477 of the Revised Statutes; and also *Goodman* v. *Niblack*, as holding that a voluntary assignment by an insolvent debtor, for the benefit of creditors, was valid to pass title to a claim against the United States; but it held that the case then before it was within the prohibition of the statute, because it involved a voluntary transfer by way of mortgage to secure a debt, finally completed and made absolute by a judicial sale.

As to the point, made by the defendant, that the insolvency law of Massachusetts was unconstitutional, we think there is no force in it, in view of the decisions of this court on the subject. *Sturges* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; *Boyle* v. *Zacharie*, 6 Pet. 348; *Cook* v. *Moffat*, 5 How. 295; *Bank of Tennessee* v. *Horn*, 17 How. 157; *Baldwin* v. *Hale*, 1 Wall. 223; *Baldwin* v. *Bank of Newbury*, 1 Wall. 234; *Gilman* v. *Lockwood*, 4 Wall. 409; *Crapo* v. *Kelly*, 16 Wall. 610; *Cole* v. *Cunningham*, 133 U. S.

107; *Geilinger* v. *Philippi*, 133 U. S. 246; *Brown* v. *Smart*, 145 U. S. 454.

Nor is there any force in the position taken by the defendant, that it was necessary, after the repeal in 1878 of the bankruptcy act of 1867 and of the provisions of the Revised Statutes of the United States in regard to bankruptcy, that the insolvency statute of Massachusetts should have been reenacted in order to become operative. *In re Rahrer*, 140 U. S. 545. The repeal of the bankruptcy act of the United States removed an obstacle to the operation of the insolvency laws of the State, and did not render necessary their reënactment.

Judgment affirmed.

HALLINGER *v.* DAVIS.

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

No. 1100. Submitted November 7, 1892. — Decided November 28, 1892.

A state statute, conferring upon one charged with crime the right to waive a trial by jury and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, is not in conflict with the Constitution of the United States.

When a prisoner, charged with the crime of murder committed in a State, pleads guilty, the proper court of the State may, if its laws permit, proceed to inquire on evidence, without the intervention of a jury, in what degree of murder the accused is guilty, and may find him to be guilty of murder in the first degree, and may thereupon sentence him to death, without thereby violating the provision in the Fourteenth Amendment to the Constitution of the United States that no State shall "deprive any person of life, liberty or property without due process of law."

THIS was a petition to the Circuit Court for a writ of *habeas corpus*. The facts were stated by this court as follows:

On the 30th day of May, A.D. 1892, the appellant, Edward W. Hallinger, presented a petition to the Circuit Court of the United States for the District of New Jersey, wherein, and in a copy of the record of the proceedings in the Court of Oyer

and Terminer and General Jail Delivery of the county of Hudson, State of New Jersey, attached to said petition as part thereof, the following facts appeared:

Hallinger, the appellant, was on the 14th day of April, 1891, indicted by the grand jury of Hudson County, for the murder of one Mary Hallinger. On the 14th day of April, 1891, he pleaded guilty, whereupon the court ordered the said plea of guilty to be held in abeyance subject to said defendant's consultation with counsel, then assigned for the purpose of consultation concerning said plea. On the 17th day of April, A.D. 1891, the defendant and his counsel again appeared and insisted on said plea of guilty; whereupon the said court continued said assignment of counsel, and ordered said defendant to be present on Tuesday, April 28, 1891, at an examination to determine the degree of guilt under said plea to be then and there had by said court. On the 28th day of April, 1891, the court composed of Knapp and Lippincott, justices, in the presence of the defendant and his counsel, heard evidence concerning the degree of defendant's guilt, and on the 12th day of May, 1891, the court adjudged the defendant guilty of murder in the first degree, and committed him to the custody of the jailor of Hudson County to be confined in the common jail of said county until Tuesday, the 30th day of June, A.D. 1891, on which day he was condemned to be hanged.

Article I, section 7, of the constitution of the State of New Jersey provides: "The right of a trial by jury shall remain inviolate, but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men." Section 68 of the Criminal Procedure Act of the State of New Jersey provides: "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which shall be committed in perpetrating or in attempting to perpetrate any arson, rape, sodomy, robbery, or burglary, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty

thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime and give sentence accordingly." In his said petition the defendant alleged that said section 68 of the Criminal Procedure Act of New Jersey is in violation of the Constitution of the United States and of the State of New Jersey, and that his sentence and detention are illegal. He also stated that, by virtue of the statutes and laws of the State of New Jersey, no right of appeal in murder cases existed, and he had no right to appeal to any higher court in the State to review or annul said illegal judgment and sentence.

On the 30th day of May, 1892, this application for a writ of *habeas corpus* was by the Circuit Court of the United States for the District of New Jersey refused; from which judgment this appeal was taken.

Mr. B. F. Rice for appellant.

The defendant cannot waive his constitutional rights in so material a point as trial by jury. If he could he could only do so directly, and not by implication.

A plea of guilty is not a waiver of a right to a trial by jury. The most that can be said of it is that it dispenses with such trial. But a plea of guilty to a crime that has degrees does not dispense with the necessity for a jury trial to ascertain the degree. The plea of guilty has never been held to apply to the first degree, or any other, unless the defendant designates the degree to which his plea applied.

In case the statute had provided that the jury before whom the defendant was tried should, if they found him guilty, say so and no more, and that thereupon the court should upon the evidence given before the jury, designate whether it be murder in the first or second degree, would that be giving the defendant a trial by a jury? To make it a trial by jury every material fact in the case must be decided by the jury, and it is a very material fact that settles the degree of the crime.

Now, if such a statute as is above described would not be constitutional because it did not provide for a trial by jury, wherein is the statute that allows the court to designate the degree of the crime upon a plea of guilty in any better attitude?

The plea of guilty is no stronger than a verdict of guilty.

Hence so much of the statute of New Jersey as provides that the judges may designate the degree in case of confession is unconstitutional and void, and the appellant in this case has been sentenced upon a state of facts found by the court which were not confessed by the appellant or passed on by a jury. *Wartner* v. *State*, 102 Indiana, 51; *Lemons* v. *State*, 4 W. Va. 755; *Williams* v. *State*, 12 Ohio St. 622; *State* v. *Holt*, 90 N. Car. 749; *Giles* v. *State*, 23 Texas App. 281; *Robbins* v. *State*, 8 Ohio St. 131; *Cancemi* v. *People*, 18 N. Y. 128.

The defendant is without remedy in the courts of the State where he was tried.

The statute gives the defendant in a capital case no right of appeal, and in case of confession no appeal, (apparently,) at all, certainly not that will stay execution.

We respectfully submit that the appellant is held without due process of law and ought to be discharged.

Mr. C. H. Winfield for appellee.

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

It is contended on behalf of the appellant that the judgment and sentence of the Court of Oyer and Terminer of Hudson County, New Jersey, whereby he is deprived of his liberty and condemned to be hanged, are void, because the Act of Criminal Procedure of the State of New Jersey, in pursuance of the provisions of which such judgment and sentence were rendered, is repugnant to the Fourteenth Amendment of the Constitution of the United States, which is in these words: "Nor shall any State deprive any person of life, liberty or property without due process of law." Such repugnancy is supposed to be found in the proposition that a verdict by a

jury is an essential part in prosecutions for felonies, without which the accused cannot be said to have been condemned by "due process of law;" and that any act of a state legislature providing for the trial of felonies otherwise than by a common law jury, composed of twelve men, would be unconstitutional and void.

Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by state courts, upholding the validity of such proceeding. *Dailey* v. *The State*, 4 Ohio St. 57; *Dillingham* v. *The State*, 5 Ohio St. 280; *People* v. *Noll*, 20 California, 164; *State* v. *Worden*, 46 Connecticut, 349; *State* v. *Albee*, 61 N. H. 423, 428.

If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the Constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law. It is only necessary, in order to determine whether the legislature transcended its power in the act, to inquire whether it is prohibited by the Constitution. The right of the accused to a trial was not affected, and we can, therefore, have no doubt that the proceeding to ascertain the degree of the crime where, in an indictment for murder, the defendant enters a plea of guilty, is constitutional and valid. Statutes of like or similar import have been enacted in many of the States, and have never been held unconstitutional. On the other hand, they have been repeatedly and uniformly held to be constitutional.

In Ohio the statute is: "If the offence charged is murder and the accused be convicted by confession in open court, the court shall examine the witnesses and determine the degree of the crime, and pronounce sentence accordingly." In *Dailey* v. *The State*, 4 Ohio St. 57, the statute was held to be constitutional and a sentence thereunder valid.

The statute of California in relation to this subject is in the identical language of the statute of New Jersey. In *People* v. *Noll*, 20 California, 164, the defendant on arraignment pleaded guilty. Thereupon witnesses were examined to ascertain the degree of the crime. The court found it to be murder in the first degree and sentenced him accordingly. One of the errors assigned was that, after the plea of guilty by the defendant, the court did not call a jury to hear evidence and determine the degree of guilt. The Supreme Court held: "The proceeding to determine the degree of the crime of murder after a plea of guilty is not a trial. No issue was joined upon which there could be a trial. There is no provision of the Constitution which prevents a defendant from pleading guilty to the indictment instead of having a trial by jury. If he elects to plead guilty to the indictment, the provision of the statute for determining the degree of the guilt, for the purpose of fixing the punishment, does not deprive him of any right of trial by jury."

In Connecticut, the act of 1874 provided that in all prosecutions the party accused, if he should so elect, might be tried by the court instead of by the jury, and that, in such cases, the court should have full power to try the case and render judgment. In *The State* v. *Worden*, 46 Connecticut, 349, this statute was held not to conflict with the provisions of the state constitution, that every person accused "shall have a speedy trial by an impartial jury, and that the right of trial by jury shall remain inviolate."

And, of course, the decision in the present case, of the highest court of the State of New Jersey having jurisdiction, that the statute is constitutional and valid, sufficiently and finally establishes that proposition, unless the proceedings in the case did not constitute "due process of law" within the meaning of the Fourteenth Amendment to the Constitution of the United States.

That phrase is found in both the Fifth and the Fourteenth Amendments. In the Fifth Amendment the provision is only a limitation of the power of the general government; it has no application to the legislation of the several States. *Barron*

v. *Baltimore*, 7 Pet. 243. But in the Fourteenth Amendment the provision is extended in terms to the States. The decisions already cited sufficiently show that the state courts hold that trials had under the provisions of statutes authorizing persons accused of felonies to waive a jury trial, and to submit the degree of their guilt to the determination of the courts, are "due process of law." While these decisions are not conclusive upon this court, yet they are entitled to our respectful consideration.

The meaning and effect of this clause have already received the frequent attention of this court. In *Murray* v. *Hoboken Land and Improvement Co.*, 18 How. 272, the historical and critical meaning of these words was examined. The question involved was the validity of an act of Congress giving a summary remedy, by a distress warrant, against the property of an official defaulter. It was contended that such a proceeding was an infringement of the Fifth Amendment, but this court held that, "tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this Amendment, the proceedings authorized by the act of Congress cannot be denied to be due process of law."

In *Walker* v. *Sauvinet*, 92 U. S. 90, it was held that a trial by jury in suits at common law, pending in the state courts, is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge. The court, by Waite, C. J., said: "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."

In *Davidson* v. *New Orleans*, 96 U. S. 97, an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted, and brought into this court by a writ

of error to the Supreme Court of the State of Louisiana. In the opinion of the court, delivered by Mr. Justice Miller, will be found an elaborate discussion of this provision as found in Magna Charta and in the Fifth and Fourteenth Amendments to the Constitution of the United States. The conclusion reached by the court was that "it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." Mr. Justice Bradley, while concurring in the judgment and in the general tenor of the reasoning by which it was supported, criticised the language of the court as "narrowing the scope of inquiry as to what is due process of law more than it should do."

However, in the very next case in which the court had occasion to consider the provision in question, Mr. Justice Bradley was himself the organ of the court in declaring that "there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States

separated only by an imaginary line. *On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings.* . . . Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions — trial by jury in one, for example, and not in the other. . . . It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies." *Missouri* v. *Lewis*, 101 U. S. 51, 52.

In *Ex parte Wall*, 107 U. S. 265, it was held that a proceeding, whereby an attorney at law was stricken from the roll for contempt, was within the jurisdiction of the court of which he was a member, and was not an invasion of the constitutional provision that no person shall be deprived of life, liberty or property without due process of law, but that the proceeding itself was due process of law. The dissent of Mr. Justice Field in that case did not impugn the view of the court as to what constituted due process of law, but was put upon the proposition that an attorney at law cannot be summarily disbarred for an indictable offence not connected with his professional conduct.

One of the latest and most carefully considered expressions of this court is found in the case of *Hurtado* v. *California*, 110 U. S. 516, 534. The question in the case was the validity of a provision in the constitution of the State of California, authorizing prosecutions for felonies by information, after examination and commitment by a magistrate, without indictment by a grand jury.

In pursuance of that provision and of legislation in accordance with it, Hurtado was charged in an information with the crime of murder, and, without any investigation of the cause by a grand jury, was tried, found guilty and condemned to death. From this judgment an appeal was taken to the Supreme Court of California, which affirmed the judgment. This court, in reviewing and affirming the judgment of the Supreme Court of California, said: "We are to construe this phrase — due process of law — in the Fourteenth Amendment

by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that 'no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty or property without due process of law.'

"According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent ; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to the law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." The passage from the opinion of Justice Bradley in *Missouri* v. *Lewis*, above cited, is then quoted with approval.

In the *Case of Kemmler*, reported in 136 U. S. 436, 449, a fruitless effort was made to induce this court to hold that a statute of the State of New York, providing that punishment of death should be inflicted by an electrical apparatus, was void under the Fourteenth Amendment, and it was said: "The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the legislature of the State of New York determined that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law."

Applying the principles of these decisions to the case before us, we are readily brought to the conclusion that the appellant, in voluntarily availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the Fourteenth Amendment. The trial seems to have been conducted in strict accordance with the forms prescribed by the constitution and laws of the State, and with special regard to the rights of the accused thereunder. The court refrained from at once accepting his plea of guilty, assigned him counsel, and twice adjourned, for a period of several days, in order that he might be fully advised of the truth, force and effect of his plea of guilty. Whatever may be thought of the wisdom of departing, in capital cases, from time-honored procedure, there is certainly nothing in the present record to enable this court to perceive that the rights of the appellant, so far as the laws and Constitution of the United States are concerned, have been in anywise infringed.

Other propositions are discussed in the brief of the appellant's counsel, but they are either without legal foundation or suggest questions that are not subject to our revision.

The judgment of the Circuit Court is *Affirmed.*

Justice Harlan assents to the conclusion, but does not agree in all the reasoning of the opinion.

BENSON v. UNITED STATES.

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

No. 1007. Argued October 28, 31, 1892. — Decided December 5, 1892.

The Constitution permits a State to cede to the United States jurisdiction over a portion of its territory.

The United States has exclusive jurisdiction over the entire Fort Leavenworth reservation in Kansas, except as jurisdiction was reserved to the State of Kansas by the act of cession.

If a party does not object to testimony when offered, he cannot afterwards be heard to say that there was error in receiving it.

An objection to the competency of testimony made after the witness has left the stand, and after several other witnesses have been subsequently examined, comes too late; and a motion, in such case, to strike out the testimony on the ground of incompetency, is *held* to have been properly overruled.

When two persons are jointly indicted for crime, and a severance is ordered, one of the accused, whose case is undisposed of, may be called and examined as a witness on behalf of the government against his co-defendant.

The plaintiff in error, Benson, was indicted in the Circuit Court of the United States for the District of Kansas, jointly with one Mary Rautzahn, for a murder alleged to have been committed at the Fort Leavenworth Military Reservation, within that district, and within the exclusive jurisdiction of the United States.

On the trial Benson's wife was called as a witness on behalf of the government, and was admitted to testify. At the time when her evidence was taken no objection was made to it; but in a subsequent stage of the proceedings, after several other witnesses had been examined, a motion was made to exclude it.

On the motion of the government a severance was had between the case of Mary Rautzahn and that of Benson. She, not having been tried, was called as a witness on behalf of the government, against Benson, and her testimony was admitted.

Argument for Plaintiff in Error.

Benson, being convicted, sued out this writ of error, and assigned for error; (1) that the alleged crime was not committed within the jurisdiction of the United States; (2) that the evidence given by his wife was improperly admitted against him; and, (3) that Mary Rautzahn was not a competent witness against him.

Mr. A. L. Williams (with whom were *Mr. Leland J. Webb*, *Mr. W. C. Webb*, and *Mr. William Dill* on the brief) for plaintiff in error.

I. As to the first assignment of error he cited *McCracken* v. *Todd*, 1 Kansas, 148; *United States* v. *Ward*, Woolworth, 17; *Millar* v. *Kansas*, 2 Kansas, 174; *Clay* v. *Kansas*, 4 Kansas, 49; *United States* v. *Stahl*, Woolworth, 192; *United States* v. *Yellow Sun*, 1 Dillon, 271; *Fort Leavenworth Railroad* v. *Lowe*, 114 U. S. 525; *Chicago, Rock Island &c. Railway* v. *McGlinn*, 114 U. S. 542; contending that there is no concurrent jurisdiction of offences committed on the "reservation." Crimes committed within any "fort" are within the exclusive jurisdiction of the Federal courts. Crimes committed by private persons outside of or away from a "fort" proper, and not committed against any property of the government, are within the exclusive jurisdiction of the state courts. If this is not so, then a mere state statute can divest or destroy state sovereignty, and confer upon Federal courts a jurisdiction not theretofore possessed by the Federal government. A State cannot by its sole act narrow or reduce its territorial area, nor divest itself of any part of its political jurisdiction. Constitution, Art. 4, § 3; Art. 1, § 8.

II. As to the competency of Mrs. Benson as a witness. The competency of husband or wife as a witness against the other in criminal trials in the Federal courts, except by the act of March 3, 1887, 24 Stat. 635, c. 397, has never been directly authorized or recognized by act of Congress. The competency of witnesses in the Federal courts therefore has been, and as a general rule is, determined by the rules of the common law, or by the statutes of the State in which the Federal court is sitting

at the time of the trial. We insist that, under the laws of the United States, she was not a competent witness for any purpose whatever against her husband, even though she might be willing to testify.

The laws of Kansas, (Gen. Stats. 1889, § 5280,) permit a wife to testify "on behalf of" her husband in a "criminal cause;" but the code, § 323 provides that "in no case shall either be permitted to testify concerning any communication made by one to the other during the marriage." In *State* v. *McCord*, 8 Kansas, 232, it was held that the wife of a person on trial in a criminal case was competent to testify as a witness for the State, if she did so voluntarily. In that case Mrs. McCord voluntarily offered herself and testified as a witness for the State against her husband, but *not* respecting "any communication" whatever made to her by him, but concerning the fact or act of the shooting or killing by her husband of her paramour; and the case is not instructive here.

Bowman v. *Patrick*, 32 Fed. Rep. 368, was a civil action, in which the question of the admissibility and competency of letters written by a defendant to his wife was involved. In his opinion Mr. Justice Miller goes to the fullest extent in holding that such communications were inadmissible.

The case of *United States* v. *Jones*, 32 Fed. Rep. 569, was a criminal case, and it was expressly decided, that "in the courts of the United States the wife is not a competent witness for or against her husband in a criminal case, and this on the score of public policy." And in a note to the opinion in that case, numerous cases are cited showing how far different States have changed the rule of the common law respecting the competency of husband and wife as witnesses against each other, the grounds upon which such changes are sustained or upheld, and the reasons which not only permit, but sometimes compel them to testify against each other respecting offences committed by the one against the person of the other. But an examination of the cases referred to will furnish no ground for holding in the case at bar that Mrs. Benson was a competent witness to testify against her husband "respecting any communications made by him to her."

It may be said that it was not Mrs. Benson's testimony, but the letters written by Benson himself, which furnished evidence against him. The court will look in vain through the record to find a single word of testimony given by any witness other than Mrs. Benson respecting the penmanship, or handwriting, or the genuineness of the letters; and without her testimony, that the letters were in his handwriting, and "communications" written by him to her, they could not and would not have been given in evidence against him.

III. Mrs. Rautzahn was not competent as a witness against Benson. Neither Benson nor his counsel were in court when the order of severance was made. Whether it was illegal or not, it was undoubtedly asked by the district attorney that he might call Mrs. Rautzahn as a witness for the government against Benson.

The only statute of the United States on the subject, act of March 16, 1878, 20 Stat. 30, c. 37, applies only to persons on trial, desiring to offer evidence in their own behalf, and does not affect this case.

The rule of the common law was, that a codefendant, jointly indicted as a principal in the first degree, and against whom the indictment was still pending and undetermined, was not a competent witness for the crown against his codefendant, and this, whether the trial was joint, or several. There are grave doubts whether he was under the same circumstances a competent witness in behalf of his codefendant. A majority of the English cases hold against his competency. Russell and Wharton, speaking of the common-law rule, both state that "accessories" and "codefendants" jointly indicted are incompetent; while the rule was, and still is, that if not indicted at all, or if indicted separately, accessories and accomplices are competent. Whatever reason there may be for this distinction, or however inconsistent the two rules may appear to be, the fact remains, that the two rules as stated were the rules of the common law. The exceptions found in the books are so few as hardly to constitute substantial exceptions. 1 Greenleaf on Ev. § 363; *United States* v. *Sacia*, 2 Fed. Rep. 754; *Rex* v. *Desmond*, Noy, 154; *Rex* v. *Davis*, 3 Keble, 136;

Rex v. *Lafone*, 5 Esp. 154; *Regina* v. *George*, Car. & M. 111; *Queen* v. *Gerber*, Temple & Mew, 647; *People* v. *Bill*, 10 Johns. 95; *State* v. *Brien*, 3 Vroom, (32 N. J. Law,) 414; Roscoe's Crim. Ev. 7th Am. ed. 127, 128, where the rule is thus stated: "It is quite clear that an accomplice is a competent witness for the prisoner in conjunction with whom he himself committed the crime," "but if he is charged in the same indictment he cannot be called until after he has been acquitted, or convicted, or a *nolle prosequi* has been entered."

There is nothing in the criminal code of Kansas which extends this rule in that State.

Mr. Assistant Attorney General Parker for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

In June, 1891, plaintiff in error was convicted in the Circuit Court of the United States for the District of Kansas of the crime of murder, and sentenced to be hanged. The crime was charged to have been committed on the Fort Leavenworth military reservation, in the District of Kansas, and the first question presented for our consideration is one of jurisdiction.

The Fort Leavenworth military reservation is within the territorial boundaries of the State of Kansas, as established by the act of admission, 12 Stat. 126, c. 20; and though then the property of the government, and for a long time theretofore withdrawn from the public lands, as a military reservation, was not excepted from the jurisdiction of the newly admitted State. But in 1875 the legislature of the State of Kansas passed an act, entitled "An act to cede jurisdiction to the United States over the territory of the Fort Leavenworth military reservation," the first section of which is as follows: "That exclusive jurisdiction be, and the same is hereby, ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth reservation in said State, as declared from time to time

by the President of the United States, saving, however, to the said State the right to serve civil or criminal process within said reservation, in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State, but outside of said cession and reservation; and saving further to said State the right to tax railroad, bridge and other corporations, their franchises and property, on said reservation." Laws of Kansas, 1875, p. 95. This act was before this court for consideration in two cases: *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525; *Chicago & Pacific Railway Co.* v. *McGlinn*, 114 U. S. 542. It was held in those cases that the act was a valid cession of jurisdiction to the general government; and that, although it did not appear that any application had been made therefor by the United States, yet, as it conferred a benefit, acceptance of the cession was to be presumed. It was conceded that article I, section 8, of the Constitution was not applicable, as there was not within the terms of that section a purchase of the tract by the consent of the legislature of the State, but it was decided that, while a State has no power to cede away its territory to a foreign country, yet it can transfer jurisdiction to the general government. In the opinion in the first case, on page 541, the court observed: "In their relation to the general government, the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes, and if, to their more effective use, a

cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State." And in the opinion in the second case, on page 546, the prior decision was interpreted in these words: "We also held that it is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

It is contended by appellant's counsel that, within the scope of those decisions, jurisdiction passed to the general government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the government. The entire tract had been legally reserved for military purposes. *United States* v. *Stone*, 2 Wall. 525, 537. The character and purposes of its occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put. There was, therefore, jurisdiction in the Circuit Court; and the first contention of plaintiff in error must be overruled.

A second important question arises upon the admission of the testimony of the wife of the defendant. She was called by the government, and testified, as to six slips and two letters, that they were in the handwriting of the defendant, and that the letters were received by her through the mail. This was all of her testimony. It was received without objection. Not only was there no objection, but the court followed the suggestions of the defendant's counsel in respect to its admission. The record shows that, when she was called as a witness, the defendant's counsel stated: "The woman

upon the stand is the wife of the defendant. I desire that the court shall be satisfied of that by proper inquiries in order that the fact may be established, and then I wish her to be advised that she cannot, except with her own free will and voluntary consent, be used as a witness against him. She is his lawful wife." Thereupon some colloquy took place between the court and counsel, in which the latter, not in terms consenting that she be sworn and examined as a witness, yet making no objection thereto, insisted again and again that she be advised that she need not testify unless she desired to testify. Thereupon the court ruled that she should be so advised, and did in fact so advise her.

Again, the letters and slips, having been identified by Mrs. Benson, were received in evidence; and, being written in German, an interpreter was called to translate them to the jury. The defendant declared, while he was translating, that he was doing so incorrectly; and afterwards went upon the stand as a witness in his own behalf, and gave what he called a correct translation; and he did not confine himself to this, but went further, and testified that he wrote the letters.

If this were all that appeared in the record, there would be no shadow of a question; for if a party does not object to testimony, he cannot afterwards be heard to say that there was error in receiving it. But after Mrs. Benson had left the stand, and several other witnesses had been examined, the defendant interposed a motion to strike out her testimony on the ground that it was incompetent; which motion was overruled, and exception taken.

At common law, an objection to the competency of a witness on the ground of interest was required to be made before his examination in chief; or, if his interest was then not known, as soon as it was discovered. 1 Greenl. on Ev., § 421. And the rule was the same in criminal as in civil cases. Roscoe's Cr. Ev., 124; *Commonwealth* v. *Green*, 17 Mass. 515, 538. Tested by that rule, the attempt to get rid of the testimony of Mrs. Benson by a motion, long after its admission, to strike it from the record, was too late. The defendant by not objecting to her testimony at the time it was offered,

waived the objection. But if that rigorous rule does not now prevail, and a party has a right at any time, by motion to strike out, to secure the removal from a case of objectionable and incompetent testimony, still we think no substantial error can be adjudged in overruling this motion; for here not only did the defendant not object to this testimony, but on the contrary it was admitted in the way suggested and insisted upon by his counsel. The court accepted the suggestions of such counsel, and gave the witness the advice and directions urged. The testimony was in reference to a subordinate matter — mere identification of certain papers. No objection was raised until after the witness had left the stand and the trial had proceeded at some length, and when, perhaps, witnesses by whom the same fact could have been established were discharged, or when too late to obtain other witnesses by whom it could have been proved, and the defendant himself, as a witness in his own behalf, testified as to having written the letters. Under these circumstances we do not think there was error in overruling this motion to strike out.

The third principal point upon which defendant relies is this: Mary Rautzahn, the daughter of the murdered woman, was jointly indicted with the defendant. A severance was ordered by the court, and on this trial of defendant his codefendant, Mary Rautzahn, was called and examined as a witness for the government, and this examination was before any disposition of the case against her. Authorities on this question are conflicting. The following sustain the ruling of the Circuit Court: *State* v. *Brien*, 3 Vroom, (32 N. J. Law,) 414; *Noyes* v. *The State*, 12 Vroom, (41 N. J. Law,) 418; *Noland* v. *The State*, 19 Ohio, 131; *Allen* v. *The State*, 10 Ohio St. 287; *Jones* v. *The State*, 1 Georgia, 610; *State* v. *Barrows*, 76 Maine, 401. In this last case is quite a discussion of the question by Peters, C. J., and review of the authorities. We quote from the opinion: "As a question simply at common law, although there is a contradiction in the cases, the preponderance of authority seems to favor the admission of a codefendant, not on trial, as a witness, if called by the prosecution. There is very much less authority allowing him to be sworn as a

witness for the defence. Whether the distinction be a sensible one or not, it has prevailed extensively. . . .

"Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the State. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice. Hawkins' P. C. book 2, c. 46, § 90; 1 Hale's P. C. 305; 2 Starkie's Ev. 11; Roscoe's Cr. Ev. 9th ed. 130, 140; 2 Russell's Crimes, 957. Mr. Wharton says: 'An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered.' Whart. Cr. Ev. 8th ed. § 439. Mr. Greenleaf states the same rule. He says: 'The usual course is, to leave out of the indictment those who are to be called as witnesses, but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt. 1 Greenl. Ev. § 379.'"

Referring to the English authorities, it has there been held that, at common law, and independently of any statute, when two persons jointly indicted are tried together, neither is a competent witness; but that if one is tried separately, the other is a competent witness against him, because, as observed by Mr. Justice Blackburn, "the witness was a party to the record, but had not been given in charge to the same jury." *Queen* v. *Payne*, L. R. 1 C. C. 349, 354; *Winsor* v. *The Queen*, L. R. 1 Q. B. 390.

But it is said that this court has already practically decided this question in the case of *United States* v. *Reid*, 12 How. 361. The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the government to call the codefendant, and a distinction has been recognized between the two cases. It is true that the reasons

given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the Circuit Court of the United States for the District of Virginia. A statute had been passed in that State, in terms permitting a codefendant when not jointly tried to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the Judiciary Act of 1789. It was assumed both in this court and in the Circuit Court, 3 Hughes, 509, 539, 540, that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other States of the Union. We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason.

In this examination it is well to consider upon what reasons the codefendant was excluded. They were substantially two: first, that he was interested; and, second, that he was a party to the record. It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule. The exceptions which were engrafted upon it were only those which sprang from the supposed necessities of the case, and were carried no further than such necessities demanded. So late as 1842 it was a question doubtful enough to be sent on certificate of division to this court, whether the owner of goods stolen on the high seas was

a competent witness on the trial of the party accused of the larceny, the statute providing for the punishment of the offence enacting that the party convicted should be fined not exceeding fourfold the value of the property stolen — the one moiety to be paid to the owner and the other to the informer. And after a full discussion, in an opinion by Mr. Justice Story, it was resolved in favor of the competency of the witness. *United States* v. *Murphy*, 16 Pet. 203.

Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors. But the last fifty years have wrought a great change in these respects, and to-day the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. By Congress, in July, 1864, (Rev. Stat. § 858,) it was enacted 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," with a proviso as to actions by and against executors, etc. And on March 16, 1878, it also passed an act permitting the defendant in criminal cases to testify at his own request. 20 Stat. 30, c. 37. Under that statute, if there had been no severance and the two defendants had been tried jointly, either would have been a competent witness for the defendants, and though the testimony of the one bore against the other, it would none the less be competent. *Commonwealth* v. *Brown*, 130 Mass. 279. The statute in terms places no limitation on the scope of the testimony, for its language is "the person so charged shall at his own request, but not otherwise, be a competent witness." His competency being thus established, the

limits of examination are those which apply to all other witnesses. Legislation of similar import prevails in most of the States. The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally, though perhaps not universally, true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence.

In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. If interest and being party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent? The conviction or acquittal of the former does not determine the guilt or innocence of the latter, and the judgment for or against the former will be no evidence on the subsequent trial of the latter. Indeed, so far as actual legal interest is concerned, it is a matter of no moment to the latter. While the codefendant not on trial is a party to the record, yet he is only technically so. Confessedly, if separately indicted, he would be a competent witness for the government; but a separate trial under a joint indictment makes in fact as independent a proceeding as a trial on a separate indictment. In view of this, very pertinent is the observation of Chief Justice Beasley, in *State* v. *Brien*, *supra*: "The only reason for the rejection of such a witness is, that his own accusation of crime is written on the same piece of paper, instead of on a different piece, with the charge against the culprit whose trial is in progress. It is obvious such a rule could only stand, in any system of rational law, on the basis of uniform precedent and ancient usage. I have discovered no such basis." We think the testimony of Mrs. Rautzahn was competent, and there was no error in its admission.

These are the only important questions presented by defendant. Two or three other matters are suggested, and, indeed, only suggested. In respect to them it is sufficient to say that

either the rulings of the court were not erroneous, or else no sufficient exceptions were taken to them.

The judgment of the Circuit Court is

Affirmed.

UNITED STATES *v.* DUNNINGTON.

DUNNINGTON *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 51, 52. Argued November 18, 1892. — Decided December 8, 1892.

The estate forfeited by proceedings to judgment under the confiscation act of July 17, 1862, 12 Stat. 589, c. 195, and the joint resolution of the same date, 12 Stat. 627, is the life estate of the offender; the fee remaining in him after the confiscation, but without power of alienation until his disability is removed.

The conflicting cases on the subject of proceedings under that act reviewed, and *Illinois Central Railroad* v. *Bosworth*, 133 U. S. 92, and *Jenkins* v. *Collard*, 145 U. S. 546, followed.

A judicial condemnation, for the use of the United States, of land in Washington which had been so confiscated and sold, made during the lifetime of the offender from whom it had been taken under the confiscation act, is *held* to operate upon the fee as well as upon the life estate, assuming that due and legal notice of the proceedings for the condemnation were given.

The appraised value of the property in such proceedings for condemnation represents the whole fee, and the interests, both present and prospective, of every person concerned in it.

By the payment into court of the amount of the appraised value of the property so condemned, the United States was discharged from its whole liability, and was not even entitled to notice of the order for the distribution of the money.

This was a petition to recover from the United States the sum of $12,644, the alleged value of lot 3, square 688, in the city of Washington, condemned for the enlargement of the Capitol grounds. The following facts were found by the Court of Claims:

1. Charles W. C. Dunnington, the ancestor of the claimants,

was, on April 2, 1852, and subsequently up to June 29, 1863, seized or well entitled in fee simple of and to lot No. 3, in square No. 688, on the plats of the squares and lots of the city of Washington, with the improvements, buildings, rights, privileges, appurtenances and heriditaments, containing 5572 square feet. Said Dunnington, the ancestor, died August 14, 1887, leaving as his sole heirs the claimants in this case, as set out in their petition.

2. May 12, 1863, proceedings *in rem*, under the confiscation act of July 17, 1862, and joint resolution of the same date, 12 Stat. p. 589, c. 195, and p. 627, were begun by the defendants in the Supreme Court of the District of Columbia to confiscate said lot as the property of Dunnington, who was in rebellion against the United States. Under these proceedings the lot was duly condemned as enemy's property, and exposed to public sale, at which A. R. Shepherd became the purchaser and entered into possession.

3. Under the act of May 8, 1872, 17 Stat. 83, c. 140, § 6, proceedings were commenced in the Supreme Court of the District of Columbia, at the instance of the defendant, for the acquisition of land to enlarge the grounds around the Capitol, in which contemplated enlargement said lot No. 3 was included.

June 11, 1872, the Secretary of the Interior informed the court that he was unable to obtain the titles to said lands by mutual agreement with the owners. Thereupon the court appointed commissioners "to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements necessary to be taken for public use, and make return to said court."

October 16, 1872, said commissioners filed their report, in which the cash value of said lot No. 3 is appraised at $1.50 a square foot, and the improvements thereon at $1500. They also report that said lot contained 5572 square feet, thus making the whole value of lot and improvements $9858.

On the same day said appraisement was approved and adopted by the court, and the same was reported to the Secretary of the Interior.

March 15, 1873, the court made the following order:

"Whereas, it appears to the court that the owner or owners of each of said lots and parts of lots have failed and neglected to demand of the Secretary of the Interior the said appraised cash value of said lots and parts of lots, respectively, for fifteen days after the appraisement thereof by this court, it is therefore ordered that leave be, and is hereby, granted to said relator to deposit the said appraised values of said lots and parts of lots in this court, to the credit of the owners thereof, respectively, subject to be drawn therefrom only upon an order of this court for payment to the parties entitled; and it is further ordered that upon the depositing of the money by the relator as hereinbefore provided, and notice thereof filed with the clerk of this court, possession of the property for which said deposit is made may be taken by the United States."

4. March 31, 1873, in pursuance of the above order, a certificate of deposit for the amount of said appraisement was filed with the court by the Secretary of the Interior.

Thereupon defendants took possession of said lot, and the same is now embraced in the ornamental grounds about the Capitol.

5. April 3, 1873, upon the petition of the heirs of Martin King, deceased, the appraised value of said lot and improvements, amounting to $9858, was, by order of the court, paid to William F. Mattingly, attorney of record for said heirs.

Said King was the vendee, through several intermediate conveyances, of said A. R. Shepherd.

6. The cash value of said lot No. 3 on August 14, 1887, was at the rate of $2 a square foot, $11,144; improvements, $1500; making together $12,644.

Upon the foregoing finding of facts the court decided, as a conclusion of law, that the claimants were entitled to recover $9858, for which judgment was entered. 24 Ct. Cl. 404. Both parties appealed to this court.

Mr. George A. King (with whom was *Mr. Charles W. Hornor* on the brief) for Dunnington's heirs.

From the time of the forfeiture of the estate under the confiscation act in 1863, until the 14th day of August, 1887,

neither Charles W. C. Dunnington nor his prospective or expectant heirs, nor any one of them, retained any right, title or interest, which could be asserted in any court of law or equity, in or to the said property, or any part thereof. Upon his death, at the latter date, the forfeiture of the property determined, and the fee simple vested *eo instanti* in the claimants, his heirs at law.

It was the duty of the United States as plaintiffs in the condemnation proceedings to have taken proper steps by application to the Supreme Court of the District of Columbia for the payment of the sum fixed by the appraisers as the value of the property to the persons entitled thereto by either apportioning the same between the then tenants — *per autre vie* and those who should appear after the death of Dunnington to be entitled to the property, or for the investment of the capital sum — the interest or rents thereof to be paid to said tenants *per autre vie* during the lifetime of the *cestui que vie*, and for the ultimate delivery of the capital after the death of said *cestui que vie* to those who might be entitled thereto, it being at that date impossible to ascertain with any approach to certainty who such persons would be.

The Supreme Court of the District of Columbia not having taken such proceedings, and having under misapprehensions then prevalent as to the effect of the confiscation act paid the whole of the appraised value to the tenants for life, the present claimants are not barred of their right by such action, but may seek their remedy in the Court of Claims under the constitutional duty of the United States to compensate for private property taken for public uses.

No rights having accrued to these claimants enforcible in any court until the death of their ancestor on the 14th of August, 1887, they are not chargeable with laches by reason of their non-assertion of such rights at an earlier date, nor had the statute of limitations barred their claim.

If these propositions are sustained their inevitable result will be a judgment in favor of these claimants for the value of their property thus taken for public uses.

In *Bigelow* v. *Forrest*, 9 Wall. 339, 350, this court had occa-

sion to consider the effect of a decree of forfeiture and sale under the confiscation act of July 17, 1862, and joint resolution of the same date. Construing the act and the resolution together this court held, that "they admit of no doubt that all which could under the law become the property of the United States or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized."

This decision was rendered at the December term, 1869, of this court. It was at first supposed by many to hold that what was forfeited was a life estate carved out of a fee, thus divesting the offender of his estate for life, but leaving in him the fee simple which was not only descendible to his heirs, but which he could dispose of and convey as he might any other property.

It was upon this ground that the Supreme Court of the District of Columbia in *Wallach* v. *Van Riswick*, 1 MacArthur, 73, held that even after a decree of confiscation of the property the confederate might execute a valid mortgage or conveyance of the property, which, however, would only take effect at the termination of his own life. This view, however, did not meet the approval of this court; for, on appeal, the decree was reversed. *Wallach* v. *Van Riswick*, 92 U. S. 202.

This decision was made at the October term, 1875. In *French* v. *Wade*, 102 U. S. 132, 134, decided October term, 1880, it was said, p. 134, referring to it: "This case has been followed many times since. *Pike* v. *Wassell*, 94 U. S. 711. It must now be considered as the settled rule of decision in this court."

We do not understand that *Wallach* v. *Van Riswick*, followed as this court has itself stated it to have been many times, and which had as long ago as 1880 become the settled rule of decision in this court, has ever been overruled, whatever distinctions or limitations may have been made as to its application and effect. Applying it to this case, it could not be known with any approach to certainty who would be his heirs at the time of his death, nor was it by any means certain that those who stood in the position of probable, prospective or presumptive heirs, would so remain till he died. The interest of an heir during

the lifetime of his ancestor is not recognized by the law. *Nemo est hæres viventis. Hutchins* v. *Hutchins*, 7 Hill, 104; *Jackson* v. *Kniffen*, 2 Johns. 31, 36; *S. C.* 3 Am. Dec. 390; *Doe* dem. *Winter* v. *Perratt*, 5 B. & C. 48.

Impossible, then, as it was to know who would be the persons interested in the estate after the forfeiture should have terminated by the death of the offender, how can it in justice be contended that it was the duty of either Dunnington or his children to intervene in the condemnation proceedings for the protection of their interests, — interests neither vested nor contingent, not recognized by the law, and which could not possibly come into being until the death of their ancestor, an event whose date could not be foretold, and which did not in fact occur for many years afterwards?

Manifestly it was the duty of the United States as plaintiffs, or of the court upon its own motion, to see to the interests of these claimants or of such as there might be in future times, and to have had the purchase-money so secured that upon the termination of the forfeiture by the death of the offender, Dunnington, the fee-simple price of the property would be ready for delivery to the heirs. *In re Phillips' Trusts*, L. R. 6 Eq. 250; *In re Pfleger*, L. R. 6 Eq. 426; Delalleau, Traité de l'Expropriation, 246, § 891.

Having thus made payment in its own wrong, and in prejudice of the rights of these claimants, the government cannot escape liability on the plea that they should have intervened. No intervention was possible. To hold against these parties would in effect permit the government to deprive them of their property without a day in court or an opportunity to be heard — a thing abhorrent to the judicial sense of justice, and expressly prohibited by Art. V of the constitutional amendments. *Mc Veigh* v. *United States*, 11 Wall. 259; *Lasere* v. *Rochereau*, 17 Wall. 437; *Windsor* v. *Mc Veigh*, 93 U. S. 274; *Ensminger* v. *Powers*, 108 U. S. 292, 301.

Mr. Solicitor General for the United States.

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

This was a proceeding by the heirs at law of a person formerly in rebellion against the United States to recover the value of a lot of land, which had first been confiscated as enemy's property, and then condemned, in the hands of the purchaser, for the use of the government and for the enlargement of the Capitol grounds.

If the case were the simple one assumed by the claimants of a piece of private property taken for the public use without compensation to the owners, their right to recover its value would be beyond question; but there are other facts which put the case in a somewhat different light. Under the confiscation act of July 17, 1862, 12 Stat. 589, c. 195, the lot had been seized as the property of a public enemy and sold to Shepherd; by these proceedings the estate of Charles W. C. Dunnington, the ancestor of the claimants, was forfeited and vested in the purchaser. There remained, however, the reversionary interest, which upon his demise would become vested in these heirs.

During his life, and on May 8, 1872, Congress passed an act for the enlargement of the Capitol grounds, by taking in square No. 688, which included the lot in question. 17 Stat. 61, 83, c. 140, § 6. By section 7 it was made "the duty of the Secretary of the Interior to purchase, from the owner or owners thereof, at such price, not exceeding its actual cash value, as may be mutually agreed on, . . . such private property as may be necessary for carrying this act into effect." By section 8 it was directed "that if the Secretary of the Interior shall not be able to agree with the owner or owners . . . upon the price . . . it shall be his duty to make application to the Supreme Court of the District of Columbia, which court is hereby authorized and required, upon such application, in such mode, and under such rules and regulations as it may adopt, to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate," etc. By section 9: "that the fee simple of all premises so appropriated . . . shall, upon payment to the owner or owners, respectively, of the appraised value, or in case the said owner or owners refuse or neglect for

fifteen days after the appraisement . . . to demand the same, . . . upon depositing the said appraised value in the said court to the credit of such owner or owners, respectively, be vested in the United States." Section 11 provided "that no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners; but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases, as soon as the United States shall have paid the compensation assessed, or secured its payment, by a deposit of money, under the order of the court, possession of the property may be taken."

The Secretary of the Interior, being unable to agree with the owners upon a price, on June 11, 1872, informed the court to that effect, and applied for the appointment of commissioners to make a just and equitable appraisement of the cash value of the several interests of each and every owner of the real estate and improvements, etc. On October 16, 1872, the commissioners filed their report, appraising the property at $9858. This appraisement was approved, and on March 15, 1873, the court made an order in the terms of the act, reciting that the owners had neglected to demand of the Secretary of the Interior the appraised cash values of said lots for fifteen days after the appraisement thereof by the court, and directing that leave be granted to deposit the appraised values in court to the credit of the owners, subject to be drawn therefrom only upon the order of the court for payment to the parties entitled, and that upon the deposit of the money and notice to the clerk, possession of the property might be taken by the United States. In pursuance of this order the money was deposited, and the United States took possession of the lot, which is now embraced within the ornamental grounds of the Capitol. Three days thereafter the entire appraised value of the lot, viz., $9858, was paid to the heirs of Martin King, who had become vested, through several intermediate conveyances, with the title acquired at the confiscation sale.

1. It is insisted by the claimants, in this connection, that these proceedings in condemnation were a nullity as to them; that from the time the estate was forfeited under the confiscation act until August 14, 1887, neither Charles W. C. Dunnington nor his heirs retained any right, title or interest in this property which could be asserted in a court of law or equity; that neither of them had any day in court in the condemnation proceedings, nor was it in law possible for them in any way to intervene or assert any claim whatever. By the joint resolution accompanying the confiscation act, (12 Stat. 627,) no proceedings under such act could be considered "to work a forfeiture of the real estate of the offender beyond his natural life." The status of the fee between the time the forfeiture took effect and the termination of the life estate, by the death of the offender, when his heirs took title to the property, has been the subject of much discussion and of some conflict of opinion in this court.

In the first case that arose under this act, *Bigelow* v. *Forrest*, 9 Wall. 339, Mr. Justice Strong suggested anomalies presented by the forfeiture of lands of which the offender was seized in fee, during his life and no longer, without any corruption of his heritable blood, and declined to inquire how, in such a case, descent could be cast upon his heir notwithstanding he had no seisin at the time of his death. In *Day* v. *Micou*, 18 Wall. 156, it was held that it was not the property itself of the offender which was made the subject of the seizure, even during his life, but it was his *interest* in the property, whatever that interest might be, and if he had, previously to his offence, mortgaged the land to a *bonâ fide* mortgagee, the mortgage was not divested, and the sale under the confiscation act passed the life estate subject to the charge.

The subject was considered at length in the case of *Wallach* v. *Van Riswick*, 92 U. S. 202, which was a bill for the redemption of a deed of trust of property in Washington subsequently confiscated, given by Wallach, a public enemy, to secure the payment of a promissory note. Wallach's interest in the property was, therefore, an equity of redemption, which the purchaser at the confiscation sale acquired and held with

the security of the deed of trust, which he had also purchased. Wallach, having returned to Washington after the war, made a deed purporting to convey the lot in fee, with covenants of general warranty, to Van Riswick, the purchaser at the confiscation sale. The case stood in this condition until Wallach died, when his heirs, claiming that, after the confiscation proceedings, nothing remained in him which could be the subject of sale or conveyance, filed a bill to redeem the deed of trust, which was admitted to be still a valid lien upon the property. This court decided that the heirs had a right to redeem, holding in effect that, after the confiscation proceedings, the offender had no interest in the thing confiscated, which he could convey, or any power over it which he could exercise in favor of another. It was thought that Congress could not have intended to leave in the enemy a vested interest in the property which he might sell, and with the proceeds of which he might aid in carrying on the war against the government; and support was found for that conclusion in the fact that the sixth section of the confiscation act declared that all sales, transfers or conveyances of any such property should be null and void. The question whether the fee remained in abeyance pending the life of the offender, or, if not, in whom it was vested, though discussed, was not decided.

In *Pike* v. *Wassell*, 94 U. S. 711, the question arose whether the heirs of the person whose estate had been confiscated could maintain an action to require the purchaser to keep down the taxes during the life of the offender. The defendants insisted that until the death of the offender the children had no interest in the property, and, therefore, could not appear to protect the inheritance. It was held to be true, as a general rule, that so long as the ancestor lives the heirs have no interest in his estate; but without undertaking to determine where the fee dwelt during the life estate, it was held that the heirs had an estate in expectancy, and as there was no one else to look after the interests of the succession, they might properly be permitted to do whatever was necessary to protect it from forfeiture or incumbrance. The case was held a proper one for a court of equity to interfere and grant

proper relief. It is evident from the language of the opinion in this case that the necessity of having some one to represent the fee and to protect the expectant estate of the heirs was present to the mind of the court. The question decided in *Wallach* v. *Van Riswick* was raised again in *French* v. *Wade*, 102 U. S. 132, and the former case was unequivocally affirmed.

The question what became of the fee was also discussed in *Illinois Central Railroad* v. *Bosworth*, 133 U. S. 92, 102, 103, and it was intimated, as a logical consequence from the decision in *Shields* v. *Schiff*, 124 U. S. 351, that the heirs took as heirs, and not by donation from the government; "that after the confiscation of the property, the naked fee, . . . subject, for the lifetime of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise," said Mr. Justice Bradley, "how could his heirs take it from him by inheritance? But, by reason of his disability to dispose of, or touch it, or affect it in any manner whatsoever, it remained, as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view. There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent; why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?" It was further held in that case that if the disability of the offender be removed by a pardon or armistice, it restored him to the control of his property, so far as the same had never been forfeited or never become vested in another person.

In *Jenkins* v. *Collard*, 145 U. S. 546, 560, the estate of a public enemy was confiscated and sold. Subsequently to the sale he returned to Cincinnati, gave a deed in fee simple with covenants of general warranty, and it was held that he and all persons claiming under him were thereby estopped from asserting the title to premises, as against the grantee, or from conveying it to any other parties. It was further held that no disposition was ever made by the government of the reversion of the estate of the offending party; that it must, therefore, be construed to have remained in him, but without

power to alienate it during his life; that the covenant of seisin in his deed estopped him and his heirs from asserting title to the premises against the grantee; and that the disability, if any, which had rested upon him against disposing of the fee was removed by the proclamation of pardon and amnesty of December 25, 1868, and he stood, with reference to that estate, precisely as though no confiscation proceedings had ever been had. "The amnesty and pardon, in removing the disability, if any, resting upon him, respecting that estate, enlarged his estate, the benefit of which enured equally to his grantee."

Upon the whole, we think the doctrine was too broadly stated in *Wallach* v. *Van Riswick*, that the effect of the confiscation was to divest the owner of every vestige of proprietary right over the property, and that the sounder view is that intimated in *Illinois Central Railroad* v. *Bosworth*, and *Jenkins* v. *Collard*, that the estate forfeited is the life estate of the offender, and that the fee remains in him, but without the power of alienating it during his life, unless the disability be removed. The theory of the common law, that the fee can never be in abeyance, but must reside somewhere, though seemingly somewhat fanciful, is founded upon a consideration of good sense, that there shall always be some one in existence to represent it in actions brought for its recovery, and to protect the interest of the heirs. In treating of this subject, Mr. Fearne, in his work on Contingent Remainders, vol. 2, sec. 60, book I. c. 3, § 1, observes, "that if a person limits a freehold interest in the land, by way of use or devise, which he may do, though he could not do so at the common law, to commence *in futuro*, without making any disposition of the intermediate legal seisin, . . . the legal seisin, property or ownership, except such part thereof, if any, as is comprised within a prior disposition of a vested interest, of course remains in the grantor and his heirs, or the heirs at law of the testator, until the arrival of the period, when according to the terms of the future limitation, it is appointed to reside in the person to whom such interest *in futuro* is limited." That the fee is not forfeited by the confiscation is also the logical deduction from the ruling in *Shields* v. *Schiff*, 124 U. S. 351, that the heirs

take by descent from the offender and not by donation from the government, inasmuch as, if there be no vestige of the estate left in the ancestor, it would be impossible for them to take by descent from him. This, too, disposes of the theory that the fee resides in the United States in trust for the heirs.

A necessary inference from the position assumed by the claimants, that neither Dunnington nor his heirs retained any interest in the forfeited estate, nor any right to intervene in these proceedings, is, that the government can obtain no title by condemnation to confiscated property during the life of the offender; that it can only condemn his life estate in the hands of the purchaser; and that, upon the termination of such estate, the heirs can recover the property, or at least compel the government to institute new proceedings for its condemnation. Such a construction would be intolerable. The march of public improvement cannot thus be stayed by uncertainties, complications or disputes regarding the title to property sought to be condemned; and the language of section 8 of the act of May 8, 1872, requiring the appraisement to be made of the several interests of *each and every owner* of the real estate, evidently contemplated an investiture of the entire title and of the interest of every owner, present and prospective, in the United States. We are, therefore, of opinion that the condemnation in this case operated upon the fee as well as upon the life estate, and as the presumption is, that due and legal notice was given of the proceedings, the appraisement was valid and binding upon Dunnington and his heirs. Assuming that, after the confiscation proceedings, he held only the naked fee without the power of alienation, the amnesty and pardon proclamation of the President of December 25, 1868, before the proceedings to condemn, removed his disability in this particular, and restored to him the right to make such use of the remainder as he saw fit.

2. A further question remains to be considered with regard to the proceedings taken after the payment of the money into court. It is insisted by the claimants that it was the duty of the United States, as plaintiffs in the condemnation proceedings, to take proper steps for the payment of the sum fixed by

the appraisers to the persons entitled thereto, by apportioning the sum between the tenants of the life estate and the heirs of Dunnington, or by the investment of the entire amount in interest bearing securities, for the benefit of the tenants of the life estate, until its termination, and for the ultimate delivery of the same to the heirs. It is a necessary deduction from our conclusion upon the other branch of the case that the appraised value of the property represents the whole fee, and the interests, both present and prospective, of every person concerned in the property, and such are the authorities. *Tide Water Canal Co.* v. *Archer*, 9 G. & Johns. 479, 525; *Ross* v. *Adams*, 4 Dutcher, (28 N. J. Law,) 160. The money, when deposited, becomes in law the property of the party entitled to it, and subject to the disposal of the court. *In re New York Central &c. Railroad*, 60 N. Y. 116; *South Park Commissioners* v. *Todd*, 112 Illinois, 379.

It is evident that the gist of the petitioners' complaint in this connection lies in the order of the Supreme Court of the District of Columbia of April 3, 1873, directing the payment of the entire appraised value of the lot to the heirs of Martin King, the vendee of Shepherd, who had purchased the life estate of Dunnington under the confiscation proceedings. Neither Dunnington, who was still living, nor his heirs, the present claimants, appear to have intervened in the condemnation proceedings, or to have raised a question as to the propriety of this payment. The proceedings, however, appear to have been carried on in strict conformity with the act, which required the Secretary of the Interior, in case he should be unable to purchase at private sale, to apply to the court for an appraisement, and in case the owner neglected to demand of him the appraised value within fifteen days, to pay the same into court, subject to being paid out to the persons entitled to it. Assuming that the payment of the entire amount to the heirs of King was a mistake, it is difficult to see how the United States can be held responsible for it. The courts of the United States are in no sense agencies of the Federal government, nor is the latter liable for their errors or mistakes; they are independent tribunals, created and sup-

ported, it is true, by the United States; but the government stands before them in no other position than that of an ordinary litigant. If the Federal government should proceed in a state court to condemn a piece of land for a public building, under a similar statute, and should pay the appraised value into court, and the court should award the money to the wrong party, it could not be seriously claimed that the government should pay it a second time. So, if a railway company should proceed to condemn land in this city for the purposes of a station, it would be completely exonerated from all further obligation by the payment of the appraised value to the depositary designated by the law under which the proceedings were taken. What was the United States to do after the deposit was made, to protect itself? It had discharged its entire liability by the payment into court, and was not entitled to notice even of the order for the distribution of the money. If the Attorney General had appeared, it might have been charged that he was a mere interloper, and that only the owners of the land were interested in the distribution of its proceeds. We are not without authority upon this subject. In a well-considered case in New Jersey, *Crane* v. *City of Elizabeth*, 36 N. J. Eq. (9 Stewart) 339, 343, it was held that the compensation fixed for the taking of certain land for streets was to include the value of all the interests, and was to be paid to the owner of the land if no other claimant intervened; and that, if in any case such owner ought not to receive the whole, timely resort must be had to the court of chancery, which would see to the equitable distribution of the fund. "The price to be paid," said the court, "by the city is to be the full value of all rights which may be impaired for the public benefit, and this is to be ascertained only after notice, not specially to individuals who alone may appear to guard their claims, but generally by the publicity which attends the doings of the council, and by newspaper advertisement, which will reach all alike, and under which all may be protected. The action of the city authorities has thus the distinctive quality of a proceeding *in rem*, a taking, not of the rights of designated persons in the thing needed,

but of the thing itself, with a general monition to all persons having claims in the thing. When, by the appraisement of the commissioners, the price of the thing is fixed, that price stands in place of the thing appropriated, and represents all interests acquired. . . . But if, in any special case, this owner ought not, in equity, to receive the fund, the Court of Chancery will, at the instance of any interested complainant, take charge of its proper distribution, and so secure those particular equities which the generality of the statute has left without express protection." In the case of *Heirs of John Van Vorst*, 1 Green Ch. (2 N. J. Eq.) 292, it was held that when the amount to be paid by a railroad company for land taken, was directed by the statute to be paid into court for the use of the owner or owners, no notice to the company was necessary, of an application by the owners for an order upon the clerk to pay over the money so deposited. A like ruling was made in *Haswell* v. *Vermont Central Railway*, 23 Vermont, 228, wherein the court observed that the purpose of the statute was to give railroad companies a certain and expeditious mode of relieving themselves from any further responsibility in the matter, by depositing the money according to the order of the chancellor; and that the railroad company, though cited by the claimant, was not bound to appear, and that, having no interest in the matter, it had no right to appeal the case. See also *Railroad Company* v. *Prussing*, 96 Illinois, 203; *Columbia &c. Bridge Co.* v. *Geise*, 34 N. J. Eq. 268; and *Cherokee Nation* v. *Kansas Railway*, 135 U. S. 641. We think the United States discharged its entire duty to the owners of this property by the payment of the amount awarded by the commissioners into court, and that, if there were any error in the distribution of the same, it is not chargeable to the government.

We do not wish to be understood as holding that there was necessarily an error in paying the money to the heirs of King. That question is not before us for consideration, and we are not called upon to express an opinion with regard to it.

The case is doubtless a hardship for the claimants, but it would be a still greater hardship if the government, without

fault upon its part, were obliged to pay the value of this lot a second time.

The judgment of the court below must be

Reversed, and the case remanded, with directions to dismiss the petition.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* OSBORNE.

SAME *v.* JUNOD.

ORIGINAL.

Nos. 1238, 1239. Submitted November 21, 1892. — Decided December 5, 1892.

In each of these cases defendant in error sued plaintiff in error under the Interstate Commerce act, to recover alleged overcharges on the transportation of corn, and recovered judgment, to each of which judgments defendant sued out a writ of error to the Circuit Court of Appeals. The cases being heard there the judgment in each was reversed, upon the ground that the jury should have been instructed to find a verdict for the defendant, and the cases were remanded for further proceedings in accordance therewith. On petitions for writs of *certiorari* to the Court of Appeals to bring up the records and proceedings, *Held*, that the petitions should be denied.

THESE were petitions for writs of *certiorari*. The petitions set forth that the petitioners had commenced suit in the Circuit Court for the Southern District of Iowa to recover from the Chicago and Northwestern Railway Company damages for certain violations of the Interstate Commerce law of February 4, 1887, 24 Stat. 379, c. 104; that such proceedings took place therein that the plaintiffs recovered judgments against the defendant; that the defendant sued out writs of error to the United States Circuit Court of Appeals; that a hearing was had there; that the judgments were reversed; and that the court held that on the facts as they appeared the jury should have been instructed to find a

Statement of the Case.

verdict for the defendant, and reversed the judgment of the court below, and remanded the cases for further proceedings in accordance with its opinion. The petitioners prayed this court to issue writs of *certiorari* to the United States Circuit Court of Appeals for the eighth judicial circuit, commanding that court to certify to this court the record of its proceedings in the causes so pending and determined in that court. Copies of the record of the said causes in said Circuit Court of Appeals were filed and made a part of the applications.

Mr. C. C. Nourse for the petitioners.

Mr. W. C. Goudy opposing.

THE CHIEF JUSTICE: The petitions for writs of *certiorari* to the Circuit Court of Appeals for the eighth circuit are denied. *McLish* v. *Roff*, 141 U. S. 661; *Rice* v. *Sanger*, 144 U. S. 197; *Meagher* v. *Minnesota Thresher Manufacturing Co.*, 145 U. S. 608. *Denied.*

JOY *v.* ADELBERT COLLEGE.

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

No. 1014. Submitted November 28, 1892. — Decided December 5, 1892.

This court has no jurisdiction of an appeal from a judgment of a Circuit Court remanding to a state court a cause which had been improperly removed from it.

MOTION to dismiss. On behalf of the motion it was stated that the suit was originally brought in the Court of Common Pleas of Lucas County, Ohio, by the Adelbert College against the Toledo, Wabash and Western Railroad Company and other defendants, including the plaintiffs appellants; that on the 2d of December, 1890, petitions for its removal to the Circuit Court of the United States were filed by each of the present appellants on the ground that, "from prejudice or local

influence this defendant will not be able to obtain justice in the said state court situated in the county of Lucas, or in any other state court in which the said defendant may have the right to remove said cause on account of such prejudice or local influence"; that thereupon an order of removal was made, and the record was filed in the Circuit Court January 21, 1891; that thereupon motions were made in the Circuit Court to remand the cause to the Court of Common Pleas; that the motions having been submitted upon briefs, an opinion was filed by Jackson, Circuit Judge, granting the same, and an order was entered in the Circuit Court of the United States finding that that court was without jurisdiction to entertain and grant the said petitions for removal, and that the cause had been illegally removed from the Court of Common Pleas of Lucas County, and it was accordingly remanded to that court for further proceedings.

The appellants Joy and others, by their solicitors, excepted, and prayed an appeal to this court, which was allowed and ordered.

On the 10th day of November, 1891, there was filed in the Clerk's office of the Circuit Court of the United States, for the Northern District of Ohio, Western Division, a certificate of the Circuit Judge, to the effect that "the court is of opinion that the citizenship of the various parties hereto as shown by the record and affidavits filed herein is such that this court has no jurisdiction of the cause, and on this ground alone the court granted said motion and orders said cause to be remanded to the said Court of Common Pleas of Lucas County," whereupon said moving defendants having given notice of appeal on said question of jurisdiction, made application to the court for a certificate, which was accordingly granted. An assignment of errors was filed on the same day in the same court.

Mr. George Hoadly and *Mr. John C. F. Gardner* for the motion.

No one opposing.

Statement of the Case.

THE CHIEF JUSTICE: The motion to dismiss is granted upon the authority of *Richmond & Danville Railroad* v. *Thouron*, 134 U. S. 45; *Gurnee* v. *Patrick County*, 137 U. S. 141; *McLish* v. *Roff*, 141 U. S. 661; *Chicago, St. Paul &c. Railway* v. *Roberts*, 141 U. S. 690. *Dismissed.*

In re ENGLES, Petitioner.

ORIGINAL.

No number. Submitted November 28, 1892. — Decided December 5, 1892.

On the authority of *In re Fassett*, 142 U. S. 479, the court refuses to grant a writ of prohibition to restrain the District Court of the United States for the Eastern District of New York from taking jurisdiction of a petition of the owner of a barge for the benefit of the limited liability act, Rev. Stat. §§ 4283 to 4285, and from further proceedings thereunder.

THE petitioner filed her petition in this court, making the following averments:

I. That theretofore, on the 25th day of September, 1891, The Myers Excursion and Navigation Company filed its petition in the District Court of the United States, as owners of the barge Republic, for a limitation of liability, a copy of which is hereto attached, marked Exhibit A, and the usual monition was ordered by said District Court.

II. On the return day of said order this petitioner filed her answer to said petition, a copy of which is hereto attached, marked Exhibit B.

III. That thereafter, on the 21st day of November, 1892, said cause came on to be heard before the District Court, aforesaid, on exceptions to the jurisdiction of said court, and on motion of your petitioner to dismiss the same for want of jurisdiction, yet the said court overruled your petitioner's exceptions and denied said motion to dismiss, and ordered said cause to proceed, as will appear by a copy of said order hereto attached, marked Exhibit C. Wherefore, the said Elizabeth Engles respectfully requests that a writ of prohibition may be

issued out of this Honorable Court to the Judge of the District Court of the United States for the Eastern District of New York, prohibiting him from further proceeding with the petition for limited liability aforesaid, and requiring him to dismiss the said proceedings.

Exhibit A set forth that the Excursion Company was the owner of the barge Republic; that in August, 1891, the barge being strong, stanch and seaworthy, and well manned and equipped, conveyed an excursion party from Brooklyn to Cold Spring grove, on Long Island; that while at the latter place a storm struck the barge with such force that the roof of the upper deck was carried away, and other injuries inflicted, thirteen persons being killed, and many injured; that these losses and injuries were due to inevitable accident, but that nevertheless many suits had been brought in the Supreme Court of New York against the company for damages suffered by reason of the injury, but that the barge had not been libelled in admiralty; that the value of the barge was not sufficient to make compensation to all who had commenced suit, and that therefore the petitioners prayed for an appraisement, a monition to all claiming to prove their claims, and an order restraining the prosecution of the suits.

Exhibit B was as follows:

The separate answer of Elizabeth Engles respectfully shows:

I. That she claims damages against the Myers Excursion and Navigation Company in the sum of $5000, and has duly presented her claim pursuant to an order of this Court to the Commissioner Richard P. Moore, Esq., under oath, within the time limited and at the place required by order of the court.

II. That respondent is one of the parties named in schedule attached to petition herein on which the order of September 28, 1891, was granted.

III. Respondent denies, upon information and belief, the allegation in the third paragraph of petition, in words as follows:

"Said barge was fully manned and thoroughly equipped for the trip; she was tight, stanch, strong and seaworthy in all respects."

Counsel for Petitioner.

IV. The respondent denies, on information and belief, the entire fifth paragraph of the petition.

V. The respondent denies that the barge Republic was a seagoing vessel, and also denies that she was used or employed in inland navigation, and submits to the court that it appears upon the face of the petition that the petitioners are not embraced within the provisions 4283–4289 Rev. Stat.

Exhibit C, entitled in the cause, and dated November 21, 1892, was as follows: This cause coming on to be heard this day on the petition of The Myers Excursion and Navigation Company, filed September 25, 1891, and the answers of Elizabeth Engles and others, on exceptions in the answers to the jurisdiction of this court to proceed with said petition, and on motion by the respondents to dismiss the proceedings for want of jurisdiction;

On hearing *Mr. Raphael J. Moses, Jr.*, of counsel for Elizabeth Engles and others, and *Messrs. Guggenheimer & Untermeyer*, of counsel for Nellie Schaler, and *Mr. Fernando Solinger*, of counsel for Catharine Kuntz and others, in support of the exceptions to the jurisdiction and of the motion to dismiss, and *Mr. Putnam*, of counsel for the petitioners, in opposition,

On motion of *Mr. Putnam* for the petitioners,

It is ordered, that the exceptions to the jurisdiction be overruled, and the motion to dismiss be denied, and it is further ordered that the cause proceed.

Mr. Raphael J. Moses, Jr., for the petitioner.

No one opposing.

The Chief Justice: Leave to file a petition for a writ of prohibition is denied upon the authority of *In re Fassett*, 142 U. S. 479, 484, and cases there cited.

Denied.

McMULLEN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 55. Submitted November 22, 1892. — Decided December 5, 1892.

For the purpose of determining the amount of compensation to be paid to a marshal of the United States for attending Circuit and District Courts, under Rev. Stat. § 829, *Held* that the court is "in session" only when it is open by its order, for the transaction of business, and, that if it be closed by its own order for an entire day, or for any given number of days, it is not then in session, although the current term may not have expired.

The allowance of a marshal's account by the court does not preclude a revision of it by the proper officers in the treasury, nor justify its payment when it appears that such allowance was unauthorized by law.

THE appellant was United States marshal for the District of Delaware from February 1, 1880 to July 24, 1885. The terms of the District Court for that district began on the second Tuesdays in January, April, June and September in each year, and continued until the Friday or the day preceding that for opening the next succeeding term. The terms of the Circuit Court began on the third Tuesdays in June and October in each year, and continued until the Tuesday or the day preceding that for opening the next succeeding term.

It is found by the Court of Claims (Finding II) that the appellant as marshal "attended the Circuit and District Courts when in session, during the terms of said courts, nine hundred and five days;" that those days were charged by him in his account at $5 per day; that the account, being verified, was approved by the court as just and in accordance with law, but its payment was refused at the Treasury Department; and that appellant's whole compensation, if the above charges were added, would not have exceeded in any one year the maximum of $6000.

Finding VII was in these words: "Claimant has been paid in full at the rate of $5 per day for every day whilst the Circuit and District Courts of the United States in the State of Delaware

were sitting or in session from and including October term, 1879, to and including June term, 1885. The 905 days referred to in finding II were days occurring between sessions of the courts."

Mr. Charles C. Lancaster for appellant.

Mr. Assistant Attorney General Cotton for appellee.

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

We are somewhat embarrassed by the obscurity of the findings of fact. The second one states that appellant attended the Circuit and District Courts, "when in session," during the terms of those courts, nine hundred and five days, while the seventh states that those were days occurring "between sessions of the courts." But we assume that the question intended to be presented, and which was determined below, involved the right of a marshal to compensation at the rate of $5 per day, for each day of a *term*, whether the court was or was not actually in session or sitting on each day so charged. We understand the words "between sessions of the courts" to imply that there were intervening days, between those sessions, when the court, by its own action, was not open, or did not sit, for the transaction of business.

This question depends upon the construction to be given to that clause of section 829 of the Revised Statutes, fixing the compensation to be taxed and allowed to a marshal for different kinds of service, which provides that he shall be allowed "for attending the Circuit and District Courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day." When the court is open, by its order, for the transaction of business, it is in session within the meaning of this section. If the court by its own order, is closed for all purposes of business for an entire day, or for any given number of days, it is not in session on that day, or

during those days, although the current term has not expired. It is made by statute the duty of the marshal of each District "to attend the District and Circuit Courts when sitting therein." Rev. Stat. § 787. Within its meaning the court cannot be said to be sitting on any day when it is closed, by its own order, during the whole of that day for purposes of business.

In support of his position appellant relies upon the decision in *United States* v. *Jones*, 134 U. S. 483, 488, where it was held that the approval of a commissioner's account by a Circuit Court of the United States, under the act of February 22, 1875, 18 Stat. 333, c. 95, regulating fees and costs, was *prima facie* evidence of the correctness of its items, and "in the absence of clear and unequivocal proof of mistake on the part of the court it should be conclusive." That case is not decisive of the present one, because it appears that the Circuit Court, in approving appellant's account, allowed him, by mistake, for attending court upon days when the court was not in session. Besides, the above act, relating to the accounts of various officers, including marshals, payable out of the money of the United States, provides that nothing contained in it shall be deemed in anywise to diminish or affect the right of revision of the accounts to which it applies by the accounting officers of the Treasury as exercised under the previous laws in force. So that the allowance of the appellant's account by the court did not preclude all revision of it by the proper officers, nor justify its payment where it appeared, as it does in this case, that such allowance was unauthorized by law.

It results that the claim of the appellant to be compensated at the rate of $5 per day, for each day "between sessions of the court," was properly disallowed. 24 Ct. Cl. 394.

Judgment affirmed.

BALLOCH *v.* HOOPER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 21. Argued November 7, 8, 1892. — Decided December 5, 1892.

On the facts in this case detailed in the opinion it is *Held*,

(1) That the deed from Balloch to Hooper of February 25, 1880, was given to better secure Balloch's indebtedness to the Life Insurance Company;

(2) That that company believed in good faith that Hooper was authorized, as holder of the legal title of record, to raise money on the property, and secure its payment by deed of trust;

(3) That there was nothing in the relations between Hooper and Balloch which would prevent the company loaning money to Hooper on the security of the property;

(4) That there was no evidence of a fraudulent combination to injure Balloch;

(5) That there was no ground for questioning the accuracy of the accounting.

THE case is stated in the opinion.

Mr. S. S. Henkle for appellant.

Mr. Job Barnard (with whom was *Mr. James S. Edwards* on the brief) for appellees.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The appellant, Balloch, became the owner, by purchase in 1878, from J. Bradley Adams, of certain lots on Sixteenth and S streets, in the city of Washington, giving his notes for the purchase money, and securing their payment by a deed of trust covering the whole property. He placed upon record a subdivision of part of the property, making fourteen lots on the west side of Sixteenth street, seven lots (with a small strip) on the south side of Swan street, and six lots on the north side of S street.

In order to obtain money for the construction of houses

upon some of those lots, fourteen on Sixteenth street and six on S street, he borrowed from the Massachusetts Mutual Life Insurance Company the sum of $16,000, executing therefor his eight promissory notes of $2000 each, bearing interest at eight per cent until paid. Subsequently, he borrowed other sums from the company, namely, $10,200, for which he made his six promissory notes of $1700 each, bearing like interest, and $9000, for which he gave his four notes, bearing like interest, three for $2000 each and one for $3000; and to secure those respective loans Balloch executed a deed of trust upon particular lots in the above subdivision. These deeds of trust were severally executed June 4, 1879, October 11, 1879, and February 17, 1880. William R. Hooper was the general agent of the company in the city of Washington for the purpose of "placing" life insurance and collecting premiums, and Balloch's negotiations with it were through him. He was named in each of the deeds as trustee.

It was agreed that one-half of the sum loaned should be paid to Balloch at the time the notes and deed of trust were delivered; that the company should pay off the amount due on the purchase from Adams, which was secured by prior recorded deed of trust; and that the balance should be paid to Balloch as he might need it in the work of constructing the houses on the lots.

In connection with these loans Balloch purchased from the company other houses, under an agreement that the cash payments thereon might be retained by the company out of the loans, and that he would give for the balance of the price his promissory notes, payable to the company's order, and secured by deeds of trust to Hooper as trustee. It should also be stated that when the above loans were made Balloch was indebted to the company on other loans, secured by deeds of trust on property on the corner of Q and Thirteenth streets.

By deed absolute in form, dated February 25, 1880, and recorded February 27, 1880, Balloch conveyed to Hooper all the property purchased from Adams, except two lots on Sixteenth street, and all the property purchased by him from the company at the time the above three loans were effected, the

consideration recited in the deed being "the sum of five thousand dollars previously advanced, and one dollar in lawful money of the United States." It is stated by the company that at the time this deed was executed the houses proposed to be erected by Balloch on Sixteenth and S streets were in an incomplete condition; that the taxes due when he purchased from Adams, as well as the taxes on the property purchased by him from the company, were unpaid; that more than $5000 was still due Adams; that the principal of the notes given to the company was unpaid; and that the property included in the deed to Hooper was burdened with mechanics' liens, and otherwise.

Hooper took possession of the property so conveyed to him, and undertook the completion of the houses on Sixteenth and S streets. But, with the means at his command, he found it impossible to proceed without obtaining financial assistance. Accordingly, in October, 1881, he informed the company of Balloch's deed to him of February 25, 1880, and of the exact condition of affairs with respect to the property. But it appears that the company was not, in fact, notified until October, 1881, of the transfer by deed from Balloch to Hooper. It made an arrangement with Hooper to advance to him a sum sufficient to complete the proposed improvements on the property, to pay off all incumbrances, including Balloch's notes and indebtedness to it, and to discharge the liens held by it; Hooper to give his note for the amount so to be advanced, and to secure its payment by a deed of trust upon the property. This arrangement was carried out. Hooper gave his note to the company for $71,000, secured by a deed of trust running to Frank H. Smith, as trustee, and the company cancelled Balloch's notes, discharged his indebtedness to it, and released the liens created by the above deeds of trust executed in its favor. Under the above arrangement, the houses were to be completed, rented and sold, under the direction of Smith, who was to receive and disburse the sums which the company might advance to Hooper.

The present suit against Hooper and the company was brought by Balloch on the 7th of December, 1882. The theory

of the bill is that the company did not pay to Balloch, at the times agreed upon, the one-half of the several loans of $16,000, $10,200 and $9000, nor the claim of Adams, nor the remainder of the loans, but fraudulently withheld the money or a great portion of it, whereby Balloch was seriously injured and embarrassed, rendering it impossible for him to complete the improvements of his lots. The bill charges that the defendants paid upon the loans only $14,725.15; that when the deed of February 25, 1880, was made, the defendants had in their possession of his money $20,474.85, which they refused to pay him; that defendants, knowing well the plaintiff's embarrassment, on account of their failure to pay the amount due him, proposed to him that if he would convey to Hooper the property covered by the deed to the latter, the company would finish all the houses out of the funds remaining in their hands belonging to the plaintiff, sell them for the highest and best price attainable, and, after reimbursing themselves, divide the remainder, upon the basis of three-fourths to the plaintiff and one-fourth to the company; that the plaintiff's embarrassed condition, the result of corrupt and fraudulent conduct of the defendants, compelled him to accept this proposition, and that accordingly he made to Hooper the absolute deed of 1880. The bill also charges that the defendants did not proceed immediately to complete the houses according to their agreement, but allowed them to stand for two years; that most, if not all, the houses had been sold, but the defendants had failed and refused to give any account thereof; and that, upon a proper accounting, there was due to the plaintiff as much as $40,000. The relief asked was an injunction restraining the defendants from selling the property or from collecting rents therefrom; that a receiver be appointed to take possession of the unsold property and to collect rents; that the defendants be required to account as trustees; and that the plaintiff have a decree for the amount found to be due him. The defendants severally answered, putting in issue all the material allegations of the bill. The cause was referred to the auditor to take and report an account of all the transactions. A report was made, covering every possible view of the case. Among the schedules

submitted by the auditor was one stating the account of Hooper with the company. In this account Hooper was charged with the amount of the notes of Balloch secured by the several deeds of trust on the property which the latter gave, (excluding a note for $1800 secured on a lot named,) with other disbursements for the completion of the houses, for payment of taxes, insurance, costs of repairs, discharge of liens and other expenses, with interest on those respective amounts, and he was credited by the amounts received on sales of property, rents, etc., with interest thereon; showing, on that basis, a balance in favor of the company of $52,097.37, as of September 1, 1886.

The exceptions were overruled and a decree was passed declaring the above sum to be a first and prior lien and encumbrance in favor of the company, as against the claims of all the other parties to the cause, on certain lots and the improvements thereon, being the unsold property mentioned in the deed from Hooper to Smith, subject to future accounting as to interest accruing to the company on account thereof, and as to the receipts and disbursements on the property subsequent to September 1, 1886, and to a credit thereon of $2029.82 paid by the company to Smith for services rendered in disbursing moneys expended in the construction of buildings. The decree, also, allowed to Hooper $1550.43 found by the auditor to be due to him from Balloch, and made it a second and subordinate lien and encumbrance upon the property, and declared the deed of February 25, 1880, as between Balloch and Hooper, to be null and void.

Upon appeal by Balloch to the general term this decree was affirmed.

The court below correctly held that, so far as Hooper was concerned, the absolute deed from Balloch of February 25, 1880, must be held to have been taken for the purpose of better securing the indebtedness of the latter to the company. This is placed beyond doubt by the statement in Hooper's answer to the effect that, shortly after the execution of the deed of trust for the loan of $9000, "to wit, February 25, 1880, the complainant [Balloch] of his own volition voluntarily transferred and con-

veyed to this defendant all the said property before included in the said several deeds of trust, together with certain other lots described in the conveyance then made, which property was taken by this defendant for the purpose of better securing the said company in the ultimate realization and collection of the moneys so as aforesaid loaned to the complainant." This admission is conclusive as between Hooper and Balloch, and is not at all weakened by the somewhat contradictory statements subsequently made by the former in his deposition in the cause.

But, as we have seen, the company had no knowledge of this absolute deed to Hooper until October, 1881, when it was informed by him of the condition of the property upon which the three loans of $16,000, $10,200 and $9000 had been made. By the act of Balloch in making and putting that deed upon record, Hooper was enabled to represent himself as the owner of the property, and to make arrangements with the company for money with which to complete its improvement. According to the weight of the evidence, the company, in good faith, believed, and was not negligent in believing, that Hooper was authorized, as the holder of the legal title of record, to raise money upon the property and secure its payment by deed of trust. Balloch, therefore, has no right to complain of the arrangement made by Hooper with the company. Indeed, that arrangement was for the interest of Balloch, provided the moneys advanced by the company to Hooper were fairly used to liquidate the existing indebtedness of Balloch and to complete the construction of the houses according to his original plan.

Balloch insists that the relations that subsisted between Hooper and Balloch forbade the former from taking title to the property. If that were true, as between them, it would not follow that the company, acting in good faith, might not loan money to Hooper, and take a lien upon the property to secure its repayment. As, upon the evidence, the company is not chargeable with bad faith in making the arrangement it did with Hooper, all that Balloch could equitably demand was that which was awarded to him in the court below, namely,

an accounting with reference to the moneys advanced and expended under the arrangement it made with Hooper, and a recognition of his right to redeem upon paying the balance found to be due, upon such accounting, to the company. It is a mistake to suppose that in so holding we disregard the rule that "whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust*, has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable consideration, without notice." *Oliver* v. *Piatt*, 3 How. 333, 401. When Balloch put the absolute title in Hooper he knew that the contemplated improvements could not be made without borrowing more money on the property, and he must have expected that Hooper would obtain, in that way, the required funds. And there is not the slightest ground in the evidence for the charge that the company and Hooper fraudulently combined for the purpose of injuring Balloch. The company had no reason to suppose that the arrangement made with Hooper was in violation of any agreement or understanding that Balloch had with him at the time of the conveyance of February 25, 1880. The company, upon every principle of equity, is entitled to a lien upon such of the property embraced in the deed of trust to Smith, as remained unsold, to secure the payment of the balance due for the sums advanced by it. After a careful scrutiny of the evidence we find no ground for questioning the accuracy of the accounting below, or of the balance adjudged to be due the company. The contention that more was expended upon improvements than ought, in fairness to have been expended, is not sustained by such proof as would justify a reversal of the decree, in whatever light the case is viewed. While there is some slight justification for this contention, we are of opinion that the conclusion reached by the auditor is sustained by the preponderance of evidence. It is certain that the company advanced the moneys which are charged, in the accounting, against the property. And it is equally certain that these moneys were, in fact, expended upon the property, or for the benefit of

Balloch. Even if it were assumed that the company was bound to see that the moneys advanced under its agreement with Hooper were properly and reasonably expended, the evidence does not show that an excessive amount has been charged in its favor or in favor of Hooper against the property in question.

We perceive no error in the decree, and it is

Affirmed.

LEWIS *v.* UNITED STATES.

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

No. 1018. Argued October 28, 1892. — Decided December 5, 1892.

In trials for felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.

The making of challenges is an essential part of the trial of a person accused of crime, and it is one of his substantial rights to be brought face to face with the jurors when the challenges are made.

Though no specific exception was taken in this case by the prisoner, based upon the fact that he was called upon to challenge jurors not before him, a general exception, taken to the action of the court in prescribing the method of procedure, was sufficient.

Where no due exception to the language of the court in instructing the jury is taken at the trial, this court cannot consider whether the trial court went beyond the verge of propriety in its instructions.

On the trial of the case, after the accused had pleaded not guilty to the indictment, the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, one to be given to the district attorney and one to the counsel for the defendant, and further directed each side to proceed with its challenges, independently of the other, and without knowledge on the part of either as to what challenges had been made by the other. To this method of proceeding, the defendant at the time excepted, but was required to proceed to make his challenges. He challenged twenty persons from the list of thirty-seven persons from which he made his challenges, but in doing so he challenged three jurors who were also challenged by the government. The government challenged from the list of thirty-seven persons five persons, three of whom were the same persons challenged by the defendant. This fact was made to appear from the lists of jurors used by the government in making its

challenges and the defendant in making his challenges. To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection, and directed the jury to be called from the said two lists, impanelled and sworn, to which the defendant at the time excepted. *Held*, that there was substantial error in this proceeding and the judgment of guilty must be reversed.

THE case is stated in the opinion.

Mr. A. H. Garland and *Mr. H. J. May* for plaintiff in error.

Mr. Assistant Attorney General Parker for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was a writ of error sued out to review a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death upon Alexander Lewis, plaintiff in error, for the murder of one Benjamin C. Tarver, at the Cherokee Nation, in the Indian country.

It appears by the record that on the trial of the case, and after the accused had pleaded not guilty to the indictment, the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, one to be given to the district attorney and one to the counsel for the defendant, and that the court further directed each side to proceed with its challenges, independent of the other, and without knowledge on the part of either as to what challenges had been made by the other.

It further appears by the record that to this method of proceeding in that regard, the defendant *at the time excepted*, but was required to proceed to make his challenges; that he challenged twenty persons from the list of thirty-seven persons from which he made his challenges, but in doing so he challenged three jurors who were also challenged by the attorney for the government.

It further appears that the government, by its district attorney, challenged from the list of thirty-seven persons five persons, three of whom were the same persons challenged by the defendant, and that this fact was made to appear from the lists of jurors used by the government in making its challenges and the defendant in making his challenges.

To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection, and directed the jury to be called from the said two lists, impanelled and sworn, to which the defendant at the time excepted.

The assignments of error ask us to consider the validity of the method of exercising his rights of challenge, imposed upon the defendant by the order of the court, and also the propriety of the instruction given by the court to the jury, on the subject of the defence of an alibi, by giving prominence to the cautionary rules by which they should weigh this class of testimony, and particularly in saying to the jury that it was a defence often resorted to, and often attempted to be sustained and made effective by fraud, subornation and perjury.

A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. "It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence." *Prine* v. *The Commonwealth*, 18 Penn. St. 103, 104, per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus, in a Virginia case, *Hooker* v. *The Commonwealth*, 13 Grat. 763, 766, the court observed that the record showed that, on two occasions during the trial, the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court on either day,

and added, "This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. . . . It is the right of any one, when prosecuted on a capital or criminal charge, 'to be confronted with the accusers and witnesses,' and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected." Thereupon the judgment was reversed. And in the case of *Dunn* v. *Commonwealth*, 6 Penn. St. 384, it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. *Ball* v. *United States*, 140 U. S. 118 is to the same effect.

In *Hopt* v. *Utah*, 110 U. S. 574, 578, 579, it is said: "The argument in behalf of the government is that the trial of the indictment began after and not before the jury was sworn; consequently, that the defendant's personal presence was not required at an earlier stage of the proceedings. Some warrant, it is supposed by counsel, is found for this position, in decisions construing particular statutes in which the word 'trial' is used. Without stopping to distinguish those cases from the one before us, or to examine the grounds upon which they are placed, it is sufficient to say that the purpose of the foregoing provisions of the Utah Criminal Code is, in prosecutions for felonies, to prevent any steps being taken, in the absence of the accused and after the case is called for trial, which involve his substantial rights. The requirement is, not that he must be personally present at the trial by the jury, but 'at the trial.' The code, we have seen, prescribes grounds for challenge by either party of jurors proposed. And provision is expressly made for the 'trial' of such challenges, some by the court, others by triers. The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defence may

not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins." And further: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods." So, too, in the case of *Schwab* v. *Berggren*, 143 U. S. 442, 448, this language of the court in *Hopt* v. *Utah* is cited and approved.

In the case of *Dyson* v. *Mississippi*, 26 Mississippi, 362, 383, it was said: "It is undoubtedly true that the record must affirmatively show those indispensable facts without which the judgment would be void — such as the organization of the court; its jurisdiction of the subject-matter and of the parties; that a cause was made up for trial; that it was submitted to a jury sworn to try it (if it be a case proper for a jury); that a verdict was rendered, and judgment awarded. Out of abundant tenderness for the right secured to the accused by our Constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel, our court has

gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial. This is upon the ground of the peculiar sacredness of this high constitutional right. It is also true, as has been held by this court, 'that nothing can be presumed for or against a record, except what appears substantially upon its face.'" Continuing, the court said: "This rule has reference to those indispensable requisites necessary to the validity of the record as a judicial proceeding."

As already said, the record shows that at the trial of the case the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, and one to be given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges, and without knowledge on the part of either as to what challenges had been made by the other. Although the record states that after the challenges the twelve jurors who remained were sworn, yet it clearly appears from the whole record, and the lists therein referred to, that after the challenges there remained, not only twelve, but fifteen jurors, and that by the mode adopted, which required the prisoner to challenge by list, he exhausted some of his challenges by challenging jurors at the foot of the list, and who were never reached to be sworn as jurors in the case. And the record does not disclose that, at the time the challenges were made, the jury had been called into the box, nor that they or the prisoner were present at the time the challenges were made. It does, indeed, appear that the clerk called the entire panel of the petit jury, but it does not appear that, when the jury answered to said call, they were present so that they could be inspected by the prisoner; and it is evident that the process of challenging did not begin until after said call had been made. We do not think that the record affirmatively discloses that the prisoner and the jury were brought face to face at the time the challenges were made, but we think that a fair reading of the record leads to the opposite conclusion, and that the prisoner was not brought face to face with the jury until after the challenges had been made and the selected

jurors were brought into the box to be sworn. Thus reading the record, and holding as we do that making of challenges was an essential part of the trial, and that it was one of the substantial rights of the prisoner to be brought face to face with the jurors at the time when the challenges were made, we are brought to the conclusion that the record discloses an error for which the judgment of the court must be reversed.

The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. As was said by Blackstone, and repeated by Mr. Justice Story: "In criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons: 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside." 4 Bl. Com. 353; *United States* v. *Marchant*, 4 Mason, 158, 160, 162; and 12 Wheat. 480, 482. See, also, Co. Lit. 156b; Termes de la Ley, *voc.* Challenge, 2 Hawk. c. 43, § 4; *Regina* v. *Frost*, 9 Car. & P. 129, 137; *Hartzell* v. *Commonwealth*, 40 Penn. St. 462, 466; *State* v. *Price*, 10 Rich. (Law,) 351, 375.

There is no statute of the United States which prescribes the method of procedure in empanelling jurors in criminal

cases, and it is customary for the United States courts in such cases to conform to the methods prescribed by the statutes of the States. In the present instance, the method prescribed by the statutes of Arkansas was not followed, nor does it appear that there exists any general rule on the subject in the Circuit Court of the Western District of Arkansas. While the court in the present instance did not exceed its jurisdiction in directing the empanelling of the jury by a method different from that prescribed by the state statute, and while we do not feel called upon to make suggestions as to the proper practice to be adopted by the Circuit Courts in empanelling juries in criminal cases, yet obviously all rules of practice must necessarily be adapted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists at common law. In the trial of *Jeremiah Brandreth*, 32 How. St. Tr. 755, 771, where a question arose as to the order of challenge of jurors in a capital case, it was said by Mr. Justice Abbott: "Having attended, I believe, more trials of this kind than any other of the judges, I would state that the uniform practice has been, that the juryman was presented to the prisoner or his counsel that they might have a view of his person; then the officer of the court looked first to the counsel for the prisoner to know whether they wished to challenge him; he then turned to the counsel for the crown, to know whether they challenged him, and if neither of them made any objection, the oath was administered." In *Townley's Case*, 18 How. St. Tr. 347, 348, the prisoner's counsel moved that before any juryman should be brought to the book, the whole panel might be called over once in the prisoner's hearing, that he might take notice who did or who did not appear, which they said would be a considerable help to him in taking his challenges. This was done by order of the court.

In the case of *Lamb* v. *The State*, 36 Wisconsin, 424, where it did not appear affirmatively by the record that the panel of jurors in respect to which the prisoner had the right of peremptory challenge, was present in the view of the prisoner, but where the members of the jury were called into the box

one at a time, and either challenged or sworn, and to which method the prisoner excepted, this was held reversible error, and the court said: "We cannot but agree with the learned counsel for the plaintiff in error, that this mode of empanelling the jury largely impaired the right of peremptory challenge, essential in contemplation of law to the impartiality of the trial. For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose. The mode adopted gave no opportunity for comparison and choice between jurors, and little opportunity for observance of each juror, apparently essential to the exercise of a right so visionary and fanciful."

In the case of *Hopt* v. *Utah*, already cited, it was held that the trial by triers, appointed by the court, of challenges of proposed jurors in felony cases, must be had in the presence as well of the court as of the accused, and that such presence of the accused cannot be dispensed with. In that case the triers took the juror from the court-room into a different room, and tried the grounds of challenge out of the presence as well of the court as of the defendant and his counsel, and it was held by this court that it was error which vitiated the verdict and judgment to permit the trial of challenges to take place without the presence of the accused; and this, although the accused failed to object to the retirement of the triers from the court-room, or to the trial of the several challenges in his absence. The record in this case discloses that the prisoner objected and took due exception to the orders of the court directing the method of taking challenges. It is true that no specific exception was taken by the prisoner, based on the stated fact that he was called upon to challenge jurors not before him, but we think that the general exception taken to the action of the court in prescribing the method of procedure was sufficient.

Another assignment averred error in the court in its selection of the jury, in that the defendant was required to make his challenges without first knowing what challenges the government's attorney had made, and thus challenged three jurors who were also challenged by the government, whereby he was

deprived of three of his challenges, contrary to law. This assignment of error is based on a specific exception taken at the time by the prisoner, and in this respect it differs from the case of *Alexander* v. *United States*, 138 U. S. 353, where the same error was assigned, and was not considered by this court because it had not been properly excepted to at the trial. As we have already said, we do not deem it our duty to prescribe in this opinion rules to regulate the discretion of the Circuit Courts in the empanelling of jurors in criminal cases. Perhaps the preferable course would be for the Circuit Courts to adopt the methods prescribed by the statutes of the States, because such methods are familiar to the bar and the people of the States. If, however, the Circuit Courts choose to deal with such matters by rules of their own, we think it essential that such rules should be adapted to secure all the rights of the accused. It does not appear in the present case that the prisoner made any demand to challenge any of the jury beyond the twenty allowed by the Revised Statutes. In fact, it does not clearly appear which side made the first challenges, or that the defendant had not exhausted his challenges before the government challenged the three jurors in question. If it were a fact that the defendant had made his twenty challenges before the government had challenged these three men, it is difficult to see how his rights were prejudiced by the action of the district attorney, but we should hesitate to affirm this judgment upon a record giving us so little information as to the history of the trial in these respects.

The only other error assigned which calls for notice is the one objecting to the language used by the court when cautioning the jury in respect to the testimony bearing on the defence of an alibi. Whether the language of the learned judge went beyond the verge of propriety, we are not called upon to consider, as no due exception was taken at the trial, and no opportunity was, therefore, given the court to modify the charge.

The objection to the language used, urged on the motion for a new trial, cannot be regarded as equivalent to an exception at the trial. Because, however, of the error into which the

court fell, in directing secret challenges to be made, and not in the presence of the prisoner and the jurors, the judgment of the court below must be reversed and the case remanded for a new trial.

Judgment reversed.

MR. JUSTICE BREWER, with whom concurred MR. JUSTICE BROWN, dissenting.

I dissent from the opinion and judgment of the court in this case. Where the question is as to the inferences to be drawn from a record, it is well to have its very language before us. The entire record bearing upon the matters in controversy consists of a single journal entry and a portion of the bill of exceptions. The journal entry is as follows:

"TUESDAY MORNING, *October 20th*, 1891.

"(Caption omitted.)

"On this day come the United States of America, by Wm. H. H. Clayton, Esq., attorney for the Western District of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Mess. Barnes & Reed, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the petit jury, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore, and having heretofore had hearing of said indictment, and pleaded not guilty thereto, it is, on motion of the plaintiff by its attorney, ordered that a jury come to try the issue joined, whereupon the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant, the following were selected for the trial of this cause:

"Geo. A. Bryant, John W. Clayborn, Henry P. Dooly, James O. Eubanks, John A. Fisher, Henry P. Floyd, Geo. W. Hobbs, Hugh F. Mullen, Jno. D. McCleary, Obadiah C. Rich-

mond, Joseph Stafford, Henry B. Wheeler, twelve good and lawful men of the district aforesaid, duly selected, empanelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence; and after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court."

The recital in the bill of exceptions is in these words:

"Be it remembered that on the trial of the above-entitled cause the court directed two lists of 37 qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other and without knowledge on the part of either as to what challenges had been made by the other.

"To which method of proceeding in that regard defendant at the time excepted, but was required to proceed to make his challenges, and he challenged 20 persons from the list of 37 persons, from which he made his challenges, but in doing so he challenged 3 jurors who were also challenged by the attorney for the government, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack. The government, by its district attorney, challenged from the list of 37 jurors 5 persons. In making its challenges the same three persons as those challenged by the defendant, to wit, James H. Hamilton, Britton Upchurch, and James P. Mack, were challenged by the government, as appears from the lists of jurors used by the government in making its challenges and the defendant in making his challenges.

"The 12 persons who were left of the panel of 37, after both sides had made their respective challenges, were the ones selected to try and who did try the case.

"To the happening of the fact that both parties challenged the same three jurors, the defendant at the time objected, but the court overruled the objection and directed the jury to be called from the said two lists, empanelled and sworn, to which the defendant at the time excepted."

In addition, in the bill of exceptions are found the two lists of jurors, given the one to the government and the other to the defendant. Upon this record the case turns. We look to the journal entry for a recital of the facts necessary to constitute a legal trial. That recital may be in general terms, but still should affirmatively show everything essential to a valid criminal trial. This journal entry clearly affirms the presence of the defendant. The language is: "Come the said defendant in custody of the marshal," etc. Such presence, having been once stated will be presumed to have continued through the entire day, unless the contrary is shown. It never has been even suggested that the journal should contain at the statement of each separate proceeding of the day a fresh recital of the personal presence of the defendant. In *Jeffries* v. *The Commonwealth*, 12 Allen, 145, 154, it was said: "Nor is it necessary that the record should in direct terms state that the party was personally present at the time of the rendition of the verdict and during all the previous proceedings of the trial. However necessary it may be that such should have been the fact, it is not necessary to recite it in the record. The record shows that he was present at the arraignment and present to receive his sentence." "When the record shows that the defendant was in court at the opening of the session the presumption is that he continued in court during the entire day, and this presumption has been extended to the whole trial." Wharton's Cr. Pl. and Pr. § 551; *State* v. *Lewis*, 69 Missouri, 92; *Kie* v. *United States*, 27 Fed. Rep. 351; *Cluverius* v. *Commonwealth*, 81 Virginia, 787; *Folden* v. *State*, 13 Nebraska, 328; *Irvin* v. *State*, 19 Florida, 872; *People* v. *Sing Lum*, 61 California, 538; *People* v. *Jung Qung Sing*, 70 California, 469; *New Mexico* v. *Yarberry*, 2 New Mexico, 391. No claim, therefore, can be successfully presented that anything transpiring on that day took place in the absence of the defendant.

The same journal entry further recites, that "the clerk called the entire panel of the petit jury, and, after challenge by both plaintiff and defendant," the jury was selected. Where the general term is used, as here, "challenge," it means

all challenges. It is used in its comprehensive sense. It unnecessary to subdivide, and say after challenge to the array, challenges for cause, and peremptory challenges; the single general word is sufficient. But this journal entry does not stop with this. After naming the jurors, and describing them as good and lawful men, it adds, "duly selected, empanelled and sworn." Such will be found the uniform formula of journal entries. In *Kie* v. *United States*, 27 Fed. Rep. 351, 357, a case taken on error to the Circuit Court, Judge Deady observes: "The record simply states in the usual way, when the case was called for trial, a jury came, and was duly empanelled and sworn." *Potsdamer* v. *The State*, 17 Florida, 895; *Rash* v. *The State*, 61 Alabama, 89. In Wharton's Criminal Pleading and Practice, sec. 779 *a* (9th ed.) the author says: "Thus when the record shows empanelling and swearing it will be presumed, in error, that the swearing was in conformity with the law, and the empanelling was regular." It is hardly necessary to refer to the familiar fact that in criminal, as in civil cases, the presumption is in favor of the regularity of the proceedings in the trial court, and that error must affirmatively appear. Powell on Appellate Proceedings, p. 326, sec. 50; Wharton's Cr. Pleading and Practice, sec. 779 *a*, (9th ed.) and cases cited in note. I take it, therefore, that it is not open to doubt that if nothing was before us except the journal entry there would be no error apparent in the proceedings in regard to the jury.

How does the matter stand from the bill of exceptions? A bill of exceptions is prepared by the party, and being prepared by him, he may state, and ought to state, only those facts which present the very question he desires to raise. If the objection is to a ruling on the admission of testimony, he should state only that testimony and enough of the case to show its relevancy. It would be absurd to require him to set out all the testimony, or to state in terms that there was no objection to the balance. As was said in *Lincoln* v. *Claflin*, 7 Wall. 132, 136: "A bill of exceptions should only present the rulings of the court upon some matter of law, — as upon the admission or exclusion of evidence, — and should contain only

so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved." If he objects to a specific portion of a charge, he should state only that portion. Putting in the whole charge is clearly against rule 4 of this court, and has been explicitly condemned. *United States* v. *Rindskopf*, 105 U. S. 418. Indeed, the single function of a bill of exceptions is to bring upon the record so much of the proceedings as will disclose the precise question which the party desires to have ruled upon, and, when prepared by counsel and presented to the court, if it states the facts truly, the judge ought to sign it; and it is unnecessary for it to set forth affirmatively that there was no other error in the proceedings, or to state all the facts of the case in order to disclose that there was no other error. Bearing in mind this, which is confessedly the scope and purpose of a bill of exceptions, I notice that in this bill not a word is said about the absence of the jurors from the box, the personal presence or absence of the defendant, or whether the defendant was brought face to face with the jurors. If he had any fault to find in respect to these matters, the facts in respect thereto should have been explicitly stated. That he made no claim of wrong therein, is evident from the fact that he does not mention them. Examining the language of the bill of exceptions carefully, it states that two lists were given, one to plaintiff and one to defendant; and the court directed them to proceed with their challenges, each separately of the other, and without knowledge of what challenges were being made by the other. Then follow the exceptions, "to which method of proceeding in that regard defendant at the time excepted." I respectfully submit that language could not be used which makes clearer the fact that the objection ran alone to the fact that each party was required to make its challenges independently of the other, and without knowledge of what the other was doing. It is not simply said "to which method of proceeding," but as if to limit carefully to the particular matter, it says "to which method of proceeding in that regard." And at the close of the recitals it is further stated, "to the happen-

ing of the fact that both parties challenged the same three jurors, the defendant at the time objected." This is all which in any way tends to show that there was anything wrong in the matter of challenges, or that anything took place in the absence of the defendant.

Again, if the defendant had taken no exceptions to these proceedings, it is settled that this court would not inquire as to whether there was error in them. In *Alexander* v. *United States*, 138 U. S. 353, 355, a case coming from the same district, the precise state of facts in respect to the empanelling of the jury appeared, but without any exceptions. The response made by the court to the assignment of error was in these words: "The decisive answer to this assignment is, that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in empanelling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and in case of an adverse ruling to note an exception." Of course, then, if the matters are not vital to the trial, and may be waived by failure to object, as thus decided, clearly the defendant can take advantage of nothing to which he does not except. Hence, supposing that after the foregoing recital in the bill of exceptions there had appeared further recitals showing various irregularities in respect to the challenges, sufficient of themselves, if excepted to, to compel reversal, but with no following exception, clearly, under the rule laid down in *Alexander* v. *The United States*, we should have been compelled to ignore them. Surely then, when the exception runs to a specific matter, it cannot be broadened so as to extend to a matter, which is confessedly not stated, but is only inferred as probable from what is stated. In short, when the journal entry, which is of itself a part of the record, and which is the court's statement of what took place, recites the personal presence of the defendant and the full exercise of the right of challenge in language which is the ordinary formula of journal entries, and which has been uniformly regarded as

sufficient, to infer from the bill of exceptions prepared by the defendant, whose purpose is only to present the facts bearing upon the particular error alleged by him, and which only specifies in terms a single act to which exception is taken, to wit, the fact that plaintiff and defendant were compelled to challenge peremptorily, without knowledge of the other's challenges, that any challenges took place in the absence of the defendant, and to hold that an exception which is precise to a particular matter can be broadened so as to include other matters not specified, and thereupon to set aside a judgment of guilty solemnly rendered, seems to me to overturn established rules governing appellate proceedings, to destroy confidence in courts, and to work great wrong to the public.

Further than this, in the brief of counsel for the defendant there is no claim that the jury were not present in the box, face to face with the defendant, when he was called upon to make his challenges. The only points they make in respect to the matter are that the mode of designating the jury was not recognized by the statutes of the State of Arkansas, nor in conformity with any rule prescribed by Congress; and that by reason of the fact that three jurors were challenged by both the government and defendant, the latter was really deprived of three peremptory challenges.

Now, if it should prove to be the case — as it seems to me is not only possible but probable — that the defendant was in fact present in the court-room during all the challenges; that the entire panel of jurors was called into the box before him; that in their presence he was allowed and received all the challenges for cause he desired to make; and that only after a full inspection of the jury, and a questioning of each one so far as was desired, were the lists placed in the hands of the respective counsel for peremptory challenges, will not the ordinary citizen believe that substantial justice would have been done if this court had omitted to read into the record something which is not expressly stated therein, which defendant's counsel did not claim to have happened, and which did not in fact happen.

So far as respects the matter of contemporaneous challeng-

ing, at common law, and generally where no order is prescribed by statute, the defendant is required to make all his challenges before the government is called upon for any. In that aspect of the law, contemporaneous challenging works to the injury of the government rather than to that of the defendant. Further, in the only case in which the precise question has been presented, *State* v. *Hays*, 23 Missouri, 287, cited approvingly in *Turpin* v. *The State*, 55 Maryland, 462, the decision was in favor of the validity of such manner of challenge. In view of the discretion which in the absence of statute is confessedly vested in the trial court as to the manner of challenges, there was no error in this sufficient to justify a new trial.

I am authorized to say that Mr. Justice Brown also dissents.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* ILLINOIS.

CHICAGO *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

ILLINOIS *v.* ILLINOIS CENTRAL RAILROAD COMPANY.

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

Nos. 419, 608, 609. Argued October 12, 13, 14, 1892. — Decided December 5, 1892.

The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

The same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which

obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

The roadway of the Illinois Central Railroad at Chicago as constructed, two hundred feet in width, for the whole distance allowed for its entry within the city, with the tracks thereon, and with all the guards against danger in its approach and crossings, and the breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west, in no respect interfere with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic; and, as they were constructed under the authority of the law, (Stat. of February 17, 1851, Laws Ill. 1851, 192,) by the requirement of the city as a condition of its consent that the company might locate its road within its limits, (Ordinance of June 14, 1852,) they cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The Illinois Central Railroad Company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated — the construction and operation of a railroad thereon, with one or more tracks and works, in connection with the road or in aid thereof.

That company acquired by the construction of its road and other works no right as a riparian owner to reclaim still further lands from the waters of the lake for its use, or for the construction of piers, docks and wharves in the furtherance of its business; but the extent to which it could reclaim the land under water was limited by the conditions of the ordinance of June 14, 1852, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith.

The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights.

The railroad company owns and has the right to use in its business the reclaimed land and the slips and piers in front of the lots on the lake north of Randolph Street which were acquired by it, and in front of Michigan Avenue between the lines of Twelfth and Sixteenth streets, extended, unless it shall be found by the Circuit Court on further examination, that the piers as constructed extend beyond the point of navigability in the waters of the lake; about which this court is not fully satisfied from the evidence in this case.

The railroad company further has the right to continue to use, as an addi-

Statement of the Case.

tional means of approaching and using its station-grounds, the spaces and the rights granted to it by the ordinances of the city of Chicago of September 10, 1855, and of September 15, 1856.

The act of the Legislature of Illinois of April 16, 1869, granting to the Illinois Central Railroad Company, its successors and assigns, "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago," cannot be invoked so as to extend riparian rights which the company possessed from its ownership of lands in sections 10 and 15 on the lake; and as to the remaining submerged lands, it was not competent for the legislature to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; and the attempted cession by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective.

There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, is in the city, and subject to the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the right of riparian ownership, and is at full liberty to exercise it.

The city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

In equity. These appeals were taken from a decree in a bill or information filed by the State of Illinois against the

Illinois Central Railroad Company, the City of Chicago, and the United States, and a cross bill therein filed by the city against the Railroad Company, the United States and the State. 33 Fed. Rep. 730. The object of the litigation was to determine the rights, respectively, of the State, of the city, and of the Railroad Company in land, submerged or reclaimed, in front of the water line of the city on Lake Michigan.

As the record came to this court the cause was further entitled "*The United States Appellant* v. *The People of the State of Illinois et al.*, No. 610." On the suggestion of the Solicitor General that the United States had never been a party to these suits in the court below, and had never taken an appeal from the decree, that title was dropped from the opinion of the court.

The facts were stated by Mr. Justice Harlan in his opinion in the court below, as follows:[1]

It is necessary to a clear understanding of the numerous questions presented for determination, that we should first trace the history of the title to these several bodies of lands up to the time when the Illinois Central Railroad was located within the limits of Chicago.

First. *As to the lands embraced in the Fort Dearborn Reservation.*

In the year 1804 the United States established the military

[1] This court, in its opinion, *infra*, 434, says of this statement: "We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, 33 Fed. Rep. 730, for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated." After this full endorsement, the Reporter has thought it his duty to make use of this statement, making such few changes, mostly verbal, as have been found necessary to adapt it to the issues settled by the opinion of the court in this case.

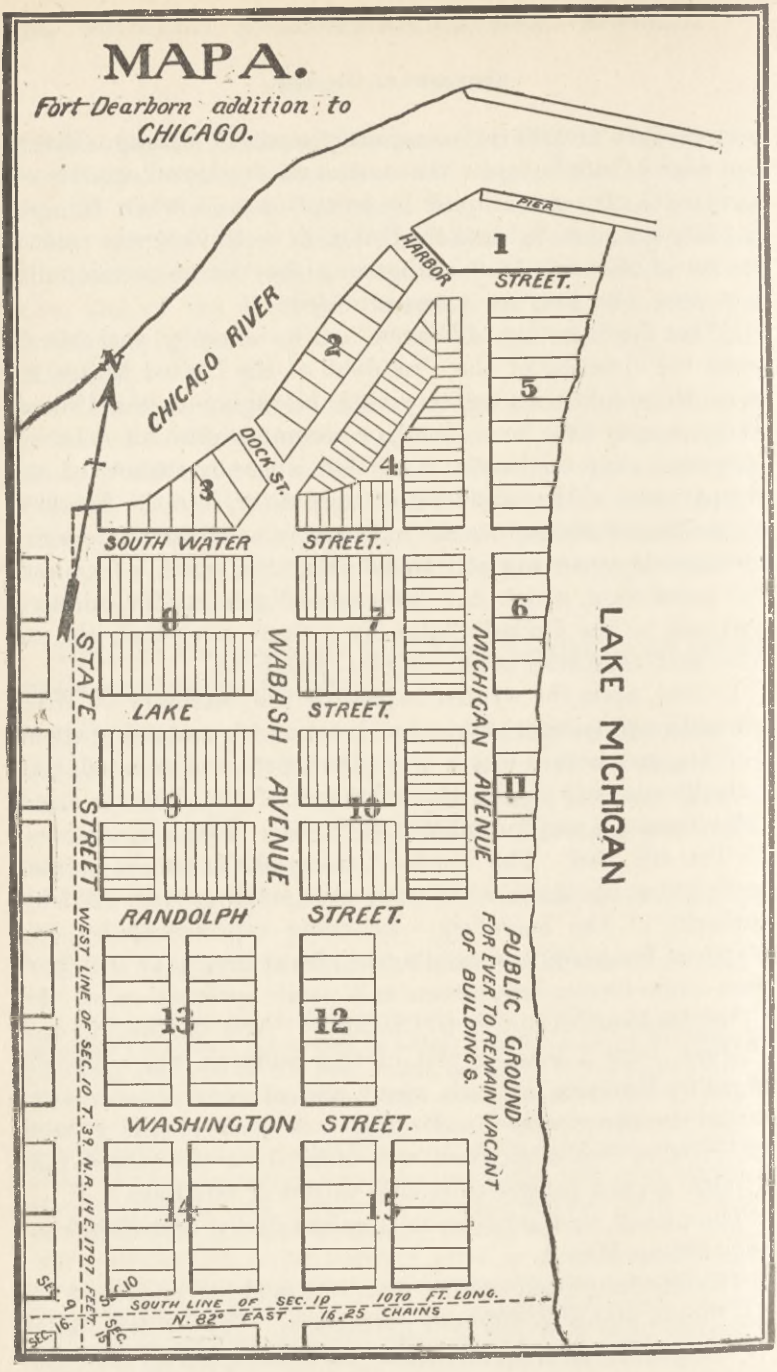
post of Fort Dearborn, immediately south of Chicago River, and near its mouth, upon the southwest fractional quarter of section 10. It was occupied by troops as well when Illinois, in 1818, was admitted into the Union, as when Congress passed the act of March 3, 1819, authorizing the sale of certain military sites. By that act it was provided:

"That the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become, useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for, into the treasury of the United States to make, execute and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction, which had been specially ceded, for military purposes, to the United States, by a State, over such site or sites, shall thereafter cease. 3 Stat. 520, c. 88.

In 1824, upon the written request of the Secretary of War, the southwest quarter of fractional section 10, containing about 57 acres, and within which Fort Dearborn was situated, was formally reserved by the Commissioner of the General Land Office from sale and for military purposes. *Wilcox* v. *Jackson*, 13 Pet. 498, 502. The United States admit, and it is also proved, that the lands so reserved were subdivided in 1837 by authority of the Secretary — he being represented by one Matthew Birchard, as special agent and attorney for that purpose — into blocks, lots, streets and public grounds called the "Fort Dearborn Addition to Chicago." And on the 7th day of June, 1839, a map or plat of that addition was acknowledged by Birchard, as such agent and attorney, and was recorded in the proper local office. A part of the ground embraced in that subdivision was marked on the record plat "Public ground forever to remain vacant of buildings."

The plat of that subdivision is substantially reproduced on page 392, as Map A.

The lots designated on this plat were sold and conveyed by the United States to different purchasers. The United States expressly reserved from sale all of the Fort Dearborn Addition


MAP A.
Fort Dearborn addition to CHICAGO.
PIER
HARBOR
STREET.
CHICAGO RIVER
DOCK ST.
SOUTH WATER
STREET.
LAKE
STREET.
STATE
STREET
WABASH AVENUE
MICHIGAN AVENUE
RANDOLPH
STREET.
WASHINGTON
STREET.
LAKE MICHIGAN
PUBLIC GROUND
FOR EVER TO REMAIN VACANT
OF BUILDINGS.
WEST LINE OF SEC. 10 T. 39 N. R. 14 E. 1797 FEET.
SOUTH LINE OF SEC. 10
N. 82° EAST
16.25 CHAINS
1070 FT. LONG.
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

(including the ground marked for streets) north of the south line of lot 8 in block 2, lots 4 and 9 in block 4, and lot 5 in block 5, projecting said lines across the adjacent streets. The grounds so specially reserved remained in the occupancy of the General Government for military purposes from 1839 until after 1845. The legal effect of that occupancy appears in *United States* v. *Chicago*, 7 How. 185. The city of Chicago having proposed, in 1844, to open Michigan Avenue through the lands so reserved from sale, notwithstanding, at the time, they were in actual use for military purposes, the United States instituted a suit in equity to restrain the city from so doing. It appeared in the case that the agent of the General Government gave notice, at the time of selling the other lots, that the ground in actual use by the United States was not then to be sold. It also appeared that the act of March 4, 1837, incorporating the city of Chicago, and designating the district of country embraced within its limits expressly excepted "the southwest fractional quarter of section 10, occupied as a military post, until the same shall become private property." Ill. Laws, 1837, pp. 38, 74.

The court held that the city had no right to open streets through that part of the ground which, although laid out in lots and streets, had not been sold by the government; that its corporate powers were limited to the part which, by sale, had become private property; and that the streets laid out and dedicated to public use by Birchard, the agent of the Secretary of War, did not, merely by his surveying the land into lots and streets, and making and recording a map or plat thereof, convey the legal estate in such streets to the city, and thereby authorize it to open them for public use, and assume full municipal control thereof. The court held to be untenable the claim of the city that "because streets had been laid down on the plan by the agent [Birchard] part of which extended into the land not sold, those parts had, by this alone, become dedicated as highways and the United States had become estopped to object." Further: "It is entirely unsupported by principle or precedent, that an agent, *merely by protracting on the plan* those streets into the reserved line and amidst lands not sold,

nor meant then to be sold, but expressly reserved, could deprive the United States of its title to real estate, and to its important public works." See also *Irwin* v. *Dixion*, 9 How. 9, 31.

Second. *As to the lands in controversy embraced in Fractional Section* 15.

This section is on the lake shore, immediately south of section 10. The particular lands, the history of the title to which is to be now examined, are between the west line of the street now known as Michigan Avenue and the roadway or wayground of the Illinois Central Railroad Company, and between the middle line of Madison street and the middle line of Twelfth street, excluding what is known as Park Row or block 23, north of Twelfth street.

By an act of the Illinois legislature of February 14, 1823, entitled "An act to provide for the improvement of the internal navigation of this State," certain persons were constituted commissioners to devise and report upon measures for connecting, by means of a canal and locks, the navigable waters of the Illinois River and Lake Michigan. Ill. Laws, 1823, p. 151. This was followed by an act of Congress, approved March 2, 1827, entitled "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," granting to this State, for the purposes of such enterprise, a quantity of land, equal to one-half of five sections in width, on each side of the proposed canal (reserving each alternate section to the United States), to be selected by the Commissioner of the General Land Office, under direction of the President; said lands to be "subject to the disposal of the said State for the purpose aforesaid, and for no other;" and said canal to remain forever a public highway for the use of the national government, free from any charge for any property of the United States passing through it. 4 Stat. 234, c. 51.

The power of the State to dispose of these lands was further recognized or conferred by the third section of the act, as follows: Sec. 3. "That the said State, under the authority of the legislature thereof, after the selection shall have been so made,

shall have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor to whomsoever shall purchase the whole or any part thereof." 4 Stat. 234.

By an act of the Illinois legislature of January 22, 1829, entitled "An act to provide for constructing the Illinois and Michigan Canal," the commissioners for whose appointment that act made provision were directed to select, in conjunction with the Commissioner of the General Land Office, the alternate sections of land granted by the act of Congress, such commissioners being invested with the power, among others, "to lay off such parts of said donation into town lots as they may think proper, and to sell the same at public sale in the same manner as is provided in this act for the sale of other lands." Ill. Laws, 1829.

The act of 1829 was amended February 15, 1831, so as to constitute the Canal Commissioners a board to be known as the "Board of Canal Commissioners of the Illinois and Michigan Canal," with authority to contract and be contracted with, sue and be sued, plead and be impleaded, and with power of control in all matters relating to said canal. Ill. Laws, 1830, 1831, 39.

Pursuant to and in conformity with said acts of Congress and of the legislature of Illinois, the selection of lands for the purposes specified was made by the proper authorities, and approved by the President on the 21st of May, 1830. Among the lands so selected was said fractional section 15.

By an act of the Illinois legislature, approved January 9, 1836, entitled "An act for the construction of the Illinois and Michigan Canal," the Governor was empowered to negotiate a loan of not exceeding $500,000, on the credit and faith of the State, as therein provided, for the purpose of aiding, in connection with such means as might be received from the United States, in the construction of the Illinois and Michigan Canal, for which loan should be issued certificates of stock, to be called the "Illinois and Michigan Canal stock," signed by the Auditor and countersigned by the Treasurer, bearing an interest not exceeding six per cent, payable semi-annually, and "reimburs-

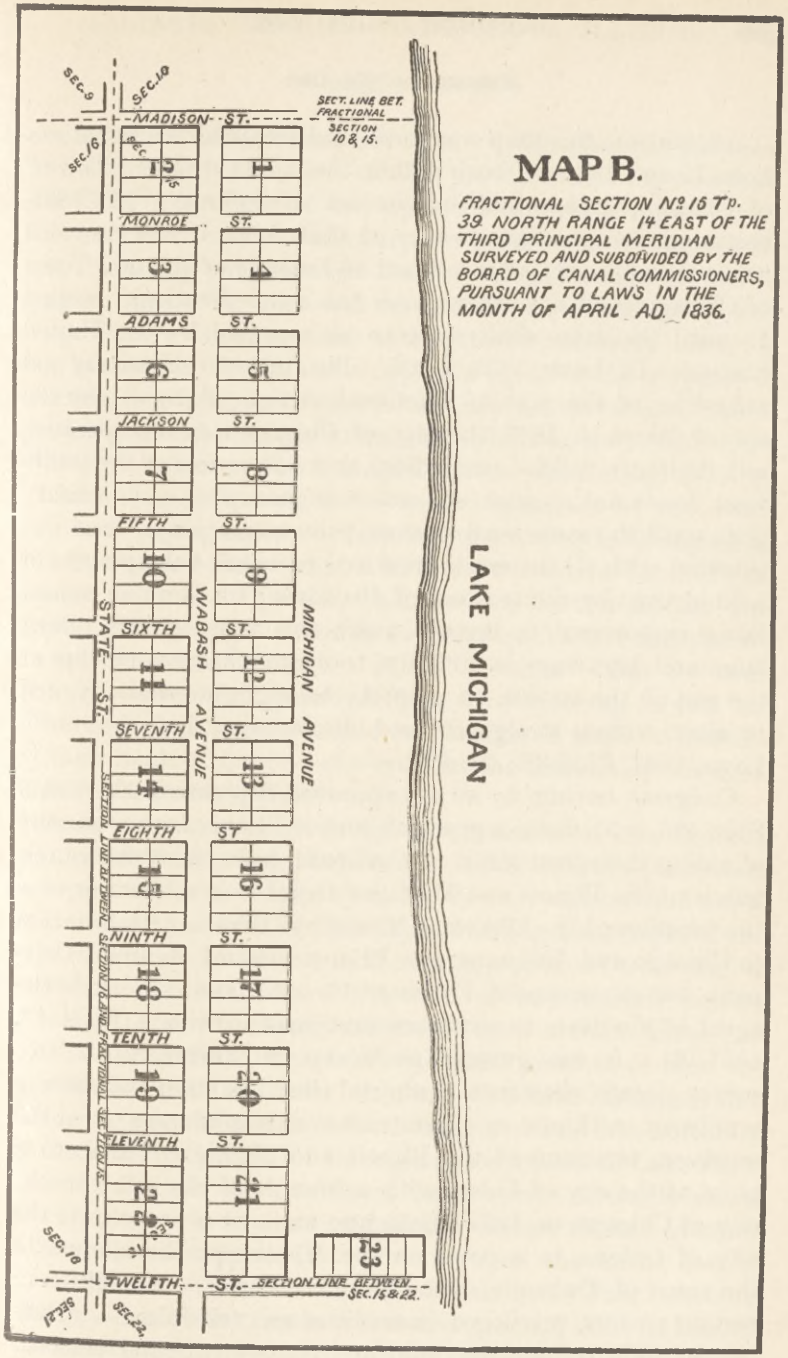
able" at the pleasure of the State at any time after 1860, and for the payment of which, principal and interest, the faith of the State was irrevocably pledged. The same act provided for the appointment of three commissioners to constitute a board to be known as "The Board of Commissioners of the Illinois and Michigan Canal," and to be a body politic and corporate, with power to contract and be contracted with, sue and be sued, plead and be impleaded, in all matters and things relating to them as canal companies, and to have the immediate care and superintendence of the canal and all matters relating thereto. Ill. Laws, 1836, 145.

That act contained, among other provisions, the following:

"SEC. 32. The commissioners shall examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots, and they shall cause the canal lands in or near Chicago, suitable therefor, to be laid off into town lots.

"SEC. 33. And the said Board of Canal Commissioners shall, on the twentieth day of June next, proceed to sell the lots in the town of Chicago, and such parts of the lots in the town of Ottawa, as also fractional section Fifteen adjoining the town of Chicago, it being first laid off and subdivided into town lots, streets and alleys, as in their best judgment will best promote the interest of the said canal fund: *Provided, always*, That before any of the aforesaid town lots shall be offered for sale, public notice of such sale shall have been given." . . . Ill. Laws, 1836, 150. The revenue arising from the canal, and from any lands granted by the United States to the State for its construction, together with the net tolls thereof, were pledged by the act for the payment of the interest accruing on the said stock, and for the reimbursement of the principal of the same. *Ibid.* § 41, 153.

In 1836 the Canal Commissioners, under the authority conferred upon them by the statutes above recited, caused fractional section 15 to be subdivided into lots, blocks, streets, etc., a map whereof was made, acknowledged and recorded on the 20th of July, 1836, which map is substantially reproduced on page 397 as Map B.


MAP B.
FRACTIONAL SECTION No. 15 Tp. 39 NORTH RANGE 14 EAST OF THE THIRD PRINCIPAL MERIDIAN SURVEYED AND SUBDIVIDED BY THE BOARD OF CANAL COMMISSIONERS, PURSUANT TO LAWS IN THE MONTH OF APRIL AD. 1836.
LAKE MICHIGAN
MICHIGAN AVENUE
WABASH AVENUE
STATE ST.
MADISON ST.
MONROE ST.
ADAMS ST.
JACKSON ST.
FIFTH ST.
SIXTH ST.
SEVENTH ST.
EIGHTH ST.
NINTH ST.
TENTH ST.
ELEVENTH ST.
TWELFTH ST.
SECT. LINE BET. FRACTIONAL SECTION 10 & 15.
SEC. 9
SEC. 10
SEC. 16
SEC. 18
SEC. 22
SECTION LINE BETWEEN SEC. 15 & 22.
SECTION LINE OF ILLINOIS & MICHIGAN CANAL RESERVATION

Statement of the Case.

At the time this map was made and recorded fractional sections 15 and 10 were both within the limits of the "Town" of Chicago, except that by the act of February 11, 1835, changing the corporate powers of that town, it was provided "that the authority of the Board of Trustees of the said Town of Chicago shall not extend over the south fractional section 10 until the same shall cease to be occupied by the United States." Ill. Laws, 1835, p. 204. But, prior to the survey and recording of the plat of fractional section 10, to wit, by the act of March 4, 1837, the city of Chicago was incorporated, and its limits defined (excluding, as we have seen, "the southwest fractional quarter of section 10, occupied as a military post, until the same shall become private property,") and was invested with all the estate, real and personal, belonging to or held in trust by the trustees of the town; its common council being empowered to lay out, make and assess streets, alleys, lanes and highways in said city, to make wharves and slips at the end of the streets, on property belonging to said city, and to alter, widen, straighten and discontinue the same. Ill. Laws, 1837, 61, § 38; 74, § 61.

Congress having, by an act approved September 20, 1850, 9 Stat. 466, c. 51, made a grant of land to Illinois for the purpose of aiding the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with branches to Chicago and Dubuque, the Illinois Central Railroad Company was incorporated February 10, 1851, and was made the agent of the State to construct that road. Private Laws Ill. 1851, 61. It was granted power by its charter, Sec. 3, "to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal, to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch, via the city of Galena, to a point on the Mississippi River, opposite the town of Dubuque, in the State of Iowa." In addition to certain powers, privileges, immunities and franchises — including the right to purchase, hold and convey real and personal

estate, which might be needful to carry into effect the purposes and objects of its charter — it was provided that the company "shall have the right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purposes of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges, belonging to the State, are hereby granted to said corporation for said purposes: . . . *Provided*, That nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams." But the company's charter also provided (Sec. 8): "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

Such consent was given by an ordinance of the common council of Chicago, adopted June 14, 1852, whereby permission was granted to the company to lay down, construct and maintain within the limits of that city, and along the margin of the lake within and adjacent to the same, a railroad with one or more tracks, and to have the right of way and all powers incident to and necessary therefor, upon certain terms and conditions, to wit: "The said road shall enter at or near the intersection of its southern boundary with Lake Michigan, and, following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such grounds as the said company may acquire between the north line of Randolph Street and the Chicago River, in the Fort Dearborn addition in said city, upon which said grounds shall be located the depot of said railroad within the city, and such other build-

ings, slips or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company." Section 1.

By other sections of the ordinance it was provided as follows:

By the second section, that the company might "enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of 300 feet, from the southern boundary of said public ground near Twelfth street, to the northern line of Randolph street — the inner or west line of the ground to be used by said company to be not less than 400 feet east from the west line of Michigan Avenue and parallel thereto;"

By the third section, that they "may extend their works and fill out into the lake to a point in the southern pier not less than 400 feet west from the present east end of the same, thence parallel with Michigan Avenue to the north line of Randolph street extended; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company;"

By the sixth section, that the company "shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences or other sufficient works, as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, said structure to be of suitable materials and sightly appearance, and of such heights as the common council may direct, and no change thereon shall be made except by mutual consent: *Provided*, That the company shall construct such suitable gates at proper places at the ends of the streets, which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake; *And provided, also*, That, in case of the construction of an outside

harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them;"

By the seventh section, that the company "shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry, pier work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan Avenue opposite thereto, from the north side of Randolph street to the southern bound of Lake Park before mentioned, at a distance of not more than 300 feet east from and parallel with the western or inner line, pointed out for said company, as specified in section two hereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient, which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan, and that part of the structure south of Lake Park shall be commenced and prosecuted with all reasonable despatch after acceptance of this ordinance;"

By the eighth section, that the company "shall not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as Lake Park, belonging to the city of Chicago, lying between Michigan Avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground;"

By the ninth section, that the company "shall erect no buildings between the north line of Randolph street and the south line of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor

suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same."

The company was given ninety days within which to accept the ordinance, and it was provided that upon such acceptance its terms should be embodied in a contract between the city and the company. The ordinance was accepted, and the required agreement entered into on the 8th day of July, 1852.

At the time this ordinance was passed the harbor of the city included, under the laws of the State incorporating the city, "the piers and so much of Lake Michigan as lies within the distance of one mile thereof into the lake, and the Chicago River and its branches to their respective sources." Private Laws Ill. 2d Sess. 1851, pp. 132, 147. Its common council had power, at the public expense, to construct a breakwater or barrier along the shore of the lake for the protection of the city against the encroachments of the water; "to preserve the harbor; to prevent any use of the same, or any act in relation thereto . . . tending in any degree to fill up or obstruct the same; to prevent and punish the casting or depositing therein any earths, ashes or other substance, filth, logs or floating matter; to prevent and remove all obstructions therein, and to punish the authors thereof; to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city by steamboats, canal boats, and other crafts and vessels, . . . and to regulate and prescribe by such ordinances, or through their harbor master, or other authorized officer, such a location of every canal boat, steamboat, or other craft or vessel or float, and such changes of station in, and use of, the harbor, as may be necessary to promote order therein, and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts or floats;" "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten and deepen the same;" and to "make wharves and slips at the end of streets, and alter, widen, contract, straighten and discontinue the same." *Ibid.*

Statement of the Case.

Under the authority of its charter, and of the ordinance of June 14, 1852, the railroad company located its tracks within the corporate limits of the city. The tracks northward from Twelfth street were laid upon piling placed in the waters of the lake, the shore line, which was crooked, being, at that time, at Park Row, about 400 feet from the west line of Michigan Avenue; at the foot of Monroe and Madison streets, about 90 feet; and at Randolph street, about 112½ feet. Since that time the space between the shore line and the tracks of the railroad company has been filled with earth by or under the direction of the city, and is now solid ground. After the construction of the track as just stated, the railroad company erected a breakwater east of its roadway, upon a line parallel with the west line of Michigan Avenue, and, subsequently, filled the space, or nearly all of it, between that breakwater and its tracks, and under its tracks, with earth and stone.

It is stated by counsel, and the record, we think, sufficiently shows, that when the road was located in 1852 nearly all of the lots bordering upon the lake, north of Randolph street, had become the property of individuals, by purchase from the United States, except a parcel adjacent to the river which had not then been sold by the General Government. Soon thereafter the company acquired the title to all of the water lots in the Fort Dearborn addition, north of Randolph street, including the remaining parcel belonging to the United States. The deed for the latter was made by the Secretary of War, October 14, 1852, and included "all the accretions made or to be made by said lake and river in front of the land hereby conveyed, and all other rights and privileges appertaining to the United States as owners of said land." The company established its passenger house at the place designated in the ordinance of 1852, and, being the owner of said water lots, north of Randolph street, it gradually pushed its works out into the shallow water of the lake to the exterior line specified in that ordinance, 1376 feet east of the west line of Michigan Avenue.

In order that the railroad company might approach its passenger depot, the common council, by ordinance, adopted

September 10, 1855, granted it permission to curve its tracks westwardly of the line fixed by the ordinance of 1852, "so as to cross said line at a point not more than 200 feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot, and crossing the north line of Randolph street, extended, at a point not more than 100 feet west of the line fixed by the ordinance, in accordance with the map or plat thereof submitted by said company and placed on file for reference." This grant was, however, upon the following conditions: That the company lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of said ordinance; that it should be restricted in the use of its tracks south of the north line of Randolph street, as provided in the ordinance of 1852; and "when the company shall fill up its said tracks south of the north line of that street down to the point where said curves and side-tracks commence, and the city shall grant its permission so to fill up its tracks, it should also fill up, at the same time and to an equal height, all the space between the track so filled up and the lake shore as it now exists, from the north side of Randolph street down to the point where said curves and side-tracks intersect the line fixed by the ordinance aforesaid."

The company's tracks were curved as permitted; the street referred to was opened and has ever since been used by the public; and the required filling was done.

It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago River, the city, by another ordinance adopted September 15, 1856, granted it permission "to enter and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its present [then] breakwater and a line drawn from a point on said breakwater 700 feet south of the north line of Randolph, extended, and running thence on a straight line to the southeast corner of its present breakwater, thence to the river: *Provided, however*, and this permission is

only given upon the express condition, that the portion of said line which lies south of the north line of Randolph street, extended, shall be kept subject to all the conditions and restrictions as to the use of the same, as are imposed upon that part of said line by the said ordinance of June 14, 1852."

In 1867 the company made a large slip just outside of the exterior line fixed by the ordinance of 1852, thereby extending its occupancy, between Randolph street and Chicago River, further to the east. Along the outer edge of this pier a continuous line of dock piling was placed, extending on a line from the river to the north line of Randolph street, 1792 feet distant from the west line of Michigan Avenue. This line formed the company's breakwater between the river and Randolph street at the time of the passage, April 16, 1869, of what is known as the Lake Front Act; which was passed by the legislature over the veto of the governor, and which is printed in full in the margin. Laws of 1869, p. 245.

In view of the important questions raised, and of the rights asserted, under that act, it is here given in full: [1]

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[1] "AN ACT in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all right, title and interest of the State of Illinois in and to so much of fractional section fifteen (15), township thirty-nine (39), range fourteen (14) east of the third (3d) principal meridian, in the city of Chicago, county of Cook, and State of Illinois, as is situated east of Michigan Avenue and north of Park Row, and south of the south line of Monroe street, and west of a line running parallel with and four hundred feet east of the west line of said Michigan Avenue — being a strip of land four hundred feet in width, including said avenue along the shore of Lake Michigan, and partially submerged by the waters of said lake — are hereby granted, in fee, to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety (90) feet in width, in such manner and upon such terms as the common council of said city may, by ordinance, provide: *Provided*, That no sale or conveyance of said property, or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the aldermen elect.

"§ 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the 'Park Fund' of

As early as May, 1869, the railroad company caused to be prepared a plan for an outer harbor at Chicago.

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the said city of Chicago, and said fund shall be equitably distributed by the common council between the South Division, the West Division and the North Division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement in each of said divisions, or in the vicinity thereof, of a public park, or parks, and for no other purpose whatsoever.

"§ 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the South Division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: *Provided, however*, That the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And provided, also,* That nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: *And provided further*, That any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the

On the 12th of July of the same year the Illinois Central Railroad Company, the Michigan Central Railroad Company,

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continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation.

"§ 4. All the right and title of the State of Illinois, in and to the lands, submerged or otherwise lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan Avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten (10) and fifteen (15) in said township thirty-nine (39), as aforesaid, are hereby granted, in fee, to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot, and for such other purposes as the business of said company may require: *Provided*, That upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds, or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid in conformity with the requirements of said charter.

"§ 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington and Quincy, and Michigan Central Railroad Companies of the land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars, to be paid in the following manner, viz.: two hundred thousand dollars within three months from and after the passage of this act; two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars within nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the Park Fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

"§ 6. The common council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe Street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon or otherwise, and in case the said common council shall neglect or refuse thus to quitclaim and release to the said companies, as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

"§ 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said

and the Chicago, Burlington and Quincy Railroad Company, by an agent, tendered to Walter Kimball, the comptroller of the city of Chicago, the sum of $200,000, as the first payment to the city under the fifth section of the act of 1869. He received the sum tendered upon the express condition that none of the city's rights be thereby waived, or its interest in any manner prejudiced, and placed the money in bank on special deposit, to await the action and direction of the common council. The matter being brought to the attention of that body, it adopted, June 13, 1870, a resolution, declaring that the city "will not recognize the act of Walter Kimball in receiving said money, as binding upon the city, and that the city will not receive any money from railroad companies, under said act of the General Assembly, until forced to do so by the courts." The city never quitclaimed or released, nor offered to quitclaim or release, to said companies or to either of them, any right, title, claim or interest in or to any of the land described in the act of 1869, nor was Kimball's act in receiving the money ever recognized by the city as binding upon it. On the expiration of his term of office he did not turn the money over to his successor in office, but kept it deposited in bank to his own individual credit, and so kept it until some time during the year 1874, or later, when, upon application by the railroad companies, he returned it to them. No other money than the $200,000 delivered to Kimball was ever tendered by the railroad companies, or either of them, to the city or to any of its officers.

At a meeting of the Board of Directors of the Illinois Central Railroad Company, held at the company's office in New York, July 6, 1870, a resolution was adopted to the effect "that this company accepts the grants under the act of the

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Illinois Central Railroad Company shall perpetually pay into the Treasury of the State of Illinois the per centum on the gross or total proceeds, receipts or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

"§ 8. This act shall be a public act and in force from and after its passage."

legislature at its last session, and that the president give notice thereof to the State, and that the company has commenced work upon the shore of the lake at Chicago under the grants referred to." On the 17th of November, 1870, its president communicated a copy of this resolution to the Secretary of State of Illinois, and gave the notice therein required, adding: "You will please regard the above as an acceptance by this company of the above-mentioned law [Lake Front Act], and it is desired by said company that said acceptance shall remain permanently on file and of record in your office." The Secretary of State replied, under date of November 18, 1870: "Yours of the 17th inst., being a notice of the acceptance by the Illinois Central Railroad Company of the grants under an act of the legislature of Illinois, in force April 16, 1869, was this day received and filed and duly recorded in the records of this office."

Following these transactions were certain proceedings, commenced about July 1, 1871, by information filed in the Circuit Court of the United States for that District by the United States against the Illinois Central Railroad Company. That information set forth that Congress, in order to promote the convenience and safety of vessels navigating Lake Michigan, had, from time to time, appropriated and expended large sums of money in and about the mouth of Chicago River, and had constructed two piers extending from the north and south banks of that river eastwardly for a considerable distance into the lake; that, in July, 1870, it appropriated a large sum of money to construct an outer harbor at Chicago, in accordance with the plans of the Engineer Department of the United States; that the railroad company had, from time to time, wrongfully filled up with earth a portion of said lake, within said harbor; that what the company had then done, in that way, and what it intended to do, unless prevented, would materially interfere with the execution of the plan of improvement adopted by the War Department. A temporary injunction was issued against the company. Subsequently, in 1872, the parties to that suit entered into a stipulation, from which it appears that the matters referred to in said information,

relating to the construction of docks and wharves in the basin or outer harbor of the city, formed by the breakwater then in process of erection by the United States, were referred to the War Department, and that the Secretary, upon the recommendation of engineer officers, approved certain lines, limiting the construction of docks and wharves in said outer harbor, to wit: commencing at the pier on the south side of the entrance to the Chicago River, 1200 feet west of the government breakwater; thence south to an intersection with the north line of Randolph street extended eastwardly; thence due west 800 feet; and thence south to the east and west breakwater proposed to be constructed by the United States 4000 feet south of the pier first above mentioned, the line so established being fixed as the line to which docks and wharves may be extended by parties entitled to construct them within said outer harbor. The railroad company desiring to proceed, under the supervision of the Engineer Bureau of the United States, with the construction of docks and wharves within the proposed outer harbor, between the pier on the south side of the entrance to Chicago River and the north line of Randolph street, extended eastwardly in conformity with the said limiting lines, and having agreed to observe said lines, as well as the directions which might be given, in reference to the construction of said docks and wharves, by the proper officers of said bureau, the injunctional order, pursuant to stipulation between the parties, was, January 16, 1872, vacated, and the information dismissed, with leave to the United States to reinstate the same upon the failure of the company, in good faith, to observe the said conditions.

Subsequently, the railroad company resumed work on, and, during the year 1873, completed, Pier No. 1 adjacent to the river and east of the breakwater of 1869.

On the 15th of April, 1873, the legislature of Illinois passed the following act, which was in force from and after July 1, 1873:

"§ 1. *Be it enacted, etc.*, That the act entitled 'An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan,

on the eastern frontage of the city of Chicago,' in force April 16, 1869, be and the same is hereby repealed." Ill. Laws of 1873, 115.

In 1880 and 1881 Piers Nos. 2 and 3, north of Randolph street, were constructed in conformity with plans submitted to and approved by the War Department.

The common council of Chicago, by ordinance approved July 12, 1881, extended Randolph street eastwardly, and declared it to be a public street, from its then eastern terminus "to the west line of the right of way of the Illinois Central Railroad Company, as established by the ordinance of September 10, 1855, . . . and also straight eastwardly . . . from the easterly line of Slip C, produced southerly to Lake Michigan;" giving permission to the company to construct and maintain at its own expense, within the line of Randolph street so extended and over the company's tracks and right of way, a bridge or viaduct, with suitable approaches, to be approved by the Commissioners of Public Works, which should be forever free to the public and to all persons having occasion to pass and repass thereon. Such a bridge or viaduct was necessary in order that the piers constructed and in process of construction east of the breakwater of 1869 might be conveniently reached by teams. The viaduct was built in 1881, and extends to the base of Pier 3. It has ever since been used by the public.

It appears from the evidence that in 1882, the pier, which was built in 1870 from Twelfth street to the north line, extended, of lot 21, was continued as far south as the centre line of Sixteenth street. The main object of this extension, according to the showing made by the company, was to protect the tracks from the waves during storms from the northeast. Another object was to construct a slip or basin south of the south line of lot 21, between the breakwater and the shore, where vessels loaded with materials for the company, or having freight to be handled, could enter and be in safety. In 1885, a pier was constructed by the company at the foot of Thirteenth street, according to a plan submitted to the War Department; and the department did not object to its construction, "provided

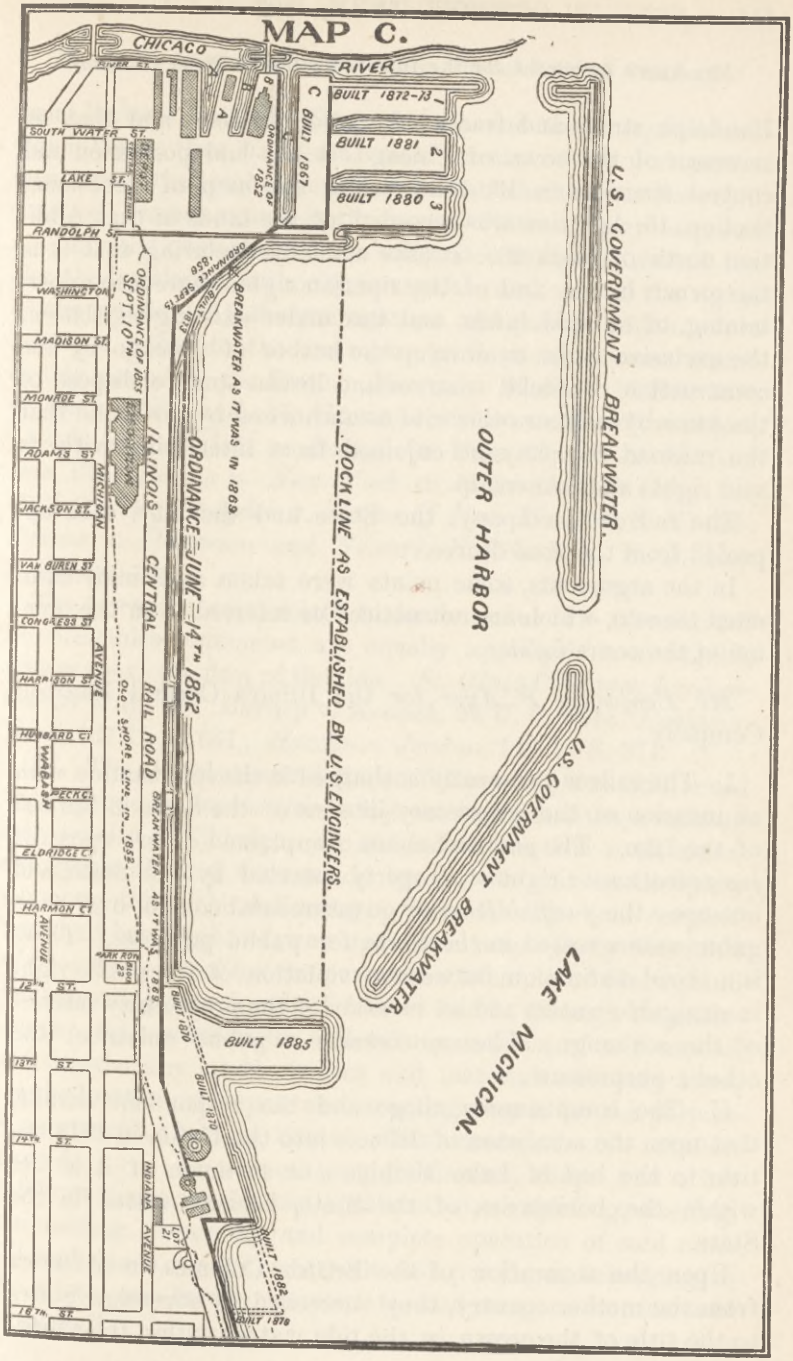
no change be made in its location and length." The pier, as constructed, does not differ from that proposed and approved, except that it is wider by fifty feet. But it does not appear that the War Department regards that change in the plan as injurious to navigation, or as interfering with the plans of the government for an outer harbor.

At the hearing in the court below, a map was used for the purpose of showing the different works constructed by the United States; the location of all the structures and buildings erected by the railroad company, with the date of their erection; and the relation of the tracks and breakwaters of the company to the shore as it now is, and, to some extent, as it was heretofore.

That map, known as the Morehouse map, and called C, is substantially reproduced on page 413.

The State, in the original suit, asks a decree establishing and confirming its title to the bed of Lake Michigan, and its sole and exclusive right to develop the harbor of Chicago, by the construction of docks, wharves, etc., as against the claim by the railroad company that it has an absolute title to said submerged lands, described in the act of 1869, and the right — subject to the paramount authority of the United States in respect to the regulation of commerce between the States — to fill the bed of the lake, for the purposes of its business, east of and adjoining the premises between the river and the north line of Randolph street, and also north of the south line of Lot 21; and, also, the right, by constructing and maintaining wharves, docks, piers, etc., to improve the shore of the lake, for the purposes of its business, and for the promotion, generally, of commerce and navigation. The State, insisting that the company has, without right, erected, and proposes to continue to erect, wharves, piers, etc., upon the domain of the State, asks that such unlawful structures be directed to be removed, and the company enjoined from constructing others.

The city, by its cross-bill, insists that since June 7, 1839, when the map of Fort Dearborn addition was recorded, it has had the control and use for public purposes of that part of section 10 which lies east of Michigan Avenue and between


MAP C.
CHICAGO
RIVER
U.S. GOVERNMENT BREAKWATER
OUTER HARBOR
LAKE MICHIGAN
DOCK LINE AS ESTABLISHED BY U.S. ENGINEERS
BREAKWATER AS IT WAS IN 1869
ORDINANCE JUNE 14TH 1852
ILLINOIS CENTRAL RAIL ROAD
BREAK WATER AS IT WAS 1869
BUILT 1872-73
BUILT 1881
BUILT 1880
BUILT 1867
BUILT 1885
BUILT 1869
BUILT 1870
BUILT 1882
BUILT 1870
ORDINANCE OF 1852
ORDINANCE SEPT. 10TH 1855
ORDINANCE SEPT. 15 1858
SOUTH WATER ST.
LAKE ST.
RANDOLPH ST.
WASHINGTON
MADISON ST.
MONROE ST.
ADAMS ST.
JACKSON ST.
VAN BUREN ST.
CONGRESS ST.
HARRISON ST.
HUBBARD CT.
PECK CT.
ELDRIDGE CT.
HARMON CT.
12TH ST.
13TH ST.
14TH ST.
18TH ST.
MICHIGAN AVENUE
WABASH AVENUE
INDIANA AVENUE
OLD SHORE LINE IN 1852
LOT 21

Randolph street and fractional section fifteen; and that, as successor of the town of Chicago, it has had possession and control since June 13, 1836, when the map of Fractional Section 15 Addition was recorded, of the lands in that Addition north of block 23. It asks a decree declaring that it is the owner in fee, and of the riparian rights thereunto appertaining, of all said lands, and has under existing legislation, the exclusive right to develop the harbor of Chicago by the construction of docks, wharves and levees, and to dispose of the same by lease or otherwise as authorized by law; and that the railroad company be enjoined from interfering with its said rights and ownership.

The railroad company, the State and the city, each appealed from the final decree.

In the arguments, some points were taken and many cases cited thereto, which are not noticed or referred to in the opinion of the court *infra*.

Mr. Benjamin F. Ayer for the Illinois Central Railroad Company.

I. The railroad company is charged in the information with an invasion of the proprietary interest of the State in the bed of the lake. The encroachments complained of are upon the *jus privatum* or right of property asserted by the State, and not upon the *jus publicum* or governmental control over navigable waters vested in the State for public purposes. There is a broad distinction between a violation of the public right in navigable waters and an invasion of the proprietary interest of the sovereign. The one creates a public nuisance; the other a purpresture.

II. The complainants allege and the respondent admits, that upon the admission of Illinois into the Union in 1818 the title to the bed of Lake Michigan, or so much of it as lies within the boundaries of the State, became vested in the State.

Upon the separation of the British Colonies in America from the mother country, they succeeded as sovereign States to the title of the crown in the tide waters within their terri-

torial limits. Both the *jus publicum* and the *jus privatum*, which before then had been vested in the crown and parliament, or in the local governments established under the royal sanction, became vested in the several States. They acquired not only the ownership of the soil under navigable waters, but also the legislative authority to regulate and control the rights of the public. All the prerogatives and powers which before belonged either to the crown or parliament, became immediately vested in the State. *Martin* v. *Waddell*, 16 Pet. 367; *Smith* v. *Maryland*, 18 How. 71; *Commonwealth* v. *Alger*, 7 Cush. 53; *Nichols* v. *Boston*, 98 Mass. 39; *S. C.* 93 Am. Dec. 132; *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71; *Langdon* v. *Mayor of New York*, 93 N. Y. 129; *Stevens* v. *Patterson and Newark Railroad*, 34 N. J. Law (5 Vroom) 532.

The foregoing cases relate to lands under tide waters; but the principles enunciated are equally applicable to navigable waters above the flow of the tide. *St. Clair County* v. *Lovingston*, 23 Wall. 46; *Barney* v. *Keokuk*, 94 U. S. 324; *Packer* v. *Bird*, 137 U. S. 661; *Hardin* v. *Jordan*, 140 U. S. 371.

III. The Illinois Central Railroad Company was authorized and required by its charter to lay out and construct a railroad *into* the city of Chicago. To aid in building the road, extensive grants of land were made by the State to the Company —among them, the following: "SEC. 3. The said corporation shall have right of way upon, *and may appropriate to its sole use and control* for the purposes contemplated herein, land not exceeding two hundred feet in width, through its entire length: may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, . . . station grounds, . . . turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes."

The effect of these words is obviously to invest the company with a complete title to all the lands belonging to the State, which should be required and taken for the purposes mentioned. *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 680; *Van Ness* v. *Washington*, 4 Pet. 232, 284.

The right of the company to appropriate to its use the lands of the State, is coëxtensive with the power conferred by the same section of the charter to acquire by purchase or condemnation the lands of private owners. The latter is a continuing power which may be exercised from time to time as the necessities of the company may require. *Chicago and West. Indiana Railroad* v. *Illinois Central Railroad*, 113 Illinois, 156; *Chicago, Burlington &c. Railroad* v. *Wilson*, 17 Illinois, 123; *N. Y. & Harlem Railroad* v. *Kip*, 46 N. Y. 546.

IV. The consent of the common council of Chicago to the location of the railroad within the city, was required by the eighth section of the company's charter. An ordinance granting that consent was passed June 14, 1852, and a formal contract under seal was entered into between the railroad company and the city, in which it was covenanted that the ordinance should be of perpetual obligation, and that each party would abide by and perform all the obligations therein contained according to the true intent and meaning thereof. The assent was given on conditions which were extremely burdensome, but they have been fully complied with. The railroad was located and built in the open waters of the lake in front of fractional sections ten and fifteen, as directed by the common council; and the company had been in peaceable possession of the grounds appropriated for that purpose, with the exception of a strip one hundred feet in width on the east side of the railroad tracks, for thirty years before the commencement of this suit. The proof shows that the ordinance was accepted by the railroad company. The company did not immediately occupy all the land described; but the title to land is not lost by leaving it in its natural state without improvement. *Potomac Steamboat Co.* v. *Upper Potomac*

Steamboat Co., 109 U. S. 672, 684; *Boston* v. *Lecraw*, 17 How. 426, 436; *Barclay* v. *Howell's Lessee*, 6 Pet. 498, 504, 505.

The company took possession of so much of the land as was then needed. When more became necessary for the proper conduct of its business, it attempted to take possession of the rest, and was prevented, not by the interference of the city — for the city did not object — but by the action of the War Department which has control of the harbor. That there was any election by the company to relinquish the right to the additional one hundred feet, or that the company is in any way estopped from claiming its rights against the city and State, is a conclusion, we respectfully submit, not warranted by any evidence in the record.

V. The railroad company's title to all the land it had reclaimed from the lake lying east of the west line of the railway in fractional sections ten and fifteen, was confirmed by the act of April 16, 1869. A confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*. *Strother* v. *Lucas*, 12 Pet. 410; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Ryan* v. *Carter*, 93 U. S. 78; *Morrow* v. *Whitney*, 95 U. S. 551.

VI. By the same act a further grant was made to the railroad company in the following terms: "All the right and title of the State of Illinois in and to the submerged land constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the round-house and machine shops of said company in the south division of the city of Chicago, are hereby granted, in fee, to the Illinois Central Railroad Company, its successors and assigns."

It is manifest that the legislature intended to transfer, by this act, all the proprietary interest which the State had in the granted premises to the railroad company. The words used in the granting clause are words of present grant, and import an immediate transfer of title. There is no subsequent re-

straining clause. The language admits, therefore, of no other interpretation. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Wright* v. *Roseberry*, 121 U. S. 488; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241. The title of the State became completely extinguished, and the entire estate in the land, subject only to the conditions annexed to the grant, became vested in the railroad company.

VII. The repeal of the act of April 16, 1869, did not divest the title which had become vested in the railroad company. Private rights which have vested under a legislative act are not affected by a repeal of the law, and cannot be annulled by subsequent legislation. A State does not possess the power of revoking its own grants.

It has been for more than eighty years the settled doctrine of this court, that a grant of land made by a State and accepted by the grantee is an executed contract, within the protection of that clause of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. *Fletcher* v. *Peck*, 6 Cranch, 87.

The right to acquire property, and to be secure in the enjoyment of it when lawfully acquired, has been placed beyond legislative encroachment everywhere in the United States. In some form of words, the constitution of every State contains a provision, that "no person shall be deprived of life, liberty or property, without due process of law"; and since the adoption of the Fourteenth Amendment in 1868, the same check on the abuse of legislative power has been provided by the Constitution of the United States. That railroad corporations are within the purview of this provision is settled by repeated decisions of this court. *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Charlotte, Columbia &c. Railroad* v. *Gibbes*, 142 U. S. 386.

The act of April 16, 1869, was repealed on the 15th of April, 1873. During the intervening period of four years the

title to the land in controversy was vested in the railroad company. The company still holds the title, unless it shall be held that the repealing act was "due process of law."

Mr. John S. Miller for the City of Chicago.

It is a matter of common knowledge that large expenditures have been made by the city of Chicago in the improvement of its harbor, the United States not having appropriated or spent any money for this harbor west of the Rush street bridge, which is near the mouth of the river, *Escanaba Co.* v. *Chicago*, 107 U. S. 678, and that the State of Illinois has never spent any money for that purpose.

The city has, in addition to its property interests upon the lake front, an interest and standing herein to protect and conserve this great harbor from encroachment and appropriation to private uses.

It is also the owner in fee, in trust for public uses, of the public grounds in section 10, south of the north line of Randolph street, upon the shore of the lake, and in section 15, known as Lake Park, and as such is entitled to the rights of riparian owner. The invasion of the shore upon this public ground south of Randolph street was the result of building the government piers at the mouth of the river. The natural effect of the waters, unaffected by these artificial causes, was to cause accretions along this front, but the current created by the construction of these piers and the turning off of the effect of storms, caused avulsion by which the shore was, not imperceptibly, but perceptibly and suddenly carried away.

This invasion of the water up to 1852, when the Illinois Central Railroad was constructed, had not changed the ownership. *Boston* v. *Lecraw*, 17 How. 426; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672. And this fact was recognized by the railroad company as well as by the city, in the ordinance of June 14, 1852, and the agreement made in pursuance thereof.

The city, being thus the owner of the shore, has all rights

of a riparian owner and its ownership includes any additions to the shore made by natural accretions or by art or industry. *Barclay* v. *Howell*, 6 Pet. 498; *New Orleans* v. *United States*, 10 Pet. 662, 717; *Barney* v. *Keokuk*, 94 U. S. 324; *Godfrey* v. *Alton*, 12 Illinois, 29; *S. C.* 52 Am. Dec. 476; *Chicago Dock & Canal Co.* v. *Kinzie*, 93 Illinois, 415.

The grant to the city of the power to establish wharves and slips was in aid of commerce and navigation, and was, by necessary implication, a grant of the lands upon which such wharves and slips might be established, such grant taking effect when structures of that kind were erected. *Williams* v. *Mayor*, 105 N. Y. 436. The same may be said of the grant of power to the city by the act of 1847, to build the breakwater. Such riparian right is property right which is within constitutional protection. *Yates* v. *Milwaukee*, 10 Wall. 497; *Dutton* v. *Strong*, 1 Black, 23; *Railway Co.* v. *Renwick*, 102 U. S. 180; *Railroad* v. *Schurmeir*, 7 Wall. 272. And it would not be competent for the legislature to grant away the adjacent soil under the lake to a private person or corporation, and thus cut off the riparian right of the shore owner. This adjacency and access, and the right to maintain them to his advantage, and to preserve and improve them, and the enjoyment of the land, and of the navigable water in connection therewith, is of the essence of this riparian right. *Stevens* v. *Patterson & Newark Railroad*, 34 N. J. L. (5 Vroom,) 532; *Keyport Case*, 3 C. E. Green, (18 N. J. Eq.) 516; *Lyon* v. *Fishmongers' Co.*, 1 App. Cas. 662, 672; *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672, 683.

By the contract made by the railroad company with the city by the ordinance of June 14, 1852, and the agreement of March 28, 1853, the city and property owners acquired rights in furtherance of the special use to which this property was devoted, which could not be impaired. They got the breakwater or barrier along the shore, fixing the shore line and protecting this trust property from encroachment. And the city, as riparian proprietor, had implied authority to erect wharves along the broad street, levee or public ground upon the shore, which was dedicated for the purpose of a landing-

place as well as a street by authority of the State, and, it would seem, had, incidentally, the right to charge a compensation for their use. *Atlee* v. *Packet Co.*, 21 Wall. 389. It is clear that the legislature could not grant a way to the Illinois Central Railroad Company over the soils under the navigable waters of the harbor in front of this ground.

If the rights of the city and its inhabitants in this lake front ground and in the harbor in front thereof are not within the constitutional protection because they are public, how much more is that true of the subject-matter of the act of 1869? The subject-matter of that act, and of the alleged grant thereby made to the Illinois Central Railroad Company, was strictly *publici juris*. The bed of Lake Michigan, so far as the same is not affected with the rights of the riparian owner, is held by the people of the State of Illinois in their sovereign capacity, and *de communi jure*, and wholly in trust for the public, and for the public uses, for which it is adapted. And the same was not held by the State in any proprietary or private right or as its demesne, and was not as to a large tract, extending a mile into the deep water of the open lake, and composing the outer harbor, and entrance to the inner harbor of a great commercial city, the subject of a private grant or contract.

The doctrine which draws a distinction between a *jus privatum* and a *jus publicum*, or a dividing the ownership or right of the sovereign in the bed of navigable waters into a private right and a public right, which is alleged to have existed in the law of England, can have no place in our institutions. The rights of the people of the State in this country — their sovereignty and jurisdiction over the waters — are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. *Martin* v. *Waddell's Lessee*, 16 Pet. 367, 410; *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229.

The ownership by the people of the State of the soils under navigable waters is, in its nature, entirely different from the title to the public lands or the demesne of the sovereign or State. That is not only shown by what is above said, and the

authorities quoted, but is emphasized by this court in *Pollard's Lessee* v. *Hagan*, 3 How. 212, and *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

It must be clear, therefore, that in this country the right or ownership of the people of the State in the soils under navigable waters is wholly *jus publicum* and in trust for public uses.

And further, at the time of the passage of the act of 1869, no docks or wharves could be permitted to extend into the lake more than 1300 feet (where the line was established by the engineers of the United States in 1871,) without seriously encroaching upon the public right of navigation. This must be held to have been known at the time of the passage of that act. The United States government breakwater, which was built as an outside breakwater, to enclose and protect the harbor of refuge from the violence of the lake, is about three-fifths of a mile from the shore, and the dock line established by the United States engineers as the limit beyond which docks should not be built, between which and the shore there would be slips in which vessels could enter and ride, is about 1300 feet east of the shore. The water at this point is not within an arm of the lake ; there are not points or projections of land within which these waters were enclosed; this entire one and four-fifths square miles of the bed of Lake Michigan was under the open, deep navigable waters of the lake. It was a public port, and as such free by the common law.

It does not help the case of the railroad company herein to say that the British Parliament might have made such a grant, and that the legislature of Illinois has in that respect, all the powers of parliament. Parliament never did make such a grant. And if parliament could make the grant under the English constitution, so by its same absolute power it could take it away. Parliament therefore could not make such an irrevocable grant as the railroad company here claims.

Neither did the act of April 16, 1869, constitute a contract between the State and the railroad company within the meaning and protection of section 10, article 1, of the Constitution of the United States, prohibiting the passage of laws impairing

the obligations of contracts. It did not invest the company with such property rights in the soil and bed of the lake in the harbor of the city of Chicago, which is covered by the act, as is within the meaning and protection of the Fourteenth Amendment to the Constitution. The act, if sustainable as valid, can be sustained only because it invested the railroad company with certain strictly public powers and trusts as a public agency and for the public good. Being without consideration, it was a mere license, revocable at the will of the legislature, if it authorized the railroad company to make any private use of the bed of the lake. It was purely voluntary. It created no obligation on the part of the railroad company.

The charter of the railroad company and this act of 1869 are to be strictly construed against the railroad company, and to give nothing by an implication which is not necessary and unavoidable. Grants of the sovereign are to be construed strictly against the grantee; they are not to be understood as diminishing its rights beyond what is taken away by necessary and unavoidable construction. *The Rebeckah*, 1 C. Rob. 230, *per* Lord Stowell. *Monroe* v. *Commissioners*, 2 Black, 720; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall, 116; *Rice* v. *Railroad Co.*, 1 Black, 358.

It follows that the repealing act of April 15, 1873, was valid, as to the entire act of 1869. Moreover, if the act of 1869 could, upon a proper construction be held to give the railroad company any beneficial right, that right extinguishing or affecting the public right, arises from the exercise by the legislature of the police power over the public use of navigable waters, for the public welfare, and is revocable. And the repealing act is the exercise of the police power. *Commonwealth* v. *Alger*, 7 Cush. 53, 95. The soil under navigable waters being held by the people of the State, *de jure communi*, in trust for the common use, as a portion of their inherent sovereignty, any act of legislation affecting their use relates to the *jus publicum*, and affects the public welfare; and is, therefore, the exercise of the police power.

Mr. S. S. Gregory for the city of Chicago.

By section 3 of the railroad company's charter, it was provided that the corporation should have the "right of way upon and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes."

Having regard to the rules of construction which apply to the grant of corporate powers and privileges from the State, it cannot be successfully maintained that this provision in the charter would confer any right upon the corporation to invade the bed or waters of Lake Michigan, of its track in Lake Michigan or upon its bed. The section concludes with a proviso against any construction of the act which would warrant the company in interrupting the navigation of "said streams."

It is quite apparent, also, that this charter contemplated that the railroad company should take a right of way upon land not exceeding two hundred feet in width, and that the grant of land, waters, etc., belonging to the State to the corporation was for such purpose — namely, the right of way and use and control for the purpose of a railroad, as contemplated by the charter.

Between Randolph street and Park Row the railroad company has, therefore, merely a right of way under its charter.

Prior to this location, the territory being concededly within the corporate limits of the city of Chicago, the railroad company applied for and obtained the consent of its common council to the location of its road within the city limits, and entered into an agreement with that body, dated the 28th of March, 1853, accepting a location, three hundred feet in width, from the southern boundary of the public ground near Twelfth

street to the northern line of Randolph street." The company did not see fit to avail itself of a right of way to the full width of three hundred feet, but, on the contrary took a right of way of two hundred feet, and constructed its breakwater or shore protection two hundred feet east from the western line of its right of way instead of three hundred feet, as it might have done under the ordinance, though not under its charter, and it has since continued to use this right of way as thus limited and defined.

It is not, therefore, true that the railroad company was the owner of the fee of this right of way, as was argued in the court below, and may perhaps be argued in this court. It had merely an easement or right of way in this land, which neither conferred any riparian right upon the railroad, nor affected such right in the owner of the land over which the right of way extended. *Banks* v. *Ogden*, 2 Wall. 57. The riparian right was in the city.

It would seem obvious that a fair construction of the charter powers of the city would include a right to build wharves on the lake front, or the east side, if it may be so called, of Michigan Avenue. That seems to be the clear purport of the decision of this court in *Potomac Steamboat Co.* v. *Upper Potomac Steamboat Co.*, 109 U. S. 672. There was a legislative purpose to effectuate the dedication of this public grant as a water front or public landing place, authority to improve which was to be vested in the city, and full municipal control over which and the adjacent harbor was to be committed to the city.

If it be conceded that these rights in the city are held at the pleasure of the legislature, then it may be said, to that extent anticipating the course of the argument, that if the act of 1869 be construed as devolving similar rights and privileges upon the railroad company as another or substituted public agency, and thus withdrawing them from the city, the company should be considered to hold those rights upon the same tenure as that of the city, prior to this substitution; and the grant in fee of the bed of the lake is to be regarded wholly as in aid of the right to dock and wharf, expressing

only what, by necessary implication, would have passed without formal grant.

It is not contended that these lot owners have strictly and technically riparian rights in the premises, but they are beneficiaries of the trust created by the dedication, and have a right to insist, as held by this court, upon its specific execution. *Barclay* v. *Howell's Lessee*, 6 Pet. 498. The rights of abutting lot owners to insist upon the appropriation of property dedicated to a specific public use in accordance with such dedication is fully recognized in the following cases: *Trustees* v. *Walsh*, 57 Illinois, 363, 369; *Maywood Co.* v. *Maywood*, 118 Illinois, 61, 72; *Jacksonville* v. *Jacksonville Railway*, 67 Illinois, 540; *Moose* v. *Carson*, 104 N. Car. 431; *Zinc Co.* v. *La Salle*, 117 Illinois, 411; *Cincinnati* v. *White's Lessee*, 6 Pet. 431; *Barney* v. *Keokuk*, 94 U. S. 324, 339, 340, 342.

The right of a State to hold the soil under its navigable waters for all municipal purposes is exclusive. If it holds title to such lands upon trusts for public use, it may be that it has power to release to an individual or a corporation such title as it has, not thereby emancipating the trust estate from the execution of the trust with which it stands charged, but substituting its grantee as the trustee of this trust. Such would be the effect of legislation authorizing any other public agency, as the city of Chicago, or perhaps the railroad company, to undertake the construction of wharves and docks in aid of navigation, and in execution of the public trust, subject to which title to the land under navigable waters rests in the State. But to say this is far from saying that the State as proprietor, or the legislature of a State by law in the exercise of plenary legislative power, such as is enjoyed by the parliament of England, may grant title to the bed of navigable waters. In so far as such grant is made in aid of navigation, as by way of granting flats which are an obstacle to navigation, or of shore privileges, the exercise of which is a positive aid to navigation, the State acts clearly within its duty as trustee for the great public trust attaching to its title.

As a proprietor in the sense in which it is the proprietor of lands, title to which rests in the State for the purpose of sale

and disposition, it has no title whatever to the bed of water actually navigable and required for the purposes of navigation. Its interest, while referred to in the case cited as proprietary, is essentially sovereign and municipal. It is not the subject of grant but of regulation by law, and disposition by law is not unrestrained as is the case in England, but in so far as attempted in derogation of the trust for public navigation, is absolutely prohibited by the commerce clause of the Federal Constitution.

Probably the history of American jurisprudence will not reveal a case in which an attempt by the State to abdicate its sovereign title to the bed of a great extent of navigable water manifestly required for the purposes of commerce and navigation, has been either made by a legislature or sanctioned by the courts. Treated as a grant by a proprietor such legislation would be inoperative because the grantor has no such title as he attempts to convey. Treated as an exercise of sovereign legislative power it would be absolutely void as a positive infraction of the Federal Constitution. No such attempt was made in this case, and no reasonable construction of the legislative act under review will permit counsel justly to tax the legislature of Illinois with such a wanton abuse of power and gross breach of high and important public trust.

All the cases establish that although the State may have in a sense a measure of proprietary right in the bed of navigable waters within its boundaries, that right pertains to sovereignty, and a grant thereof confers no such dominion or ownership upon the grantee as a grant of public lands of the State subject to disposition. Such right is also qualified by the riparian rights of shore owners which do not at all depend upon ownership of the bed of the water. Such riparian right is a valuable property right which cannot be taken or impaired by the State without compensation. This principle is firmly established in this country by the adjudications of this court and by the great weight of modern authority. *Dutton* v. *Strong*, 1 Black, 213; *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Yates* v. *Milwaukee*, 10 Wall. 497; *Weber* v. *Harbor Commissioners*,

18 Wall. 57; *St. Louis* v. *Rutz*, 138 U. S. 236; *Union Depot Co.* v. *Brunswick*, 31 Minnesota, 297; *Miller* v. *Mendenhall*, 43 Minnesota, 95; *Burton* v. *Richardson*, 105 Mass. 351; *Rumsey* v. *New York & New England Railroad*, 133 N. Y. 79.

The grant by the State to the railroad company was wholly gratuitous. When, in the exercise of legislative discretion, it appeared that those public purposes, regard for which suggested the gift of these powers to the railroad company, might be better served by their withdrawal, it was clearly competent for the legislature, having due regard for such property rights as had attached to the subject of their gift in the interval, to resume the subject of its license and to permit the city to control these essentially public and municipal franchises.

Neither the provisions of the Fourteenth Amendment, nor that clause in the Federal Constitution which forbids a State from passing a law to impair the obligation of contracts in anywise affect this exercise of legislative discretion.

The State did not attempt to convey the fee to the bed of the lake, in derogation of the public right of navigation. Its sovereign or legislative right to convey the bed of water actually navigable is clearly limited by the clause in the Constitution conferring upon Congress the power to regulate commerce. Subject to this clause its plenary power to grant the bed of the lake, adjacent to the shore, in aid of commerce and navigation must be conceded, subject also, however, to the right of the State, by subsequent legislation, to regulate and control the use to which property so bestowed might be put by the grantee.

The constitutional questions involved in this case arise on a consideration of the validity and effect of the repealing act of April 15, 1873. The company had no property rights under the act of 1869, except in so far as it acted thereunder and filled in the waters of Lake Michigan, and built wharves and other erections thereon in accordance with the permission therein contained. To the extent that its property rights actually attached, it was fully protected by the decree of the

Circuit Court. *Attorney General* v. *Boston & Lowell Railroad*, 118 Mass. 345.

Mr. George Hunt, Attorney General of the State, for the State of Illinois.

I. The lake front act was never passed by the legislature.

II. The subject of that act was not expressed in its title.

III. The railroad company had no power to hold the submerged lands. *Ill. Cent. Railroad* v. *The People*, 119 Illinois, 137; *In re Swigert*, 119 Illinois, 83.

IV. The constitution of 1870 repealed all existing charters or grants of special privileges to corporations, which were not accepted within ten days after the new constitution took effect.

V. There was no acceptance of any additional corporate powers under the lake front act within the time limited by the constitution.

VI. Under the constitution of 1848 it was not competent for the General Assembly to grant to the Illinois Central Company the title to the land in question by a mere legislative act, without the approval of the governor.

VII. No right was conferred upon the railroad company by its charter to use the harbor for railroad purposes. *St. Louis &c. Railroad* v. *Trustees*, 43 Illinois, 303.

VIII. The act of 1869 by its confirmatory clause conferred no new right. *Illinois Central Railroad* v. *Irwin*, 72 Illinois, 452.

IX. The right to construct wharves and piers in the navigable waters of a public harbor does not pass with a grant of the submerged land. The authority and duty of the city to develop the harbor by the extension of streets and piers has not therefore been taken away, nor has it been deprived of its riparian rights as owner of the public ground in front of the harbor. *People* v. *Ferry Co.*, 68 N. Y. 71; *Langdon* v. *New York City*, 93 N. Y. 144.

X. The right to wharf and construct piers in the harbor not passing with the grant of the submerged land, does not arise

by implication from the words of the proviso, and that implication is not of sufficient force to deprive the city of its power to extend streets as piers, and to take away the riparian rights of the shore owners. *Perrine* v. *Chesapeake & Delaware Canal*, 9 How. 172.

XI. The right to wharf in the harbor, even if given by the act of 1869, was revocable, and was recalled by the repealing act of 1873.

XII. The State of Illinois did not possess the power to grant these submerged lands, underlying the harbor of a great city, to a railroad corporation. *Martin* v. *Waddell*, 16 Pet. 367.

XIII. Whatever wharfing rights and franchises may have passed by the act of 1869 were recalled by its repeal, because they were supplementary, and not original privileges, and such grants and privileges create no contract protected by the Federal Constitution. *Salt Company* v. *East Saginaw*, 13 Wall. 373.

Mr. John N. Jewett closed, for the Illinois Central Railroad Company.

I. The common law doctrine in respect to the ownership, control and right of disposition of land under tide waters prevails in this country and is, by repeated decisions of this court, made applicable to the bodies of fresh water, denominated "Great Navigable Lakes," which are treated as "Inland Seas." The rule in respect of all such bodies of water is, that the title and right of disposition of the land under the waters within their respective jurisdictions, are vested in the several States by virtue of their sovereignty as such States. *Manchester* v. *Massachusetts*, 139 U. S. 240; *Smith* v. *Maryland*, 18 How. 71; *McCready* v. *Virginia*, 94 U. S. 391; *Martin* v. *Waddell*, 16 Pet. 367; *Hardin* v. *Jordan*, 140 U. S. 371; *Goodtitle* v. *Kibbe*, 9 How. 471; *Doe* v. *Beebe*, 13 How. 25; *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Mumford* v. *Wardwell*, 6 Wall. 423; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *St. Clair County* v. *Lovingston*, 23 Wall. 68; *Barney* v. *Keokuk*, 94 U. S. 324; *The Genessee Chief*, 12 How. 443.

II. The riparian owner, in the absence of restrictive legis-

lation, has the right to connect his shore line, by means of wharves, piers or docks, constructed in the shallow waters immediately bordering upon his land, with the waters which are navigable in fact, in his own interest as well as in the interest of the public. *Yates* v. *Milwaukee*, 10 Wall. 497; *Weber* v. *Harbor Commissioners*, 18 Wall. 57; *Dutton* v. *Strong*, 1 Black, 23; *Railroad Company* v. *Schurmeir*, 7 Wall. 272.

III. The making and recording of the maps and plats of the "Fort Dearborn Addition to Chicago," by authority of the United States, and the sale and conveyance of all the lots designated upon that map or plat, divested the United States of all jurisdiction and authority over the land so subdivided and sold, and of the incidents of ownership pertaining to the lands. The sovereignty and jurisdiction thereby passed to the State of Illinois, the ownership of the lots conveyed, to the purchasers, and the title to the streets, alleys and public grounds designated on the plat, to the municipal corporation of Chicago, in trust for the use of the public. Every act of the city within these powers absolutely accomplished, the State should respect. Every power of agency, unexecuted, is subject to revocation, either expressly or by implication. *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511; *Von Hoffman* v. *Quincy*, 4 Wall. 535.

IV. The making and recording of the plats of fractional section 15 addition to Chicago, and of Fort Dearborn addition to Chicago, and the sale of all the lots in those additions, in accordance with those plats, divested the former owners, although they were the State in one case, and the United States in the other case, of all their right, title and estate as individual proprietors in said additions, including the streets and public grounds; and the sovereignty and jurisdiction of the United States over the land comprising Fort Dearborn addition, was by the plat and the record of it and the sale of the lots, absolutely extinguished. In the making and recording of sheet plats, the State and the United States were acting as private owners, and subject to the law to the same extent that a citizen would be. *New Orleans* v. *United States*, 10 Pet. 662, 710.

V. The act of the general assembly of April 16, 1869, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago" and commonly known as "the Lake Front act," was a valid act of legislation, passed in a constitutional way. Due effect must therefore be given to it as such. To this extent the opinion of Mr. Justice Harlan, and the decree entered by his direction in this case, support the contention of the Illinois Central Railroad Company. See also *Schuyler County* v. *The People*, 25 Illinois, 181; *Wabash Railway* v. *Hughes*, 38 Illinois, 174.

VI. The Illinois Central Railroad Company was in no need of "the Lake Front Act" as a confirmatory act. Its rights, so far as covered by the act, as a confirmatory one, were fully protected by its original charter. The confirmation was a recognition of its existing rights. A grant, originally complete, is not made stronger by a subsequent confirmation. Still, accepting the act of confirmation, with all its consequences, it is respectfully insisted that confirmation of existing rights was not the chief purpose of the act itself. This may be safely assumed from its positive provisions.

VII. The Lake Front act, coupled with the acceptance of it, made a completed grant, in accordance with its terms, taking effect *in præsenti*. No further act on the part of the State was required, nor was it necessary to perfect the grant. *Rutherford* v. *Greene*, 2 Wheat. 196; *Harris* v. *Board of Supervisors*, 105 Illinois, 445; *Lavalle* v. *Strobel*, 89 Illinois, 370.

VIII. The Act of the General Assembly of the State of Illinois, of April 15, 1873, purporting to repeal "The Lake Front act" of April 16, 1869, was absolutely void, and did not and could not operate to divest the title and rights of the Illinois Central Railroad Company, granted to it by the earlier act, the provisions of which it had formally accepted and acted upon. *Fletcher* v. *Peck*, 6 Cranch, 87; *New Jersey* v. *Wilson*, 7 Cranch, 164; *Von Hoffman* v. *Quincy*, 4 Wall. 535.

Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the Circuit Court of the United States for the Northern District of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the Attorney General, and the city filed a cross-bill for affirmative relief against the State and the company. The latter appeared to the cross-bill and answered it, as did the Attorney General for the State. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line

extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the State, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the State was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the State were prescribed by Congress and accepted by the State in its original Constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the State and the middle of the lake south of latitude forty-two degrees and thirty minutes.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee* v. *Hagan*, 3 How. 212; *Weber* v. *Harbor Commissioners*, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of *The Genesee Chief*, 12 How. 443, 455, "tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test because it was a convenient one, and more easily determined

the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."

But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, there-

fore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time, the assent of the State to such encroachment, and also the validity of the claim which the company asserts of a right to make further encroachments thereon by virtue of a grant from the State in April, 1869.

The city of Chicago is situated upon the southwestern shore of Lake Michigan, and includes, with other territory, fractional sections 10 and 15, in township 39 north, range 14 east of the third principal meridian, bordering on the lake, which forms their eastern boundary. For a long time after the organization of the city its harbor was the Chicago River, a small, narrow stream opening into the lake near the centre of the east and west line of section 10, and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years in population, business and commerce required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago River and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels, thus enclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one-half in length from north to south, and

is of a width from east to west varying from one thousand to four thousand feet. As commerce and shipping expand, the harbor will be further extended towards the south, and, as alleged by the amended bill, it is expected that the necessities of commerce will soon require its enlargement so as to include a great part of the entire lake front of the city. It is stated, and not denied, that the authorities of the United States have in a general way indicated a plan for the improvement and use of the harbor which has been enclosed as mentioned, by which a portion is devoted as a harbor of refuge where ships may ride at anchor with security and within protecting walls, and another portion of such enclosure nearer the shore of the lake may be devoted to wharves and piers, alongside of which ships may load and unload and upon which warehouses may be constructed and other structures erected for the convenience of lake commerce.

The case proceeds upon the theory and allegation that the defendant, the Illinois Central Railroad Company, has, without lawful authority, encroached, and continues to encroach, upon the domain of the State, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the State and ordinance of the city to enter the city and appropriate land and water two hundred feet wide in order to construct a track for a railway, and to erect thereon warehouses, piers and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company of a grant by the State, in 1869, of its right and title to the submerged lands, constituting the bed of Lake Michigan lying east of the tracks and breakwater of the company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended in the same direction from the south line of lot twenty-one south of and near the machine shops and round-house of the company; and of a right thereby to construct at its pleasure, in the harbor, wharves, piers and other works for its use.

The State prays a decree establishing and confirming its title to the bed of Lake Michigan and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers and other improvements, against the claim of the railroad company, that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business; and the right, by the construction and maintenance of wharves, docks and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the State, insisting that the company has, without right, erected and proposes to continue to erect wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

And first, as to lands in the harbor of Chicago possessed and used by the railroad company under the act of Congress of September 20, 1850, (9 Stat. 466, c. 61,) and the ordinance of the city of June 14, 1852. By that act Congress granted to the State of Illinois a right of way, not exceeding one hundred feet in width, on each side of its length, through the public lands, for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with a branch to Chicago and another *via* the town of Galena to a point opposite Dubuque in the State of Iowa, with the right to take the necessary materials for its construction. And, to aid in the construction of the railroad and branches, by the same act it granted to the State six alternate sections of land, designated by even numbers, on each side of the road and branches, with the usual reservation of any portion found to be sold by the United States, or to which the right of pre-emption had attached at the time the route of the road and branches was definitely fixed, in which case provision was made for the selection of equivalent lands in contiguous sections.

The lands granted were made subject to the disposition of the legislature of the State; and it was declared that the railroad and its branches should be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of their property or troops.

The act was formally accepted by the legislature of the State, February 17, 1851, (Laws of 1851, 192, 193.) A few days before, and on the 10th of that month, the Illinois Central Railroad Company was incorporated. It was invested generally with the powers, privileges, immunities and franchises of corporations, and specifically with the power of acquiring by purchase or otherwise, and of holding and conveying real and personal estate which might be needful to carry into effect fully the purposes of the act.

It was also authorized to survey, locate, construct and operate a railroad, with one or more tracks or lines of rails, between the points designated and the branches mentioned. And it was declared that the company should have a right of way upon, and might appropriate to its sole use and control, for the purposes contemplated, land not exceeding two hundred feet in width throughout its entire length; and might enter upon and take possession of and use any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, engine-houses, shops and other buildings necessary for completing, maintaining and operating the road. All such lands, waters, materials and privileges belonging to the State were granted to the corporation for that purpose; and it was provided that, when owned by or belonging to any person, company or corporation, and they could not be obtained by voluntary grant or release, the same might be taken and paid for by proceedings for condemnation as prescribed by law.

It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city without the consent of its common council. This consent was given by an ordinance of the common council of Chicago,

adopted June 14, 1852. By its first section it granted permission to the company to lay down, construct and maintain within the limits of the city, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations with reference to speed of trains, the receipt, safe-keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as the company might from time to time establish, and to have the right of way and all powers incident to and necessary therefor in the manner and upon the following terms and conditions, namely, that the road should enter the city at or near the intersection of its then southern boundary with Lake Michigan, and follow the shore on or near the margin of the lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of that section to such grounds as the company might acquire between the north line of Randolph street and the Chicago River, in the Fort Dearborn addition, upon which grounds should be located the depot of the railroad company within the city, and such other buildings, slips or apparatus as might be necessary and convenient for its business. But it was understood that the city did not undertake to obtain for the company any right of way, or other right, privilege or easement, not then in its power to grant, or to assume any liability or responsibility for the acts of the company. It also declared that the company might enter upon and use in perpetuity for its line of road and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of the public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be not less than four hundred feet east from the west line of Michigan Avenue, and parallel thereto; and it was authorized to extend its works and fill out into the lake to a point in the southern pier not less than four hundred feet west from the then east end of the same, thence parallel with Michigan

Avenue to the north side of Randolph street, extended; but it was stated that the common council did not grant any right or privilege beyond the limits above specified, nor beyond the line that might be actually occupied by the works of the company.

By the ordinance the company was required to erect and maintain on the western or inner line of the ground pointed out for its main tracks on the lake shore such suitable walls, fences or other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger; and to construct such suitable gates at proper places at the ends of the streets, which were then or might thereafter be laid out, as required by the common council, to afford safe access to the lake; and provided that, in the case of the construction of an outside harbor, streets might be laid out to approach the same in the manner provided by law. The company was also required to erect and complete within three years after it should have accepted the ordinance, and forever thereafter maintain, a continuous wall or structure of stone masonry, pier-work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan Avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park, at a distance of not more than three hundred feet east from and parallel with the western or inner line of the company, and continue the works to the southern boundary of the city, at such distance outside of the track of the road as might be expedient; which structure and works should be of sufficient strength and magnitude to protect the entire front of the city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that that part of the structure south of Lake Park should be commenced and prosecuted with reasonable despatch after acceptance of the ordinance. It was also enacted that the company should "not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan Avenue and the western or inner line before mentioned, except so far

as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground." And it was declared that the company should "erect no buildings between the north line of Randolph street and the south side of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same."

The company was allowed ninety days to accept this ordinance, and it was provided that upon such acceptance a contract embodying its provisions should be executed and delivered between the city and the company, and that the rights and privileges conferred upon the company should depend upon the performance on its part of the requirements made. The ordinance was accepted and the required agreement drawn and executed on the 28th of March, 1853.

Under the authority of this ordinance the railroad company located its tracks within the corporate limits of the city. Those running northward from Twelfth street were laid upon piling in the waters of the lake. The shore line of the lake was, at that time, at Park Row, about four hundred feet from the west line of Michigan Avenue, and at Randolph street about one hundred and twelve and a half feet. Since then the space between the shore line and the tracks of the railroad company has been filled with earth under the direction of the city and is now solid ground.

After the tracks were constructed the company erected a breakwater east of its roadway upon a line parallel with the west line of Michigan Avenue, and afterwards filled up the space between the breakwater and its tracks with earth and stone.

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given

to locate its road within the city by the ordinance. It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. They were constructed under the authority of the law by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated — the construction and operation of a railroad thereon with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the State were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed. Whilst the grant to it included waters of streams in the line of the right of way belonging to the State, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. If the waters of the lake may be deemed to be included in the

designation of streams, then their use would be held equally restricted. The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. (See Gould on Waters, § 148, and authorities there cited.)

The riparian proprietor is entitled, among other rights, as held in *Yates* v. *Milwaukee*, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his

own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property and valuable; and though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. It had been held in the previous case of *Dutton* v. *Strong*, 1 Black, 23, 33, that whenever the water of the shore was too shoal to be navigable, there was the same necessity for wharves, piers and landing places as in the bays and arms of the sea; that where that necessity existed, it was difficult to see any reason for denying to the adjacent owner the right to supply it; but that the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.

In this case it appears that fractional section 10, which was included within the city limits bordering on the lake front, was, many years before this suit was brought, divided, under the authority of the United States, into blocks and lots, and the lots sold. The proceedings taken and the laws passed on the subject for the sale of the lots are stated with great particularity in the opinion of the court below, but for our purpose it is sufficient to mention that the lots laid out in fractional section 10 belonging to the United States were sold, and, either directly or from purchasers, the title to some of them fronting on the lake north of Randolph street became vested in the railroad company, and the company, finding the lake in front of those lots shallow, filled it in and upon the reclaimed land constructed slips, wharves and piers, the last three piers in 1872, 1873, 1880, and 1881, which it claims to own and to have the right to use in its business.

According to the law of riparian ownership, which we have stated, this claim is well founded so far as the piers do not extend beyond the point of navigability in the waters of the lake. We are not fully satisfied that such is the case from the evidence which the company has produced, and the fact is not conceded. Nor does the court below find that such navigable point had been established by any public authority

or judicial decision, or that it had any foundation other than the judgment of the railroad company.

The same position may be taken as to the claim of the company to the pier and docks erected in front of Michigan Avenue between the lines of Twelfth and Sixteenth streets extended. The company had previously acquired the title to certain lots fronting on the lake at that point, and, upon its claim of riparian rights from that ownership, had erected the structures in question. Its ownership of them likewise depends upon the question whether they are extended beyond or are limited to the navigable point of the waters of the lake, of which no satisfactory evidence was offered.

Upon the land reclaimed by the railroad company as riparian proprietor in front of lots into which section ten was divided, which it had purchased, its passenger depot was erected north of Randolph street, and, to facilitate its approach, the common council, by ordinance adopted September 10, 1855, authorized it to curve its tracks westwardly of the line fixed by the ordinance of 1852, so as to cross that line at a point not more than two hundred feet south of Randolph street, in accordance with a specified plan. This permission was given upon the condition that the company should lay out upon its own land west of and alongside its passenger house a street fifty feet wide, extending from Water street to Randolph street, and fill the same up its entire length, within two years from the passage of the ordinance. The company's tracks were curved as permitted, the street referred to was opened, the required filling was done, and the street has ever since been used by the public. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago River, the city, by another ordinance adopted September 15, 1856, granted it permission to enter and use, in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its then breakwater and a line drawn from a point thereon seven hundred feet south of the north line of Randolph street extended, and running thence on a straight line to the southeast corner of

its present breakwater, thence to the river; and the space thus indicated the railroad company occupied and continued to hold pursuant to this ordinance, and we do not perceive any valid objection to its continued holding of the same for the purposes declared — that is, as additional means of approaching and using its station grounds.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the State passed on the 16th of April, 1869, the material part of which is as follows:

"SEC. 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements

thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor."

The act, of which this section is a part, was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870; but the acceptance was not communicated to the State until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the Secretary of State, and filed and recorded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited of the act and the effect of the repeal upon its operation.

The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the State in its charter and under and "by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections ten and fifteen on the shore of the lake. Whether the piers or docks constructed by it, after the passage of the act of 1869, extend beyond the point of navigability in the waters of the lake, must be the subject of judicial

inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the State and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty-one, south of and near to the round-house and machine shops of the company "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed

under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure. And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor and to grant to it the title and interest of the State to certain lands adjacent to the shore of Lake Michigan on the eastern front of the city, and place the harbor under its control, giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that

the requirement of the constitution of the State, in its passage, was not complied with.

The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the

navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to

revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly twenty-five per cent of the lake carrying trade as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to twenty-two thousand and ninety-six, with a tonnage of over seven millions; and in 1890 the tonnage of the vessels reached nearly nine millions. As stated by counsel, since the passage of the Lake Front Act, in 1869, the population of the city has increased nearly a million souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the State of the control

and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city — a subject of concern to the whole people of the State — should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels

can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in *Martin* v. *Waddell*, 16 Pet. 367, 410: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In *Arnold* v. *Mundy*, 1 Halsted, 1, which is cited by this court in *Martin* v. *Waddell*, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

In the case of *Stockton* v. *Baltimore and New York Railroad Company*, 32 Fed. Rep. 9, 19, 20, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the State of lands under the navigable waters of the United States, he said:

"It is insisted that the property of the State in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked,

can the United States take the state house at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the king, *in trust* for the public uses of navigation and fishery, *and the erection* thereon of wharves, piers, light-houses, beacons and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public

uses for which they are adapted. *Martin* v. *Waddell*, 16 Pet. 367, 410; *Pollard's Lessee* v. *Hagan*, 3 How. 212, 220; *McCready* v. *Virginia*, 94 U. S. 391, 394.

In *People* v. *New York and Staten Island Ferry Co.*, 68 N. Y. 71, 76, the Court of Appeals of New York said:

"The title to lands under tide waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise De Jure Maris (p. 22) Lord Hale says: 'The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;' and Mr. Justice Best, in *Blundell* v. *Catterall*, 5 B. & A. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' . . .

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right."

While the opinion of the New York court contains some expressions which may require explanation when detached from the particular facts of that case, the general observations we cite are just and pertinent.

The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately within the exercise of the police power of the State.

In *Newton* v. *Commissioners*, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio, in 1846, it was provided that upon the fulfilment of certain conditions by the proprietors or citizens of the town of Canfield, the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill, setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so in the nature of things; that it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for

their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The legislation of the State in the Lake Front Act, purporting to grant the fee of the submerged lands mentioned to the railroad company, was considered by the court below, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, as a mere license to the company to prosecute such further improvement as an agency of the State, and that to this end the State had placed certain of its resources at the command of the company with such an enlargement of its powers and privileges as enabled it to accomplish the objects in view. And the court below, after observing that the act might be assumed as investing the railroad company with the power, not given in its original charter, of erecting and maintaining wharves, docks and piers in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation, added that it was unable to perceive why it was not competent for the State, by subsequent legislation, to repeal the act and withdraw the additional powers of the company, thereby restricting it to the

business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. The court, treating the act as a license to the company, also observed that it was deemed best, when that act was passed, for the public interest that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested, to some extent, in the accomplishment of that result, and said: "But if the State subsequently determined, upon consideration of public policy, that this great work should not be entrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or State constitution forbade the general assembly of Illinois from giving effect, by legislation, to this change of policy. It cannot be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it *might* derive either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature — certainly not within any given time — and could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects." If the act in question

be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the State, then we think the right to cancel the agency and revoke its power is unquestionable.

It remains to consider the claim of the city of Chicago to portions of the east water front and how such claim, and the rights attached to it, are interfered with by the railroad company.

The claim of the city is to the ownership in fee of the streets, alleys, ways, commons and other public grounds on the east front of the city bordering on the lake, as exhibited on the maps showing the subdivision of fractional sections ten and fifteen, prepared under the supervision and direction of United States officers in the one case and by the canal commissioners in the other, and duly recorded, and the riparian rights attached to such ownership. By a statute of Illinois the making, acknowledging and recording of the plats operated to vest the title to the streets, alleys, ways and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were applicable. *Canal Trustees* v. *Havens*, 11 Illinois, 556; *Chicago* v. *Rumsey*, 87 Illinois, 354.

Such property, besides other parcels, included the whole of that portion of fractional section fifteen which constitutes Michigan Avenue, and that part of the fractional section lying east of the west line of Michigan Avenue, and that portion of fractional section ten designated on one of the plats as "public ground," which was always to remain open and free from any buildings.

The estate, real and personal, held by the trustees of the town of Chicago was vested in the city of Chicago by the act of March 4, 1837. It followed that when the Lake Front Act of 1869 was passed the fee was in the city, subject to the public uses designated, of all the portions of section ten and fifteen, particularly described in the decree below. And we agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the

breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the breakwater on the shore west of it, did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city, under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracts on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did.

We also agree with the court below that the city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same is valid and effective

for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago River, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section ten, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake; and, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the State as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law.

Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray and Mr. Justice Brown, dissenting.

That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.

Thus it was said in *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 65, that "upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, *with the consequent right to dispose of the title to any part of said soils* in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

In *Hoboken* v. *Pennsylvania Railroad*, 124 U. S. 656, 657, — a case in many respects like the present — it was said: "Lands below high-water mark on navigable waters are the absolute property of the State, subject only to the power conferred upon Congress to regulate foreign commerce and commerce between the States, and *they may be granted by the State*, either to the riparian proprietors or to a stranger, as the State may see fit," and, accordingly, it was *held*, "that the grant by the State of New Jersey to the United Companies by the act of March 31, 1869, was intended to secure, and does secure, to the respective grantees the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants."

In *Stevens* v. *Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532, it was declared by the Court of Errors and Appeals of New Jersey that it was competent for the State to grant to a stranger lands constituting the shore of a navigable river under tide water below the tide-water mark, to be occupied and used with structures and improvements.

Langdon v. *New York City*, 93 N. Y. 129, 155, was a case in which it was said by the Court of Appeals of New York: "From the earliest times in England the law has vested the

title to, and the control over, the navigable waters therein, in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament. . . . In this country, the State has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State."

These citations might be indefinitely multiplied from authorities both Federal and State.

The State of Illinois, by her information or bill of complaint in this case, alleges that "the claims of the defendants are a great and irreparable injury to the State of Illinois as *a proprietor and owner of the bed of the lake*, throwing doubts and clouds upon its title thereto, and preventing an *advantageous sale or other disposition thereof;*" and in the prayer for relief the State asks that "its title may be established and confirmed, that the claims made by the railroad company may be declared to be unfounded, and that the State of Illinois may be declared to have the sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., and to *dispose of such rights at its pleasure.*"

Indeed, the logic of the State's case, as well as her pleadings, attributes to the State entire power to hold and dispose of, by grant or lease, the lands in question; and her case is put upon the alleged invalidity of the title of the railroad company, arising out of the asserted unconstitutionality of the act of 1869, which act made the grant, by reason of certain irregularities in its passage and title, or, that ground failing, upon the right of the State to arbitrarily revoke the grant, as a

mere license, and which right she claims to have duly exercised by the passage of the act of 1873.

The opinion of the majority, if I rightly apprehend it, likewise concedes that a State does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be, in some way restricted to "small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the State of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant and its effect upon the public interests in the lands and waters remaining are matters of legislative discretion.

Assuming, then, that the State of Illinois possesses the power to confer by grant, upon the Illinois Central Railroad Company, private rights and property in the lands of the State underlying the waters of the lake, we come to inquire whether she has exercised that power by a valid enactment, and if so, whether the grant so made has been legally revoked.

It was contended, on behalf of the State, that the act of 1869, purporting to confer upon the railroad company certain rights in the lands in question, did not really so operate, because the record of proceedings in the senate does not show that the bill was read three times during its passage, and because the title of the bill does not sufficiently express the purpose of the

bill — both of which are constitutional requisites to valid legislation.

It is unnecessary to discuss these objections in this opinion, because the court below held them untenable, and because the opinion of the majority in this court adopts the reasoning and conclusion of the court below in this regard.

It was further contended, on behalf of the State, that, even if the act of 1869 were a valid exercise of legislative power, yet the grant thereby made did not vest in the railroad company rights and franchises in the nature of private property, but merely conferred upon the company certain powers for public purposes, which were taken and held by the company as an agency of the State, and which accordingly could be recalled by the State whenever, in her wisdom, she deemed it for the public interest to do so, without thereby infringing a contract existing between her and the railroad company.

This is a question that must be decided by the terms of the grant, read in the light of the nature of the power exercised, of the character of the railroad company as a corporation created to carry out public purposes, and of the facts and circumstances disclosed by the record.

It must be conceded, *in limine*, that, in construing this grant, the State is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the State to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act that interpretation must be put upon it which is most favorable to the State; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the State acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the State at large and of the particular community to be affected.

These are large concessions, and, of course, in order to defeat the grant, they ought not to be pushed beyond the bounds of reason, so as to result in a strained and improbable construction. Reasonable effect must be given to the language employed, and the manifest intent of the enactment must prevail.

Dissenting Opinion: Shiras, Gray, Brown, JJ.

By an act of Congress, approved September 20, 1850, 9 Stat. 466, c. 61, the right of way not exceeding 200 feet in width through the public lands was granted to the State of Illinois, for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal in that State (at La Salle) to Cairo, at the confluence of the Ohio and Mississippi Rivers, with a branch from that line to Chicago, and another, *via* the city of Galena, to Dubuque, in the State of Iowa. A grant of public lands was also made to the State to aid in the construction of the railroad and branches, which, by the terms of the act, were to "be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." It was also provided that the United States mail should at all times be transported on the said railroad under the direction of the Post Office Department at such price as the Congress might by law direct.

This act of Congress was formally accepted by the legislature of the State, February 17, 1851. Laws of Ill., 1851, 192, 193. Seven days before the acceptance — February 10, 1851 — the Illinois Central Railroad Company was incorporated for the purpose of constructing, maintaining and operating the railroad and branches contemplated in the act of Congress.

By the second section of its charter, the company was authorized and empowered "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi River opposite the town of Dubuque in the State of Iowa."

It was provided in the third section that "the said corporation shall have the right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and

singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided."

The eighth section had the following provision: "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

By the fifteenth section, the right of way and all the lands granted to the State by the act of Congress before mentioned, and also the right of way over and through lands owned by the State, were ceded and granted to the corporation for the "purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches." There was a requirement in this section (clause 3) that the railroad should be built into the city of Chicago.

By the eighteenth section, the company was required, in consideration of the grants, privileges and franchises conferred, to pay into the treasury of the State, on the first Monday of December and June of each year, five per centum of the gross receipts of the road and branches for the six months then next preceding.

The twenty-second section provided for the assessment of an annual tax for state purposes upon all the property and assets of the corporation; and if this tax and the five per cent charge upon the gross receipts should not amount to seven per cent

of the total proceeds, receipts or income of the company, it was required to pay the difference into the State treasury, "so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation." Exemption was granted in that section from "all taxation of every kind, except as herein provided for."

The act of November 5, 1849, referred to in the third section of the charter, provided a mode for condemning land required for railroad uses, and contained an express provision that upon the entry of judgment the corporation "shall become seized in fee of all the lands and real estate described during the continuance of the corporation." 2 Laws of Illinois, 1849, 27.

The consent of the common council to the location of the railroad within the city of Chicago was given by an ordinance passed June 14, 1852.

On the 16th of April, 1869, an act was passed by the legislature of Illinois, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." The third section of this act provided as follows:

"SEC. 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois, in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended eastwardly, and a line extended eastward from the south line

of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successor and assigns: *Provided, however*, That the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same, and that all gross receipts from use, profits, leases or otherwise of said lands or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And provided, also*, That nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor: *And provided further*, That any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinios Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation." Ill. Laws 1869, 245, 246, 247.

By this act, the right of the railroad company to all the lands it had appropriated and occupied, lying east of a line drawn parallel to, and four hundred feet east of, the west line of Michigan Avenue, in fractional sections ten and fifteen, was confirmed; and a further grant was made to the company of the submerged lands lying east of its tracks and breakwater, within the distance of one mile therefrom, between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one.

What is the fair and natural import of the language used?

So long as the act stands in force there seems to me to exist a *contract*, whereby the Illinois Central Company is to have and enjoy perpetual possession and control of the lands in question, with the right to improve the same and take the rents, issues and profits thereof, provided always that the company shall not have the power to sell or alien such lands, nor shall the company be authorized to maintain obstructions to the Chicago harbor, or to impair the public right of navigation; nor shall the company, its lessees or assigns, be exempted from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor, and whereby, in consideration of the grant of these rights and privileges, it shall be the duty of the company to pay, and the right of the State to receive, seven per cent of the gross receipts of the railroad company from "use, profits, leases or otherwise, of said land or the improvements thereon, or that may be hereafter made thereon."

Should the railroad company attempt to disregard the restraint on alienating the said lands, the State can, by judicial proceeding, enjoin such an act, or can treat it as a legal ground of forfeiting the grant; or, if the railroad company fails or refuses to pay the per centum provided for, the State can enforce such payment by suit at law, and possibly by proceedings to forfeit the grant. But so long as the railroad company shall fulfil its part of the agreement, so long is the State of Illinois inhibited by the Constitution of the United States from passing any act impairing the obligation of the contract.

Doubtless there are limitations, both expressed and implied, on the title to and control over these lands by the company. As we have seen, the company is expressly forbidden to obstruct Chicago harbor, or to impair the public right of navigation. So, from the nature of the railroad corporation and of its relation to the State and the public, the improvements put upon these lands by the company must be consistent with their duties as common carriers, and must be calculated to

promote the efficiency of the railroad in the receipt and shipment of freight from and by the lake. But these are incidents of the grant and do not operate to defeat it.

To prevent misapprehension, it may be well to say that it is not pretended in this view of the case that the State can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the State as obtain in the case of other owners of property. Nor can the grant in this case be regarded as in any way hostile to the powers of the general government in the control of harbors and navigable waters.

The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the State of Illinois see, in the great and unforeseen growth of the city of Chicago and of the lake commerce, reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill the desire to do, a "more advantageous sale or disposition to other parties," without offence to the law of the land.

The doctrine that a State, by making a grant to a corporation of her own creation, subjects herself to the restraints of law judicially interpreted, has been impugned by able political thinkers, who may, perhaps, find in the decision of the court in the present case some countenance of their views. But I am unable to suppose that there is any intention on the part of this court to depart from its doctrine so often expressed.

"We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito.* Such a doctrine . . . is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

"A private corporation created by the legislature may lose its franchises by a *misuser* or *non-user* of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. . . . But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." *Terrett* v. *Taylor*, 9 Cranch, 43, 51, 52.

In *Stone* v. *Mississippi*, 101 U. S. 814, 816, Chief Justice Waite, in delivering the opinion of the court, said: "It is now too late to contend that any contract which a State actually enters into, when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. The doctrines of *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself."

The obvious conclusion from the foregoing view of the case is that the act of 1873, as an arbitrary act of revocation, not passed in the exercise of any reserved power, is void, that the

decree of the court below should be reversed, and that that court should be directed to enter a decree dismissing the bill of the State of Illinois and the cross-bill of the city of Chicago.

I am authorized to state that MR. JUSTICE GRAY and MR. JUSTICE BROWN concur in this dissent.

The CHIEF JUSTICE, having been of counsel in the court below, and MR. JUSTICE BLATCHFORD, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.

DERBY *v.* THOMPSON.

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

No. 40. Argued November 11, 14, 1892. — Decided December 12, 1892.

The article claimed to be protected under the second claim in letters patent No. 224,923 issued February 24, 1880, to Joseph W. Kenna for a new and useful improvement in a combined child's chair and carriage, did not, with reference to the state of the art at the time, involve invention in the opinion of the majority of the court; but all the judges concur in the opinion that the claim should receive a narrow construction, and, that, in this aspect of the case, the defendants' chairs did not infringe.

THIS was a bill in equity for the infringement of letters patent number 224,923, issued February 24, 1880, to Joseph W. Kenna, for a new and useful improvement in a combined child's chair and carriage.

The invention related to an article of furniture which, by a simple adjustment of the parts, may be converted from a child's high chair for use at a table to a child's carriage, and *vice versa*, as may be desired; and more particularly to the manner of connecting the chair to its supporting frame, and supporting it thereon. It consisted practically of an ordinary chair, B, with four legs, mounted when used as a high chair upon a

standard, A, also having four legs to correspond with those of the chair. The front legs of the chair were pivoted at their

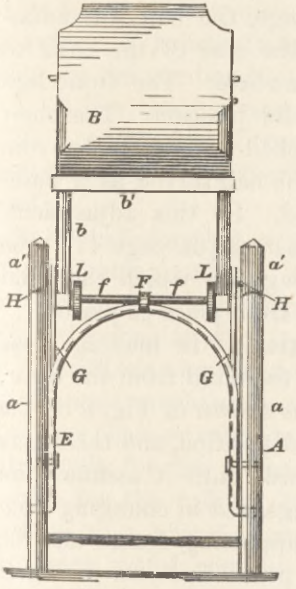


Fig. 1.

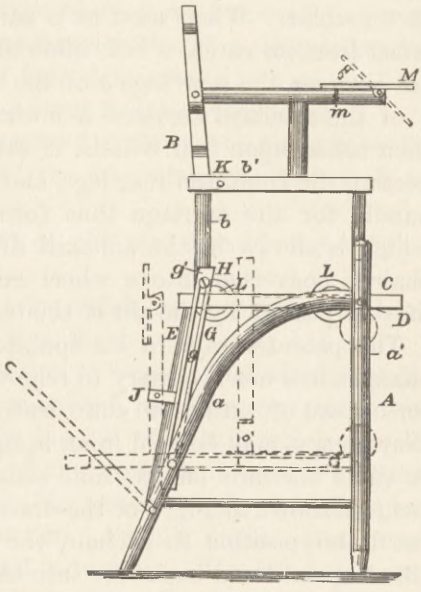


Fig. 2.

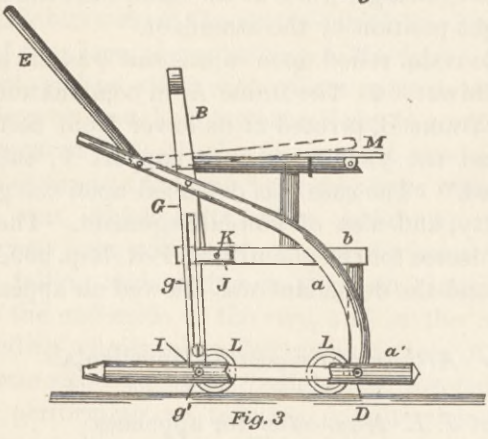


Fig. 3

lower ends, D, upon the corresponding legs of the standard. Upon the rear legs of the standard there were pivoted at their

lower ends the arms of a bail, E, which turned up under the rear part of the chair, and supported it by the aid of a catch, F, fastened to a cross-piece or rod between the two rear legs of the chair. When used as a carriage, the bail was unfastened from its catch, which allowed the rear of the chair to fall between the rear legs *a* of the standard. The front legs *a'* of the standard assumed a horizontal position. The chair then rested upon four wheels, L, attached to cross-pieces connecting the front and rear legs, and the bail served as a push-handle for the carriage thus formed. By this adjustment, which is shown in the annexed drawings, [on page 477,] the chair is converted into a wheel carriage, on which the child may be pushed by the aid of the bail from place to place.

The patentee says in his specification: "In making these changes it is not necessary to remove the child from the chair, for instead of tilting the chair back, as shown in Fig. 2 of the drawings, it may be held in an upright position, and the frame A tilted forward on its front standard, until it assumes the position shown in Fig. 3 of the drawings, and in changing from the latter position to a chair, the supporting frame may be tilted upward and backward into the position shown in Fig. 2 of the drawings, while at the same time the chair is held in an upright position by the attendant."

The claim relied upon in this suit was the second, which was as follows: "2. The frame A, in combination with the bail E, chair-frame B, pivoted at its lower front corners to the frame A, and the yielding rest or support F, substantially as described." The case was defended upon the ground of want of novelty, and also of non-infringement. The court ordered a final decree for the plaintiff, 26 Fed. Rep. 299, and 32 Fed. Rep. 830, and the defendant was allowed an appeal to this court.

Mr. Arthur v. Briesen for appellants.

Mr. J. E. Maynadier for appellees.

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

The first assignment of error turns upon the validity of the second claim of the patent in question, which was for "the frame A, in combination with the bail E, chair-frame B, pivoted at its lower front corners to the frame A, and the yielding rest or support F, substantially as described." This claim is practically for the combination of four elements:

1. A low chair having the usual frame of four legs;
2. A supplemental frame placed under the chair to raise it, and arranged to fold out of the way when the low chair is used;
3. A bail forming a part of the rear legs of the supplemental frame; and
4. A catch or fastening device which keeps this bail in place when the chair is used as a high chair.

If Mr. Kenna had been the first to invent a high chair, which, by a simple mechanical arrangement, could be converted into a rolling chair or carriage, by the aid of a bail, which served alternately for the support of the high chair and as a push-handle for the rolling chair, his patent would doubtless be entitled to a liberal construction. Such a device is at once ingenious, useful, compact and convenient. He was not, however, the first in this field of invention. The patent to Caulier of April 23, 1878, exhibits a chair, the seat of which was hinged to the upper end of four legs, corresponding to the frame A of the plaintiff's patent, and provided with rollers secured to the lower part of the legs or stretchers between them, in combination with rollers secured beneath the foot-rest of the chair. The rear legs were secured to the seat by spring-bolts immediately beneath the seat, which bolts, when withdrawn, permitted the front legs to turn, and assume a partially horizontal position, the chair falling and resting in front on casters or wheels attached to the underside of the step, and in the rear, upon two corresponding wheels journalled in the bottom of the four legs. There was also a swinging push-handle pivoted to the rear legs, but performing no function except when the device was used as a rolling chair. This chair contained a frame corresponding to the frame A of the plaintiff's patent, in combination with a push-handle or bail, and a chair-seat

pivoted in front to the supplemental frame; but it did not contain a supporting chair frame of four legs, nor the yielding rest or support F. While evidently a somewhat crude device, it did contain two, if not three, of the four elements of the plaintiff's patent though combined in a different manner.

The exhibit Pearl chair, which, we agree with the court below, antedates the Kenna invention, also consisted of a chair-seat hinged to the front legs of a frame, corresponding to the Kenna frame A, immediately beneath the seat, while to the rear legs of this frame was pivoted a bail, which served to support the rear of the chair-seat when used as a high chair, and as a push-handle when used as a rolling chair. The wheels were pivoted, as in the Caulier chair, to the underside of the step and to the lower ends of the front legs of the frame A. There was also a catch attached to the rear of the chair seat into which the bail fitted when turned up for use in supporting the high chair. There are found in this chair all the elements of the Kenna chair, except that the chair is pivoted or hinged to the frame immediately beneath the seat, and hence both this and the Caulier chair are less compact, convenient and sightly than the Kenna device. When used as a rolling chair, the chair seat was thrust forward in front of the legs, which projected in the rear and made the carriage much less convenient to handle.

In the Patten patent of September 3, 1878, however, the hinges, by means of which the legs of the supplemental frame were turned under, were placed some distance below the seat, which had the effect, when used as a rolling chair, of throwing the chair seat farther backward and nearer to the bail. This peculiarity is also found in the Chichester patent of July 8, 1879, which, while differing widely from the Kenna patent in other respects, resembles it in the particular of having a complete chair instead of a mere chair seat.

Plaintiff is evidently not entitled to claim the combination of the chair frame pivoted to the supplemental frame A, and the bail, without the yielding support or rest, since the latter is not only incorporated in his claim, but a claim which he originally made for "the supporting frame A, in combination

with the chair frame hinged thereto at its lower front corners, and the movable support E, substantially as described," was rejected by the Patent Office upon reference to the Caulier patent, and Kenna acquiesced in such rejection. It is, then, only in connection with the yielding rest or support F that he could possibly claim the combination of the other three elements. But this rest or support is also found in connection with a chair seat, a standard of four legs, and a bail in the Pearl chair, performing the same function of holding the bail in position, to support the rear of the chair seat when not in use as a rolling chair, but attached directly to the chair seat, instead of to a rod connecting the two rear legs of the chair. Although the Pearl chair is referred to in one of the letters of the department, (December 12, 1879,) it was only as exhibited in the catalogue of Heywood Brothers, the manufacturers, wherein the catch for the support of the bail was not represented; but, appearing as it does in the Pearl chair put in evidence, it is difficult to see why this chair does not contain practically all the elements of the Kenna claim. It is true there is a difference in the manner in which the combination is put together; but the part wherein they differ most widely, namely, the pivoting of the chair frame at its lower front corners to the front legs of the supplemental frame, is found both in the Patten and prior Chichester patents. What, then, has Mr. Kenna done? He has taken the Patten or Chichester chairs bodily, pivoted as they are at the lower front corners to the supplemental frame, and has applied to them the bail and catch of the Pearl chair, and has thereby made a chair more compact than the Pearl, but not more so than the Patten and Chichester chairs, but perhaps more convenient in other respects. While the question is not altogether free from doubt, the majority of the court are not disposed to accord to the changes made by Kenna the merit of invention. Though he may not in fact have known of these three chairs, but may have supposed that he was inventing something valuable, we are bound, in passing upon his device, to assume that he had them all before him, and with that knowledge it seems to us that it required nothing more than the skill of an ordinary

mechanic to adopt the most valuable features of each in the construction of a new chair. Indeed, the result is rather an aggregation of old elements than the production of a new device. As a high chair the Kenna is not superior to the Pearl chair, and as a rolling chair it is no more compact and apparently no more convenient than the Patten and Chichester chairs. It is pertinent to remark in this connection, as bearing upon the merits of this patent, that the invention described in it never seems to have gone into use, perhaps owing to the fact that the chair was encumbered by a slotted bar G, which was necessary, when used as a high chair, to prevent it from tilting forward on its pivots, and throwing the child out. Plaintiff's chair as constructed and put upon the market not only dispenses with the catch F, but locates the wheels upon the front legs of the supplemental frame, much as in the Caulier and Pearl chairs. As Kenna was confessedly not the inventor of the three principal elements of his chair, viz., the chair frame, the frame A, and the bail, either separately or in combination, and as the fourth element, which is claimed to give life to his patent, viz., the catch F, has either been abandoned altogether, or practically abandoned by substituting for it a bail having an elasticity sufficient to hold it in place without a catch, we think the introduction of this catch into the prior combination is insufficient to support the patent.

But, even conceding that the Kenna device does involve a patentable novelty, we are all of the opinion that his claim should receive a narrow construction, and that, in this aspect of the case, neither of the defendant's chairs can be said to infringe. In these devices the frame A is not *pivoted* to the chair frame, but is *hinged* to it in such a manner that the chair cannot tip forward, and hence the slotted bars (which, though not claimed, are an essential feature of the Kenna device) are unnecessary. Neither of the exhibits put in evidence as the defendant's chair has the yielding rest or support F. It is true that, by a slight elasticity in the bail, it is made to catch under the frame of the chair seat in such manner as to obviate the necessity of a rest or support. But the fact that the defendants have been able, by a skilful contrivance, to dispense with

one of the elements of the Kenna claim does not make the devise an infringement. In this case the Pearl chair possessed the same feature of elasticity in the bail, which is claimed to be the mechanical equivalent of the yielding rest or support. In the other exhibit a button is used to hold the bail under the frame of the seat; but as this button is not a "*yielding* rest or support," or a "spring catch," the charge of infringement as to this exhibit is not sustained.

The decree of the court below is, therefore,

Reversed, and the case remanded, with directions to dismiss the bill.

COMPANIA BILBAINA DE NAVEGACION, DE BILBAO *v.* SPANISH-AMERICAN LIGHT AND POWER COMPANY.

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

No. 66. Argued December 1, 2, 1892. — Decided December 12, 1892.

Clauses in a charter-party of a vessel construed.

The owner of the vessel held not to be entitled to recover from the charterer any part of the expense of fitting up the tanks in the vessel to carry petroleum in bulk.

The owner could not affirm the charter-party for one purpose and repudiate it for another.

The charter-party never became a binding contract.

If there was any part of it in regard to which the minds of the parties did not meet, the entire instrument was a nullity, as to all its clauses.

Nor did the delivery of the vessel to the charterer, and her acceptance by him, constitute a hiring of her under the charter-party, as it would stand with certain disputed clauses omitted.

The delivery of the vessel was the adoption by the owner of the existing charter-party.

The owner could not collect rent for the time he was fitting up the tanks, and the charterer was liable to pay rent for the use of the vessel only while she was in his service.

THE case is stated in the opinion

Mr. James Parker for appellant.

Mr. George W. Wingate for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a libel *in personam*, in Admiralty, filed in the District Court of the United States for the Southern District of New York, by La Compania Bilbaina de Navegacion, de Bilbao, a corporation of Spain, as owner of the Spanish steamship Marzo, against the Spanish-American Light and Power Company, Consolidated, a corporation of the State of New York, claiming to recover $5520.97, with interest from August 4, 1886; $1800, with interest from May 21, 1886; $3300, with interest from June 21, 1886; and $8.14. The case is fully stated in the findings of fact hereinafter set forth.

The claim is made on a charter-party, a copy of which is annexed to the libel. It is dated December 14, 1885, at the city of New York, and purports to be made by the agent of the owner of the steamship and by the Spanish-American Company, and to let the steamship to that company for twelve months. The important clauses in it are those numbered 11, 12 and 18, which are as follows: "11. That the charterers shall have the option of continuing the charter for a further period of twelve months on giving notice thereof to owners thirty days previous to first-named term, and to have the liberty of subletting the steamer, if required by them. 12. That in the event of loss of time from deficiency of men or stores, break down of machinery, or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should she, in consequence, put into any other port other than that to which she is bound, the port charges and pilotages at such port shall be borne by the steamers' owners; but should the vessel be driven into port or to anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense." "18. Should steamer be employed

in tropical waters during the term of said charter-party, steamer is to be docked and bottom cleaned and painted, if charterers think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in a proper state for the service; charterers to have the privilege of shipping petroleum in bulk in water-ballast tanks, which are to be fitted for the purpose at owners' expense, satisfactory to charterers, and have permission to appoint a supercargo at their expense, who shall accompany steamer, and be furnished free of charge with first-class accommodations, and see that voyages are made with utmost dispatch."

The respondent appeared in the action, and put in its answer, denying that the libellant was entitled to recover any part of the $5520.97, admitting the payment of $1500 and $3300, and denying that it owed anything to the libellant. It alleged that the libellant never fitted up the centre water-ballast tank to carry oil in bulk, its use being consequently lost to the respondent; that the capacity of that tank was about 50,000 gallons, and its loss reduced the value of the vessel to the respondent $1100 a month from May 15, 1886, making a damage of $10,084; that from February 21, 1886, to August 27, 1886, the date of the bringing of the suit, was 188 days; that during that period the respondent was deprived of the use of the vessel forty-two days, leaving only 146 days for which hire was due; that such hire, at the rate of £675 a month, amounted to $16,060; that on account of such hire the respondent had paid altogether $15,137; that it was entitled to deduct from the moneys due on the charter-party $2390, for the expense to which it was put in procuring barrels so to transport the oil, and for the charges connected therewith, and the further sum of $10,084 for the damages which it would sustain by reason of the refusal of the libellant to fit up the centre tank to carry oil in bulk; and that it had filed a cross-libel to recover from the libellant so much thereof as exceeded the hire of the vessel claimed in the libel.

The case was heard in the District Court by Judge Brown, and a decree was entered by that court on June 21, 1887, for the recovery by the libellant of $1800, being the balance of

hire unpaid for the vessel for the month beginning May 21, 1886, and for $117 interest thereon from May 21, 1886, and $95.73 costs, the whole amounting to $2012.73.

The opinion of Judge Brown is reported in 31 Fed. Rep. 492. He took the view that the charter-party signed by the broker of the libellant did not constitute a legal contract, binding upon either of the parties, because such broker, in signing it, exceeded his authority; that that fact was communicated at the time to the broker of the respondent; that it was agreed, between the brokers of the two parties, that, if the clause relating to the extension of time for twelve months, and the clause requiring the vessel to fit up the oil tanks at the expense of the owner, were objected to by the latter, the matter should be settled by negotiation; that the respondent from the first refused the charter unless the vessel should fit up the tanks at the expense of her owner; that that fact was stated to libellant's broker at the time; that the owner of the vessel subsequently refused to confirm these two clauses in the charter; that notice of such refusal was given to the respondent, and it never consented to waive those two clauses; that no agreement as to those two clauses was ever arrived at; that the subsequent conduct of each party showed that neither intended to recede from its position; that, when the vessel arrived at Philadelphia, ready for the first voyage, neither party made any inquiry as to the disputed clauses; that both parties assented to the use of the vessel on the first voyage, without any definite agreement on the disputed points, and without any settlement by negotiation; that the respondent did not object, because it was not ready to use the tanks; that, when it was ready to use them, and required that they should be fitted up by the libellant in pursuance of the terms of the charter-party, the libellant refused to do so; that the cargo was then taken in barrels, under a stipulation that that might be done without prejudicing the rights of either party, the respondent claiming damages for the extra expense; and that subsequently the libellant fitted up the tanks, claiming that the expense would be at the charge of the respondent, while the latter notified the libellant that it would not pay for any such expense.

Opinion of the Court.

The District Court also held that, although the charter-party as a whole never became a contract binding upon either of the parties, it might be referred to as fixing the rights of each in so far as it might be presumed to have been adopted by both parties in their subsequent acts; that the respondent was apprised of the verbal refusal of the owner to agree to the two disputed clauses of the charter-party; that, nevertheless, the vessel came to the respondent, and was tendered to it by the owner, without any attempt to settle the disputed points; that both parties consented to the first voyage without any settlement of those differences; that as soon, however, as any question was made between the master and the respondent, after the first voyage, the original refusal of the owner was made known to the respondent, and neither party ever agreed to the demands of the other party on the subject; and that the vessel was employed without either side yielding anything to the other as to the charter-party. The court further held, that, under that state of things, the terms of the charter-party constituted the implied agreement of the parties in the actual use made of the vessel, in everything except as to the disputed clauses; that neither party could found any claim against the other upon the clauses which the other always refused to accept, because, in the face of such refusal, no agreement to those clauses could be implied; that the libellant, therefore, could recover nothing for its expenditure in fitting up the tanks to carry oil in bulk, nor could the respondent by its cross-libel recover any damages because the tanks were not fitted up earlier; that for the same reason, the libellant could not recover for any time of the vessel lost while it was fitting up the tanks; that it lost nothing by that disallowance, because it did not appear that any more time was required to fit up the tanks, when the work was actually done, than would have been required when the vessel was brought over to the respondent; that the evidence showed that after the employment of the vessel had begun, neither party was desirous of insisting on its legal right to discontinue all further service by reason of the failure of the parties to come to an agreement upon the disputed clauses; that the rights and liabilities of the parties

were founded, not at all upon the written charter-party, but wholly upon their subsequent conduct in the actual use of the vessel; that the charter-party was applied by implication to those acts, so far as it presumptively indicated the intention of both parties, and no further; that there could be no implied promise or obligation in contradiction of the expressed refusal of either party; that the result was that neither had any claim upon the other for the damages set forth by them respectively; and that the libel and the cross-libel must be dismissed, except as respected the hire, if any, unpaid for the time of the actual use of the vessel by the respondent.

Both parties appealed to the Circuit Court. That court, held by Judge Lacombe, dismissed the cross-libel of the respondent, without costs of the Circuit Court to either party, and decreed that the libellant recover from the respondent the amount of damages and costs decreed by the District Court, viz., $2012.73 and $185.27 interest thereon, being a total of $2198.

Judge Lacombe, in his opinion, said that there was nothing to add to the opinion of the District Judge; that the findings made by the Circuit Court sufficiently showed upon what theory the decision of Judge Brown was affirmed; and that, as both sides had appealed, no costs of the Circuit Court were allowed to either party.

The Circuit Court filed original findings of fact and conclusions of law, on October 15, 1888; and on January 14, 1889, it filed supplemental findings of fact. The original and supplemental findings of fact are as follows, the latter being enclosed in brackets:

"First. On December 19, 1885, the Spanish-American Light and Power Company, Consolidated, by the signatures of its president and secretary, executed a charter-party of the S. S. Marzo, owned by La Compania Bilbaina de Navegacion, de Bilbao.

"Second. Said charter-party contained three clauses, as follows, viz.:" then setting forth clauses 11, 12 and 18.

"Third. The negotiations preliminary to the signing of said charter-party were conducted by Henry P. Booth, acting as broker for the said the Spanish-American Light and Power

Company, and William W. Hurlbut, acting as broker for La Compania Bilbaina de Navegacion, de Bilbao, and was signed by said Hurlbut as agent for said last-named company.

"Fourth. Prior to said signature Hurlbut stated to Booth that he had no authority from his principals, the owners of the ship, to give the option of the continuance set forth in clause 11, or to agree to the insertion in clause 18 of the words 'at owners' expense,' or to agree upon behalf of the owners that they would pay any part of the expense of fitting water-ballast tanks for carrying oil in bulk; [and that he would not sign the charter-party containing the said clause 11 and said words 'at owners' expense' until authorized by the owners, his principals; that he, Hurlbut, would cable for authority, or he would sign the charter-party with that clause and those words therein upon the condition that the said clause and words were not to be binding upon the owners of the vessel until approved by the said owners; that Booth thereupon agreed to said proposal made by Hurlbut; that thereupon said charter-party, containing said clause and words 'at owners' expense,' was taken by Booth to the office of the Spanish-American Light and Power Company, and was there signed by its president and secretary and manager, and was brought back to Hurlbut's office by Booth.]

"Fifth. Thereupon said Hurlbut signed the charter-party and wrote a memorandum to the effect that the charter-party was signed subject to the approval of the owners as to those two clauses. He at that time again announced to Booth his want of authority to incorporate those clauses, and that a copy of the memorandum should be sent with the copies of the charter to be furnished to Booth, as broker, for delivery to the charterers.

"Sixth. Prior to the time of the signature aforesaid Hurlbut had not in fact received from his principals any authority to bind them to a contract containing these clauses.

"Seventh. Upon being notified of the action of Hurlbut in signing a charter-party containing these clauses they refused to ratify his action in that regard.

"Eighth. The authority of Booth, the charterers' agent,

was limited to securing the execution of a charter containing these clauses. [Immediately after the signature of the charter-party, on December 19th, Hurlbut made a clean copy of the memorandum agreement, as follows, viz.:

"'New York, *December 19th*, 1885.

"'Spanish-American Light and Power Company, charterers S. S. Marzo.

"'Sirs: I have signed charter-party by authority contained in the cables received.

"'Should the two clauses, viz.: "Privileges of twelve months' extension," and the "fitting of ballast tanks for petroleum at owners' expense," be not accepted by owners it is understood that the same may be arranged or compromised by mutual consent by cable.

"'Yours truly, W. W. Hurlbut.'

"And on the following Monday enclosed three copies of the charter-party, with copy of said memorandum attached, and sent same to Mr. Booth, the broker of the charterers, with the following letter, viz.:

"'New York, *December* 21, 1885.

"'Messrs. James E. Ward & Co.

"'Dear Sirs: I enclose three certified copies charter-party S. S. Marzo; also letter for charterers to accept, covering the two conditions inserted in charter-party as understood on signing same.

"'Yours truly, W. W. Hurlbut.'

"These were received by Booth.

"That on the 11th January, 1886, Hurlbut sent to Booth information that he had received a letter, dated December 31, 1885, from the London brokers, as follows: 'Owners refused to give option continuation which was asked them. We cabled you this: owners only gave liberty to carry petroleum in ballast tanks; they never agreed to "fitted at their own expense." We are really sorry you put them in charter-party

without authority. Owners are certain to pitch into us;' and that he had also received cable information that the steamship Marzo was about leaving Bilbao for the United States.

"That on January 4th, 1886, the owners of the steamship (La Compania Bilbaina de Navegacion, de Bilbao), having received copies of the charter-party, wrote to Messrs. Walker, Donald & Taylor, the London brokers, as follows, viz.:

"'BILBAO, *January 4th*, 1886.

"'DEAR SIRS: We are in receipt of your favor of the 23d and 31st ulto. and the 1st inst. enclosing charter-party for the Marzo S. S. As we are completely ignorant of this time-charter business, being the first time that we fix any one of our boats in this way, we are not decided until we see clearly and experience what there may be left to prolong the T. C. for another twelve months. If we see, and this will be soon seen, that things go all right, etc., it is probable that we shall agree to it and even be disposed to fix any other of our boats if you can then place her, but for the present we regret not to be able to agree to the option of twelve months more, nor can we admit that the cost for fitting the water-ballast tanks for carrying oil (petroleum) should be at steamer's expense, as we only, when accepting the terms of the charter, authorized the shipper to carry petroleum in water-ballast tanks, even (? never) thinking that besides our yielding to that condition they would ask us to spend money for it. As for the super-cargo, we agree to give him a first-cabin accommodation gratis on board, but he shall have to pay to the steward of the boat the food, as we do for the officers and crew. Marzo is now here in dry-dock and loads end of this week for Baltimore.

"'Yours truly, AZNAR Y ASTIGARRAGA.'

"Endorsement on margin: 'If delivery is accepted Baltimore, to whom must boat be delivered there, or whom Philadelphia or New York? Please wire before steamer leaves this port. As agreed, we suppose payment shall be made in London one month in advance.'

"That on January 9th, 1886, said Walker, Donald & Tay-

lor transmitted a copy of said letter to Hurlbut at New York, and the latter, on January 18th, enclosed copy to Booth, the broker for charterers.]

"Ninth. [That the steamship Marzo sailed from Bilbao on January 15th, 1886, for Philadelphia, where she duly arrived, and on the 18th of February was tendered to the charterers, who accepted her as in their service under the charter from the date of February 21st, 1886.

"That the charterers, after acceptance of the vessel on February 21st, loaded and despatched her to Cuba and return to Philadelphia, at which latter port she arrived about March 18th, 1886.

"That upon her arrival at Philadelphia, Smith, the manager of the charterers, went over to Philadelphia, and for the first time stated to the master of the vessel that it was possible something would be required to be done towards fitting the tanks for petroleum on the voyage next after the one for which she was loading, to which the master replied that he must be notified in time, because the owners understood the fitting of the tanks would be at the cost of the charterers, to which Smith replied, 'That will be arranged.'

"The vessel then for the second time proceeded to Cuba and loaded thence for Boston, arriving at the latter port early in May; that while the vessel was still in Boston the charterers wrote to the agents of the vessel at New York as follows:

"'New York, May 13th, 1886.

"'Messrs. Latasa & Co. City.

"'Gentlemen: We learn from the captain of the Marzo that he will complete his discharge at Boston to-day and that he will reach here to-morrow. We beg to again call your attention to the fact that we are now prepared to ship oil in bulk, and we shall expect the steamer to be put in proper condition to receive it this trip. We will gladly give you all the assistance we possibly can to hurry forward the work, for we do not wish the steamer to be unnecessarily detained any more than you do.

"'Yours very truly, R. A. C. Smith, *Sec'y.*'

"And on May 17th, 1886, again wrote as follows:

"'NEW YORK, *May 17th*, 1886.

"'Messrs. Latasa & Co., agents for owners of S. S. Marzo.

"'DEAR SIRS: Please take notice that we are prepared to ship oil in bulk, in the water-ballast tanks of the steamship Marzo, and that, according to the terms of the charter-party, same are to be fitted up for the purpose at owners' expense, satisfactory to us. Until said tanks are put in the condition contemplated by said charter-party the payment of the hire of the vessel ceases.

"'Yours very truly, R. A. C. SMITH, *Sec'y*.'

"And also informed Latasa & Co. by another letter of the 'appointment of an engineer to supervise the fitting of the tanks.'

"That the letter of May 17th, above recited, was the very first intimation given to the owners, agents, brokers or master of the steamship by the charterers that the latter had not accepted the refusal of the owners to confirm the words 'at owners' expense,' inserted in the charter-party by Hurlbut without authority, as above recited.]

"Tenth. At the time of such delivery her owners supposed that the company was receiving her with the intention of fitting up the tanks at its expense, and the Spanish-American Company supposed that the owners were delivering her in accordance with the terms of the charter-party which it had signed.

"Eleventh. Upon her receipt and on or about February 21, 1886, the Spanish-American Company loaded and dispatched her on a voyage to Cuba and returned to Philadelphia, at which latter port the vessel again arrived on or about March 18th. The Spanish Company again loaded her; she proceeded to Cuba and thence to Boston, arriving at the latter port early in May.

"Twelfth. Thereupon the Spanish Company notified the ship's agents, Messrs. Latasa & Co., that it was prepared to ship oil in bulk and should expect the steamer to be put in proper condition as to tanks, etc., to receive it.

"Thirteenth. Discussion thereupon arose between the ship's agents and the manager (Smith) of the Spanish Company, the latter demanding that the owners should fit the tanks at their expense and the owners expressing an entire willingness to fit the tanks, but refusing to pay the expense, which correspondence resulted in the following agreement, viz.:

"'It is hereby mutually agreed by and between the owners and the charterers of the steamship Marzo that the said vessel shall proceed to load oil and coal for Havana, Cuba, pending the settlement of matters in dispute between said owners and charterers, and that said loading shall not prejudice the claim of either party to said charter-party.

"'(Signed) R. A. C. Smith, *Sec'y.*

"'New York, May 26th, 1886.'

"And that a further arrangement was made by which $1500 was paid by the charterers on account of the vessel's hire that had already fallen due.

"Fourteenth. Upon return of the vessel to Philadelphia the Spanish Company again renewed the demand that the tanks should be fitted by the owners at their expense and refusing to pay hire until it was done, and the owners, through the ship's agents, again refused to pay the expense, but expressing an entire willingness to fit the tanks at the expense of the Spanish Company. Much correspondence ensued, but finally the owners, after notifying the Spanish Company that they would be held for the expense, to avoid further delay, proceeded to fit the tanks under the supervision of the engineer appointed by said company. The fitting was completed on July 30, and on that day the Spanish Company were notified that as soon as the bills for the expense thereof were received they would be presented to it for payment. They were so presented a few days later, amounting in the aggregate to the sum of $5520.97, but the said company refused to pay the same, [or any portion of the hire remaining unpaid, which hire amounts to the further sum of $5108.97, and have ever since refused to do so.]

"Fifteenth. The sum of six hundred and seventy-five pounds

British sterling, per calendar month, payable monthly in advance, was a fair and reasonable consideration for the use of said steamer during the time she was actually used by the said Spanish Company.

"Sixteenth. The said company has paid the owners of the Marzo for the use of said steamship at the said rate for said time during which she was so used, except the sum of eighteen hundred dollars which was due May 21, 1886, [but has not paid any hire for the time employed in fitting the tanks, viz., from July 3 to August 3, 1886."]

The conclusions of law accompanying the original findings of the Circuit Court were as follows:

"First. The charter-party signed December 18, 1885, was not a valid contract, because the agent of the owners had no authority to agree to the disputed clauses, and his action in signing a charter-party with such clauses contained in it was never ratified by said owners.

"Second. The Spanish-American Company never executed a charter-party with those clauses omitted, nor ever authorized any one to execute such a charter-party in their behalf.

"Third. The owners of the steamer never agreed with the Spanish Company that they would fit up the tanks at their own expense.

"Fourth. The Spanish Company never agreed with the owners that they would pay for the expense which might be incurred in fitting up the tanks.

"Fifth. For the actual use of the vessel, which, with the assent of the owners, the Spanish Company has enjoyed, it should pay a fair and reasonable rent.

"Sixth. The libel and cross-libel should therefore be each dismissed, except as respects the hire unpaid, (eighteen hundred dollars, with interest from May 21, 1886,) for the time of the actual use of the vessel by the Spanish Company.

"Seventh. The decision of the District Court is affirmed, without costs of this court."

There were no further conclusions of law accompanying the supplemental findings of fact.

The libellant has appealed to this court; but the respondent

has not appealed. The libellant contends, in this court, that it ought to recover all the items claimed in its libel, and not merely the $1800 with interest from May 21, 1886.

It is quite clear that the libellant could not, in any event, recover from the respondent any part of the expense of fitting up the tanks in the vessel to carry petroleum in bulk. There was nothing in the acts of the parties to throw on the respondent any obligation to fit up the tanks, or to pay the expense thereof, if the work should be done. The respondent never promised to make or to pay for any such alteration. On the contrary, it always refused to recognize any such liability on its part, and insisted it was the duty exclusively of the libellant to pay therefor. If the libellant chose to fit up the tanks, that was a voluntary act on its part in regard to work upon its own property, for which it has no remedy against the respondent.

It is contended, however, that, as the respondent refused to retain or use the vessel unless the tanks were fitted up by the libellant, as provided in the charter-party, an implied contract arose; and that, as the libellant did such fitting up, the respondent must bear the expense. But it is found, in effect, that the respondent always and constantly refused to assume the expense, and insisted, as the ground for the making of the alterations, that, under the charter-party it was the duty of the libellant to make them. No duress by the respondent is alleged in the libel, or shown.

The position of the libellant is, that, although the charter-party is a binding instrument on the respondent, so far as relates to the hire of the vessel, it has no effect against the libellant as to the provision contained in clause 18, as to the fitting up of the water-ballast tanks at the expense of the libellant, in order to have petroleum shipped in bulk. If the libellant seeks to enforce any part of the charter-party, it must rely on the instrument as a whole; and it cannot affirm the charter-party for one purpose and repudiate it for another. The respondent refused at all times to enter into an express contract that it would pay for fitting up the tanks; and the charter-party as executed indicated the respondent's inten-

tion not to do so. On the facts as found, no such contract can be implied. The charter-party never became a binding contract.

The contention of the libellant is, that the instrument became binding on the parties, with the exception of the particular clauses referred to, if the libellant should dissent from those clauses. Thus the same effect is claimed as if the charter-party had been returned to the persons who had signed it, and the clauses referred to had been erased by mutual consent. But if there is any part of it in regard to which the minds of the parties have not met, the entire instrument is a nullity, as to all its clauses. *Eliason* v. *Henshaw*, 4 Wheat. 225; *Insurance Company* v. *Young's Administrator*, 23 Wall. 85; *Tilley* v. *County of Cook*, 103 U. S. 155; *Minneapolis & St. Louis Railway* v. *Columbus Rolling Mill*, 119 U. S. 149, 151.

Nor did the delivery of the vessel to the respondent, and her acceptance by the latter, constitute a hiring of her under the charter-party as it would stand with the disputed clauses omitted. The proposition of Hurlbut to the respondent, on December 19, 1885, was that if the libellant did not agree to the two disputed clauses, those clauses should "be arranged or compromised by mutual consent, by cable." The libellant was apprised of that proposition prior to December 31, 1885, as on that day the London brokers of the libellant, Walker, Donald & Taylor, wrote to Hurlbut, the agent of the libellant, the letter of that date. On January 4, 1886, the libellant wrote to Walker, Donald & Taylor the letter of that date, and the latter, on January 9, 1886, sent a copy of that letter to Hurlbut at New York, and he, on January 18, 1886, enclosed a copy of it to Booth, the broker for the respondent. Without any direct communication with the respondent, and without receiving any communication from it, the vessel was dispatched to Philadelphia and tendered to the respondent on February 18, 1886, not a word being said at the time to the respondent as to the disputed clauses. On these facts, the respondent had a right to conclude that the dissent of the libellant from the two disputed clauses was not insisted upon.

It was important to the respondent to know promptly if the

charter-party which had been signed was binding; and it was the duty of the libellant, before delivering the vessel to the respondent, to have the latter understand distinctly that the libellant did not deliver her under the charter-party which had been signed. It is expressly found, in the tenth original finding of fact, that the respondent, at the time the vessel was delivered to it, supposed that the libellant was delivering her in accordance with the terms of the charter-party which the respondent had signed. Under these circumstances, the delivery of the vessel to the respondent by her master was, in legal effect, the adoption by the libellant of the existing charter-party, and not an acceptance of the vessel by the respondent with the omission from the charter-party of the two clauses in question. *Drakely* v. *Gregg*, 8 Wall. 242, 267.

The legal effect of the transaction was that the libellant thus waived its former objections to the charter-party whether it intended to do so or not. It follows that the libellant cannot claim rent for the use of the vessel during the time she was undergoing alterations. As the libellant was bound to pay the cost of fitting up the tanks, if it did the work, it cannot recover the rent for the time during which such work was being done. The loss of the use of the vessel by the respondent during the time the alterations were being made was a part of the expense of fitting up the tanks, the eighteenth clause of the charter-party meaning that the tanks were to be fitted at the expense of the libellant before the delivery of the vessel under the charter-party. No interpretation of the charter-party can be allowed which would permit the libellant to take its own time to fit up the tanks and yet collect full rent from the respondent during the time that work was being done, and while the respondent was necessarily deprived of the use of the vessel.

Moreover, the respondent, insisting that the libellant should fit up at its own expense the water-ballast tanks, delivered the vessel back to the libellant, which accepted her for that purpose and kept her for a month. This necessarily stopped the running of the rent under the charter-party. The respondent

can be liable to pay rent for the use of the vessel only while she was in its service. The libellant recovered all that it was entitled to recover.

Decree affirmed, but without interest, and with costs.

SCOTT *v.* ARMSTRONG.

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

FARMERS' AND MERCHANTS' STATE BANK *v.* ARMSTRONG.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Nos. 53, 1025. Argued November 18, 21, 1892. — Decided December 12, 1892.

The closing of a national bank by order of the examiner, the appointment of a receiver, and its dissolution by decree of a Circuit Court necessarily transfer the assets of the bank to the receiver.

The receiver in such case takes the assets in trust for creditors, and, in the absence of a statute to the contrary, subject to all claims and defences that might have been interposed against the insolvent corporation.

The ordinary equity rule of set-off in case of insolvency is that, where the mutual obligations have grown out of the same transaction, insolvency, on the one hand, justifies the set-off of the debt due, on the other; and there is nothing in the statutes relating to national banks which prevents the application of that rule to the receiver of an insolvent national bank under circumstances like those in this case.

A customer of a national bank who in good faith borrows money of the bank, gives his note therefor due at a future day, and deposits the amount borrowed to be drawn against, any balance to be applied to the payment of the note when due, has an equitable (but not a legal) right, in case of the insolvency and dissolution of the bank and the appointment of a receiver before the maturity of the note, to have the balance to his credit at the time of the insolvency applied to the payment of his indebtedness on the note.

In this case this court reverses the judgment of the court below, declining to sustain it upon a jurisdictional ground not passed upon by that court.

Statement of the Case.

No. 53 was an action brought by David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio, against Levi Scott and the Farmers' and Merchants' State Bank, in the Circuit Court of the United States for the Southern District of Ohio, upon a promissory note for $10,000, dated at Cincinnati on June 6, 1887, payable ninety days after date, at said Fidelity Bank, with interest after maturity at the rate of 8 per cent per annum, signed by Scott and endorsed by the Farmers' Bank to the order of the Fidelity Bank.

The defendant Scott was the cashier of his codefendant, and pleaded that he signed the note for the accommodation of the banks under an agreement that he should not be looked to for its payment. The Farmers' Bank made the same averments as to Scott, and pleaded a set-off to the amount of $8809.94, as arising on certain facts, in substance as follows: That the Fidelity Bank lent the Farmers' Bank the $10,000 at a discount at the rate of seven per cent per annum, for ninety days, under an agreement that the money so borrowed, less the discount, should be placed to the credit of the Farmers' Bank on the books of the Fidelity Bank; that the note in suit was executed accordingly, dated and discounted on June 6, 1887, and the proceeds, $9819.17, were placed to the credit of the Farmers' Bank upon the books of the Fidelity Bank, to meet any checks or drafts of the Farmers' Bank, and to pay the note when it became due; that afterwards, and before June 20, the Farmers' Bank drew against the deposit the sum of $1009.23, and the balance, $8809.94, remained to the credit of the defendant to meet the note, and was so to its credit at the time the receiver was appointed; that upon the maturity of the note and before suit was brought, defendant tendered to the receiver the sum of $1190.06, the balance due on the note; and that the tender had since that time been kept good, and the money was now brought into court.

Demurrers to the pleas were sustained and judgment was entered for the plaintiff for $10,833.33, with interest and costs. The judgment, as provided by section 5419 of the Revised Statutes of Ohio, contained a certificate that the Farmers' Bank was liable as principal and Scott as surety.

The opinion of the Circuit Court, by the District Judge, will be found in 36 Fed. Rep. 63, and states that the Circuit Judge concurred in its conclusions as being in accord with his opinion in *Bung Company* v. *Armstrong, Receiver*, reported in 34 Fed. Rep. 94. The case being brought here by writ of error, it was assigned for error that the court erred in sustaining the demurrers and in rendering judgment against the defendants below.

While the writ of error was pending, a bill in equity was filed in the Circuit Court in behalf of the Farmers' Bank and Scott against Armstrong, as receiver, praying for an injunction against the judgment and for the enforcement of the set-off. Armstrong demurred, his demurrer was sustained, the bill dismissed, and an appeal taken to the Circuit Court of Appeals for the Sixth Circuit. That court certified to this court for instructions as to the proper decision, seven questions, accompanied by a brief statement of the contents of the bill and proceedings thereon.

The bill, as summarized by the court, rehearsed the facts set forth in the answers in the suit at law somewhat more in detail, and among other things stated that "on the 20th day of June, 1887, said Fidelity Bank was closed by order of the bank examiner of the United States, and thereafter remained closed;" that "on June 27, 1887, the Comptroller of the Currency of the United States, having become satisfied that said Fidelity Bank was insolvent, appointed the appellee, David Armstrong, receiver of said bank to wind up its affairs, as provided under the authority given by the laws of the United States in such case made and provided, and said receiver qualified and entered upon the performance of his duties as such. On July 12, 1887, the charter of said Fidelity Bank was forfeited and said banking association dissolved by the decree of the Circuit Court of the United States for the Southern District of Ohio;" and that "said Fidelity Bank was in good credit at the time said discount was made, and was then thought by said Scott and said state bank, with good reason for so thinking, to be solvent, but was in fact insolvent and known so to be by said Harper," its managing officer, with whom the transaction had been had.

The recovery of the judgment and pendency of the writ of error were also set forth, and it was averred "that said Scott and said state bank were advised said Circuit Court sitting as a court of law had not jurisdiction to entertain and adjudge upon the set-off pleaded as aforesaid, and that relief should be sought in a court of equity;" the tender was reiterated; and it was prayed, among other things, "that the collection of the judgment at law might be enjoined, and that the set-off might be established and allowed." The grounds of demurrer were:

"1. That it appeared from the bill that the complainants were not entitled to the relief sought.

"2. That the complainants had an adequate remedy at law for the relief sought, which had been already adjudicated."

The case on certificate is No. 1025. The first, second and fourth questions are as follows:

"1. Where a national bank becomes insolvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, can a debtor of the bank set off against his indebtedness the amount of a claim he holds against the bank, supposing the debt due from the bank to have been payable at the time of its suspension, but that due to it to have been payable at a time subsequent thereto?

"2. Has a Circuit Court of the United States, sitting in Ohio as a court of law, jurisdiction to entertain a defence of set-off as against an action brought by a receiver appointed by the Comptroller of the Currency to wind up the affairs of a national bank doing business in Ohio because of its insolvency, upon a note held by said bank, which note matured and became payable after the appointment of such receiver?"

"4. Where a national bank doing business in Ohio in 1887 discounts a promissory note with the understanding that the proceeds of the discount are to remain on deposit with it subject to the checks of the borrower and any balance of such deposit remaining undrawn at the maturity of the note is to be applied as a credit thereon, and where at the time such discount was made said bank was in fact insolvent and known so to be by the officer through whom it acted in making such

Citations for Plaintiffs in Error.

discount and agreement, but such bank was then in good credit and thought by the borrower to be solvent, with good reason for so thinking, and where afterwards, the insolvency of said bank becoming known to the Comptroller of the Currency, that officer assumed charge of said bank and afterwards, in June, 1887, but before the maturity of the note so discounted, appointed a receiver to close up the affairs of said bank, can such borrower by suit in equity against such receiver compel a set-off of the balance of said deposit account at the time of the suspension of said bank against the amount due upon such note at its maturity?"

The third, fifth, sixth and seventh related to the effect of the judgment at law as a bar to the bill in equity.

Mr. William Worthington, (with whom was *Mr. J. W. Warrington* on the brief,) for plaintiffs in error and appellants, cited the following cases as to the right of set-off under the early English statutes of bankruptcy: *Anonymous*, 1 Mod. 215 (1676); *Curson* v. *African Co.*, 1 Vern. 121 (1682); *Chapman* v. *Derby*, 2 Vern. 117 (1689); *Peters* v. *Soame*, 2 Vern. 428 (1701); *Lord Lanesborough* v. *Jones*, 1 P. Wms. 325 (1716); *Downam* v. *Matthews*, Prec. Ch. 580, pl. 351 (1721); *Jeffs* v. *Wood*, 2 P. Wms. 128 (1723); *Hawkins* v. *Freeman*, 2 Eq. Cas. Abr. 10 pl. 10 (1723). With regard to the effect of the statutory provisions as to winding up insolvent national banks upon the doctrine of set-off, he cited: (1867) *Venango National Bk.* v. *Taylor*, 56 Penn. St. 14; (1872) *Platt* v. *Bentley*, 11 Am. Law Reg. (N. S.) 171; (1878) *Hade* v. *McVay*, 31 Ohio St. 231; (1883) *Balch* v. *Wilson*, 25 Minnesota, 299; (1888) *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675; (1888) *United States Bung Manufacturing Co.* v. *Armstrong*, 34 Fed. Rep. 94; (1888) *Armstrong* v. *Scott*, 36 Fed. Rep. 63 (the case at bar); (1888) *Snyders' Sons Co.* v. *Armstrong*, 37 Fed. Rep. 18; (1889) *Stephens* v. *Schuchmann*, 32 Mo. App. 333; (1889) *Armstrong* v. *Warner*, 21 Weekly Law Bull. 136; (1889) *Armstrong* v. *Second Nat'l Bank of Springfield*, 38 Fed. Rep. 883; (1889) *Tehan* v. *First Nat. Bank of Auburn*, 39 Fed. Rep. 577; (1891) *Armstrong* v. *Law*, 27 Weekly Law

Bull. 100; (1892) *Yardley* v. *Clothier*, 49 Fed. Rep. 337; (1892) *Armstrong* v. *Warner*, 27 Weekly Law Bull. 330.

Mr. J. W. Herron, for defendant in error and appellee.

In *United States Bung Manufacturing Co.* v. *Armstrong*, 34 Fed. Rep. 94, Judge Jackson says: "It is well settled that the mere existence of cross-demands, or independent debts, does not create any right to an equitable set-off. There must exist a mutual credit between the parties, founded at the time upon the existence of some debt due by the crediting party to the other. . . . Mutual credits such as would give rise to an equitable set-off apply only to that class of cases where there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt."

In this case there was no knowledge on either side "of an existing debt due to one, founded on and trusting to such debt as a means of discharging it." It is true that the deposit resulted from the discount of the note in controversy; but that did not change the character of the deposit unless connected with an agreement that it could be used as a set-off to the note. The transaction negatives in the strongest manner any such knowledge or intention. The parties did not occupy the relation usual between bankers and their depositors, where one party deposits a sum in a bank, and borrows money from that bank, and when this loan is due pays it by checks on the money so deposited. The State Bank borrowed this money not to let it lie in the Fidelity Bank, but to be used by it in its own business. It paid a discount upon the entire amount, for the entire time the note had to run. The note and the deposit account were therefore wholly independent claims and were not the subject of set-off.

The question principally relied on in the present case is, whether the national banking act modifies in any respect, and if so how far, any right of set-off which might on principles of law or equity be applicable in the case of other classes of insolvents?

I do not claim that no cross demand can in any case be allowed by the court in the case of the insolvency of national banks.

In the case of a current account existing between a national bank and another, the balance of the account due at the time of the act of insolvency only can be collected. In such a case both sides of the account constitute but one account, and the excess of the larger over the smaller side of that account is the sum actually due between the parties.

Where the debtor bank has on the faith of its indebtedness accepted or agreed to accept a draft drawn on that indebtedness, so as to render it liable to the holder of that draft, it may deduct the amount of that draft from the account; not entirely on the doctrine of set-off, but as a payment made on the account. The agreement to pay the draft out of that fund is treated the same as if it had actually been paid. This was the case in *Armstrong* v. *Seventh National Bank of Philadelphia*, 38 Fed. Rep. 883.

An agreement to sell bonds of the debtor, and to credit the proceeds on the note of that debtor held by the bank, will be enforced when the bank holding the paper has received and sold such bonds, and not made the credit. This was the case in *The Venango Bank* v. *Taylor*, 56 Penn. St. 14.

In this case Justice Strong allowed the credit, not as a set-off but because there had been an understanding that the proceeds of such sale should be applied on the debt.

Where the note held by the insolvent bank is past due at the time of the insolvency, and it, at the same time, held a deposit account of the debtor on the note, also due, a set-off will probably be allowed. In such cases set-off legally applies, and the bank has the right to charge the past due paper to the account, and the debtor ought to have given his check for the amount due him to pay such note in whole or part: no injury in such a case is done to the general creditors.

But where a national bank at the time of an act of insolvency, holds a discounted note not due, and the debtor has in the same bank a deposit account not placed there on account of, or to meet that note, which the bank cannot take or hold

for its debt, the national banking law, as I claim, prohibits the receiver from receiving the deposit as payment in whole or in part of the note. He must hold the note in trust for the general creditors, including the debtor, to collect it and divide the proceeds ratably among them. Rev. Stat. §§ 5234, 5236, 5242; *National Bank* v. *Colby*, 21 Wall. 609, 613; *Pacific National Bank* v. *Mixter*, 124 U. S. 721, 725; *Venango Bank* v. *Taylor*, 56 Penn. St. 16; *Stephens* v. *Schuchmann*, 32 Mo. App. 333; *Snyders' Sons Co.* v. *Armstrong*, 37 Fed. Rep. 18; *Armstrong* v. *Warner*, 21 Weekly Law Bull. 136; *Yardley* v. *Clothier*, 49 Fed. Rep. 337.

As to the equity suit, I have argued that there was no legal set-off in this case which a court of law could recognize. Will a court of equity go further than the legal rights of the parties authorizes a court of law to do? Equity favors an equal distribution of the assets of an insolvent national bank. Equity grants the same relief to all creditors alike. So far as this deposit is concerned the State Bank stands no higher, has been no more defrauded or injured, than every other depositor has, and is entitled to no higher consideration. That bank should stand or fall upon its legal rights. Equity will not stretch its rules to protect it, to the loss of other creditors. The question here is solely between the general creditors *represented* by the receiver, and the State Bank. It should suffer equally with them. The national banking act recognizes in the strongest language the equity of this equality. This court has fully recognized the justice of that equality.

I submit that the law case, No. 55, should be affirmed by this court, and the questions submitted by the Circuit Court of Appeals answered in such a manner as will authorize the receiver to enforce the judgment rendered in the action at law.

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

The Fidelity National Bank was closed by order of the bank examiner June 20, the receiver was appointed June 27,

and the charter of the bank was forfeited and the bank dissolved by the decree of the Circuit Court, July 12, 1887. Title to its assets was necessarily thereby transferred to the receiver. *National Bank* v. *Colby*, 21 Wall. 609.

The note in controversy did not mature until September 7, 1887, but the deposit to the credit of the Farmers' Bank was due for the purposes of suit upon the closing of the Fidelity Bank, as under such circumstances no demand was necessary. The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defences that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached.

The right to assert set-off at law is of statutory creation, but courts of equity from a very early day were accustomed to grant relief in that regard independently as well as in aid of statutes upon the subject.

In equity, relief was usually accorded, says Mr. Justice Story, (Eq. Jur. § 1435,) "where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to such debt, as a means of discharging it."

This definition is hardly broad enough to cover all the cases where, as the learned commentator concedes, there being a "connection between the demands, equity acts upon it, and allows a set-off under particular circumstances." § 1434. Courts of equity frequently deviate from the strict rule of mutuality when the justice of the particular case requires it, and the ordinary rule is that where the mutual obligations have grown out of the same transaction, insolvency on the one hand justifies the set-off of the debt due upon the other. *Blount* v. *Windley*, 95 U. S. 173, 177.

In *Carr* v. *Hamilton*, 129 U. S. 252, 262, it was decided

that, when a life insurance company becomes insolvent and goes into liquidation, the amount due on an endowment policy, payable in any event at a fixed time, may, in settling the company's affairs, be set off against the amount due on a mortgage deed from the holder of the policy to the company by way of compensation; and Mr. Justice Bradley, delivering the opinion of the court, said: "We are inclined to the view that where the holder of a life insurance policy borrows money of his insurer, it will be presumed, *prima facie*, that he does so on the faith of the insurance and in the expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credits, and entitled to the privilege of compensation or set-off whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company." And the case of *Scammon* v. *Kimball*, 92 U. S. 362, was referred to, where it was held that a bank, having insurance in a company which was rendered insolvent by the Chicago fire of 1871, had a right to set off the amount of his insurance on property consumed against money of the company in his hands on deposit, although the insurance was not a debt due at the time of the insolvency.

Indeed natural justice would seem to require that where the transaction is such as to raise the presumption of an agreement for a set-off it should be held that the equity that this should be done is superior to any subsequent equity not arising out of a purchase for value without notice.

In the case at bar the credits between the banks were reciprocal and were parts of the same transaction, in which each gave credit to the other on the faith of the simultaneous credit, and the principle applicable to mutual credits applied. It was, therefore, the balance upon an adjustment of the accounts which was the debt, and the Farmers' Bank had the right, as against the receiver of the Fidelity Bank, although the note matured after the suspension of that bank, to set off the balance due upon its deposit account, unless the provisions of the national banking law were to the contrary. Whether this was so or not is the question on which the opinion of the

District Judge turned, and which was chiefly urged in argument upon our attention.

Sections 5234, 5236 and 5242 are the sections relied on. Section 5234 provides for the appointment of a receiver by the Comptroller of the Currency and defines his duties as follows:

"Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

Section 5236 provides:

"From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Section 5242 reads:

"All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and

all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court."

The argument is that these sections by implication forbid this set-off because they require that after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered, in contemplation of or after committing the act of insolvency, shall stand. And it is insisted that the assets of the bank existing at the time of the act of insolvency include all its property without regard to any existing liens thereon or set-offs thereto.

We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank.

There is nothing new in this view of ratable distribution. As pointed out by counsel, the bankruptcy act of 13 Eliz. c. 7, contained no provision in any way directing a set-off or the striking of a balance, and by its second section, commissioners in bankruptcy were to seize and appraise the lands, goods, money and chattels of the bankrupt, to sell the lands and chattels, "or otherwise to order the same for true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate alike, according to the quantity of his or their debts." 4 Statutes of the Realm, Part I, 539. Yet, in the earliest reported decisions upon set-off, it was allowed under this statute. *Anonymous*, 1 Mod. 215; *Curson* v. *African Co.*, 1 Vern. 121; *Chapman* v. *Derby*, 2 Vern. 117.

The succeeding statutes were but in recognition, in bankruptcy and otherwise, of the practice in chancery in the settlement of estates, and it may be said that in the distribution of the assets of insolvents under voluntary or statutory trusts for creditors the set-off of debts due has been universally conceded. The equity of equality among creditors is either found inapplicable to such set-offs or yields to their superior equity.

We are dealing in this case with an equitable set-off, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank.

The state of case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed. *Venango National Bank* v. *Taylor*, 56 Penn. St. 14; *Colt* v. *Brown*, 12 Gray, 233.

Our conclusion is that this set-off should have been allowed, and this has heretofore been so held in well-considered cases. *Snyders' Sons Co.* v. *Armstrong*, 37 Fed. Rep. 18; *Yardley* v. *Clothier*, 49 Fed. Rep. 337; *Armstrong* v. *Warner*, 21 Weekly Law Bull. 136; 27 Weekly Law Bull. 100.

The Ohio Code of Civil Procedure abolishes the distinction between actions at law and suits in equity, requires all actions (with some exceptions) to be brought in the name of the real party in interest, and permits all defences, counter-claims and set-offs, whether formerly known as legal or equitable, to be set up therein. Rev. Stats. Ohio, §§ 4971, 4993, 5071.

Section 914 of the Revised Statutes in providing that the practice, pleadings and forms and modes of proceeding in civil causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as under the Constitution matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the Circuit Courts of the United States, nor are equitable defences permitted. *Bennett* v. *Butterworth*, 11 How. 669; *Thompson* v. *Railroad Companies*, 6 Wall. 134; *Scott* v. *Neely*, 140 U. S. 106; *Montejo* v. *Owen*, 14 Blatchford, 324; *La Mothe Manufacturing Co.* v. *National Tube Works Co.*, 15 Blatchford, 432.

We are of opinion that the Circuit Court had no power to grant the set-off in question in the suit at law. Judgment, however, was given in that case on the merits upon sustaining the demurrer to the defence of equitable set-off, and as we think that the set-off should have been allowed, we do not feel called upon, having the judgment before us and under our control for affirmance, reversal or modification, to sustain it upon a jurisdictional ground not passed upon by the Circuit Court.

We shall, therefore, reverse it without discussing the question whether if affirmed, it would or would not be a bar to

relief in the suit in equity. *Butler* v. *Eaton*, 141 U. S. 240; *Ballard* v. *Searls*, 130 U. S. 50.

It follows from what we have said that the first question certified from the United States Circuit Court of Appeals for the Sixth Circuit must be answered in the affirmative and the second in the negative, and that the other questions propounded require no reply.

Judgment in No. 53 reversed and cause remanded to the Circuit Court with directions for further proceedings in conformity with this opinion.

In No. 1025, the answers to the first and second questions above indicated will be certified.

MITCHELL *v.* NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY.

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

No. 71. Argued December 6, 1892. — Decided December 12, 1892.

A direction of the Circuit Court to the jury to find for the defendant in an action against a common carrier for causing the death of a passenger, on the ground that the evidence did not establish negligence on the part of the carrier, and did show contributory negligence on the part of the passenger, is approved.

This action was brought under an act of the legislature of the State of New Jersey, to recover damages for the death of the plaintiff's intestate, caused by the neglect of the defendant. The facts claimed to be established were substantially these. On the 15th of November, 1887, at about half-past nine in the evening, the plaintiff's intestate, a lad about sixteen years old, his brother Henry, a young man named Robert Henry, and a number of other lads, got on a coal train of the defendant at the Bergen end of the tunnel which runs from

that place to Hoboken, in order to go through this tunnel on coal trains of the defendant. The train was sixty or seventy cars in length. The lads were on separate cars sitting on the coal. Lawrence Mitchell, the plaintiff's intestate, was sitting on the end on top of the car, his feet hanging over down between the cars. As the train approached First Street there was a sudden jerk which threw the lads on the cars into various positions, Lawrence falling down between two cars. He was found lying alongside the track with one leg off, and two days after died from the effects of his injuries.

When the evidence was in, the court said: "I will direct a verdict for the defendant on the ground that there is not sufficient evidence to justify a recovery upon the case as it stands. There is not sufficient evidence of negligence on the part of the defendant, and the evidence proves concurring negligence on the part of the deceased."

Exceptions were taken to this instruction and this writ of error was sued out to review it.

Mr. Hermon H. Shook for plaintiff in error.

Mr. Charles Steele and *Mr. William D. Guthrie* for defendant in error; but the court declined to hear them.

The Chief Justice: A verdict for the defendants was directed in this case, on the ground that there was not sufficient evidence to justify a recovery. We concur in that view, and therefore affirm the judgment.

Judgment affirmed.

BRINKERHOFF *v.* ALOE.

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

No. 85. Argued December 9, 1892. — Decided December 12, 1892.

Letters patent No. 224,991, granted to Alexander W. Brinkerhoff, March 2, 1880, for an improvement in rectal specula are void for want of novelty in the invention protected by them.

This was a bill to restrain the infringement of letters patent No. 224,991, granted to Alexander W. Brinkerhoff under date of March 2, 1880, for an improvement in "rectal specula."

The claims made in the specification were as follows:

"1. A slide in the side of a speculum extending through its whole length, and used substantially as herein described.

"2. The incline in the front end of the chamber, in combination with the tube, slot and slide, substantially as and for the purposes herein set forth.

"3. In cylindrical tubular specula having a slotted side and closed end to prevent the entrance of fæces, the incline in the front end of the chamber extending upward from the bottom and forward to under side of slide, substantially as described, and for the purposes herein set forth."

The court below in its opinion in the record said:

"1. It is clear that the first claim of this patent, covering 'a slide in the side of a speculum, extending its whole length,' cannot be sustained. Indeed it is not seriously contended by complainant's counsel that the device covered by that claim is novel."

"Hilton's rectal speculum, an instrument said to have been in use in England as early as 1870, also clearly anticipates the first claim of complainant's patent, and probably the second and third claims. If Hilton's speculum, as contended, was described in a printed publication in England as early as 1876, that fact also invalidates the first claim of the patent

under consideration, and most likely the second and third claims."

"2. The third claim of the patent is a claim for the 'incline' in cylindrical tubular specula having a slotted side and closed end.

"The particular device attempted to be covered by this claim was anticipated, in my opinion, by a rectal speculum produced by Dr. Mudd and shown, to the satisfaction of the court, to have been purchased at an instrument store, and to have been in use in this country before the date of complainant's invention."

"But, regardless of the obvious nature of the improvement made by adding the incline, the court is of the opinion that the combination so formed was not patentable, because no new result or effect was produced by the united action of the old elements.

"To sustain a patent on a combination of old devices it is well settled that a new result must be obtained which is due to the joint and coöperating action of all the old elements. Either this must be accomplished or a new machine of distinct character and function must be constructed. *Pickering* v. *McCullough*, 104 U. S. 310; *Hailes* v. *Van Wormer*, 20 Wall. 353; *Tack Co.* v. *Manufacturing Co.*, 9 Bissell, 258; *Wringing Machine Co.* v. *Young*, 14 Blatchford, 46.

"If several old devices are so put together as to produce even a better machine or instrument than was formerly in use, but each of the old devices does what it had formerly done in the instrument or machine from which it was borrowed and in the old way, without uniting with other old devices to perform any joint function, it seems that the combination is not patentable. *Hailes* v. *Van Wormer*, *supra*; *Reckendorfer* v. *Faber*, 92 U. S. 347.

"In the present case the incline, when placed in combination with the 'tube, slot and slide,' acted precisely as it did when placed in the forward end of a slotted tube not provided with a slide. Its action was in no sense modified by the new relation in which it was placed, nor did it, in unison with the other elements of the combination, produce a distinctively new result."

Statement of the Case.

The bill was accordingly dismissed, and the plaintiffs appealed from that decree.

Mr. J. C. Smith for appellants.

Mr. George H. Knight for appellee.

THE CHIEF JUSTICE: Having reached the same conclusions as those expressed in the opinion of the Circuit Court, reported in 37 Fed. Rep. 92, we direct the decree to be

Affirmed.

NATIONAL TUBE WORKS COMPANY *v.* BALLOU.

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

No. 70. Argued December 2, 1892. — Decided December 19, 1892.

A Massachusetts corporation brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, against a citizen of New York, founded on a judgment obtained by it in a State Court of Connecticut, and an execution issued there, and returned unsatisfied, against a Connecticut corporation, to compel the defendant to pay what he owed on his subscription to shares of stock in the Connecticut corporation, and have it applied towards paying the debts of that corporation, including one due to the plaintiff: *Held*, that the bill was defective in not alleging any judgment in New York against the corporation, or any effort to obtain one, or that it was impossible to obtain one.

THIS was a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, on November 1, 1888, by the National Tube Works Company, a Massachusetts corporation, against George William Ballou, a citizen of New York.

The bill set forth that the Wiley Construction Company was a corporation organized in February, 1880, under the joint stock laws of Connecticut, and located in Hartford, in

that State. The bill was filed on behalf of the plaintiff and such other creditors of the Wiley Company as might come in and be made parties to the suit and contribute to the expenses thereof. It set forth that the capital stock of the Wiley Company was fixed at $500,000, divided into five thousand shares of $100 each; that all of the stock was subscribed for; that the defendant subscribed and agreed to pay at par for 2499 shares; that he had never paid in anything on account of such subscription; that immediately after the organization of the company, it proceeded to carry on its business, and continued to do so until about July, 1883, the defendant and the other subscribers to the stock taking an active part in the management and acting as stockholders and directors of the company; that between May, 1880, and August, 1882, the plaintiff sold and delivered to it merchandise at the agreed price of $78,955.49; that it had paid $40,789.51 on account thereof; that on March 10, 1883, the Wiley Company, being then indebted to the plaintiff in $49,828.37, gave to the plaintiff its promissory note for that amount, with interest; that no part of the note had been paid; that in October, 1886, in the Superior Court for the county of Hartford, in the State of Connecticut, the plaintiff recovered a judgment, on said note, against the Wiley Company, for $52,041.51, damages and costs, that company having been duly served with process and having appeared in the action; that in June, 1887, the judgment was, on appeal, affirmed by the Supreme Court of Errors of Connecticut, and is still in force; that execution was issued out of said Superior Court against the property of the Wiley Company, to the sheriff of Hartford County, wherein the principal office of said company was situated, and had been returned unsatisfied; that the Wiley Company had no fund or assets wherewith to pay the claim of the plaintiff; and that the whole of the $52,041.51 was still due to it.

The prayer of the bill was that an accounting be had of the amount unpaid on the stock subscription of the defendant in the Wiley Company, and that he be decreed to pay so much of the balance found unpaid on his subscription as would be sufficient to pay such debts of the Wiley Company as might

be proved in this suit, including the said judgment in favor of the plaintiff. The Wiley Company was not made a party to the suit.

There was not in the bill any statement that the plaintiff had recovered any judgment against the Connecticut corporation in any court of the State of New York, or in any court of the United States within the State of New York, or issued an execution within the State of New York, to collect its claim against the Wiley Company; nor does the plaintiff allege in its bill any reason why it has not done so, or why it cannot do so.

The defendant demurred to the bill, and set forth as ground of demurrer that the plaintiff did not by its bill make such a case as entitled it in a court of equity to any discovery or relief touching any of the matters contained in the bill, and also that it appeared by the bill that the plaintiff was not entitled to the discovery or relief prayed for. The case was heard before Judge Wallace in the Circuit Court, and a decree was entered, dismissing the bill, with costs. The plaintiff appealed to this court.

Mr. W. J. Curtis for appellant.

I. The unpaid subscriptions to the capital stock of the Wiley Construction Company constitute a trust fund for the benefit of the company's creditors. This is true regardless of any statutory provision in the matter.

The earliest authority upon this point is said to be the case of *Salmon* v. *Hamburgh Company*, decided in 1670, reported in 1 Cas. Ch. 204; *S. C.* 6 Viner's Abridg. 310, 311.

The modern doctrine on this subject is well expressed in the opinion of Mr. Justice Miller in *Sawyer* v. *Hoag*, 17 Wall. 610, 620, where he says: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business

world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." See also *Wood* v. *Dummer*, 3 Mason, 308: *Briggs* v. *Penniman*, 8 Cowen, 387; *S. C.* 18 Am. Dec. 454.

II. To be entitled to reach this trust fund, a creditor need only show that he has exhausted his legal remedies against the company itself.

It has always been well understood that a court of equity will not entertain jurisdiction of a case where there is a complete remedy at law. It is for this reason that a creditor of a corporation must show that he has exhausted his remedy at law before he can successfully invoke the aid of a court of equity.

III. The National Tube Works Company has exhausted its remedies at law against the Wiley Construction Company, and is entitled therefore to the assistance of a court of equity in collecting the unpaid stock subscriptions of the latter company to pay its debts.

In pursuit of its remedy at law the National Tube Works Company has done the following things: (1) It has brought and prosecuted to judgment an action on its claim against the Wiley Construction in the Superior Court of Hartford County, Conn. This judgment has been affirmed on appeal by the Supreme Court of that State: (2) Upon the judgment so obtained it caused an execution to be issued to the sheriff of Hartford County, where the Wiley Construction is located and does its business, and where presumably all of its property, if it has any, may be found: (3) This execution has been returned *nulla bona* and the judgment has never been paid: (4) It has discovered equitable assets that cannot be reached by execution, viz., unpaid subscriptions of a stockholder.

This stockholder resides, however, in New York City out of the reach of any ancillary process that may issue from the court wherein the judgment was obtained. The complainant cannot sue the Wiley Construction Company in the courts of New York State, because those courts have no jurisdiction over

controversies between two foreign corporations where the cause of action arose in another State — as in this case, where the cause of action arose in Connecticut. N. Y. Code Civ. Proc. § 1780.

The question is, has the complainant exhausted its remedy at law sufficiently to authorize its application to a court of equity to reach these unpaid subscriptions? Defendant's counsel says no; he insists that the complainant should have obtained judgment in the courts of New York State against the company and issued execution thereon before he could maintain this suit. He contends that a judgment in a Connecticut court is for all purposes only a foreign judgment in any Circuit Court of the United States out of the District of Connecticut, and that an action of this character can be based only on a domestic judgment.

Appellant contends that the true rule in this class of cases is merely that the legal remedies should be exhausted; that the obtaining of a judgment and the issue of an execution and its return unsatisfied, is conclusive proof that the legal remedies have been exhausted, but is not the only proof of that fact, and that where it is shown to be impossible, as in this case, or even where it is useless, as in cases of notorious insolvency, a court of equity will not require a creditor to obtain a judgment before permitting him to follow the equitable assets of his debtor.

We believe that an examination of the authorities will confirm the reasoning and position of the appellant. *Adsit* v. *Butler*, 87 N. Y. 585; *Estes* v. *Wilcox*, 67 N. Y. 264; *Shellington* v. *Howland*, 53 N. Y. 371; *Kincaid* v. *Dwinelle*, 59 N. Y. 548; *Terry* v. *Tubman*, 92 U. S. 156; *McCartney* v. *Bostwick*, 32 N. Y. 53; *National Tradesmen's Bank* v. *Wetmore*, 124 N. Y. 241. These cases furnish a fair illustration of the many various instances where a court of equity has afforded a creditor relief, when the usual condition precedent of judgment obtained and execution returned *nulla bona* has not been complied with, and from an examination of these cases it is not difficult to deduce the correct general rule that should govern a court of equity in deciding whether to entertain a

so-called creditor's bill. It is this: The complainant must do all that he can at law to obtain his rights; if he is then still without remedy, a court of equity will entertain his case. *Case* v. *Beauregard*, 101 U. S. 688.

IV. All the facts requisite to give a court of equity jurisdiction of this case appear in the bill of complaint; and the complaint is otherwise sufficient.

The action was begun upon the authority of *Hatch* v. *Dana*, 101 U. S. 205; and the bill of complaint herein is modelled upon the bill of complaint in that suit, and the sufficiency of it is supported thereby.

Mr. Thomas Thacher for appellee.

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

In his opinion in the case, Judge Wallace states that he sustains the demurrer on the authority of his decisions in *Claflin* v. *McDermott*, 20 Blatchford, 522, 12 Fed. Rep. 375; and *Walser* v. *Seligman*, 21 Blatchford, 130, 13 Fed. Rep. 415; that he feels free to say that he doubts whether those cases did not adopt too technical a view of the right of a creditor, whose judgment has been obtained against his debtor at the place of the latter's domicil, and whose execution has been issued there and returned unsatisfied, to maintain a creditor's bill in a court of another State; and that he may be permitted to express the hope that the present case may be taken to this court for review.

In *Claflin* v. *McDermott*, *supra*, it was held, that a creditor's bill, founded on a judgment recovered against a debtor in a state court in California, would not lie in a Circuit Court of the United States in New York, to set aside a fraudulent transfer of personal property made by the debtor in California, by means of collusive judgments and sales under executions issued thereon, no judgment having been obtained or execution issued in such Circuit Court or in any state court of New York. The case of *Tarbell* v. *Griggs*, 3 Paige, 207, was cited as au-

thority, where the Court of Chancery of the State of New York refused jurisdiction of a creditor's bill filed to obtain satisfaction of a judgment rendered in the Circuit Court of the United States for the Southern District of New York, and upon which an execution had been returned unsatisfied, the judgment being treated as a foreign judgment and as standing on the same footing with the judgments of a court of another State. The principle invoked was, that the plaintiff's remedy at law had not been exhausted by the issuing and return of an execution on a foreign judgment; and *McElmoyle* v. *Cohen*, 13 Pet. 312, was referred to as authority.

In *Walser* v. *Seligman*, *supra*, creditors and stockholders of a corporation organized under the laws of Missouri and Kansas brought a suit in equity, in the Circuit Court of the United States for the Southern District of New York, against certain persons, to enforce the liability of the latter as holders of a number of shares of unpaid capital stock of the corporation, without the corporation being made a party to the suit, and without the plaintiffs being judgment creditors elsewhere than in Missouri; and the court held that, the plaintiffs being merely creditors-at-large, and not having exhausted their remedy at law, in New York, and the Missouri judgments not having in New York the force of domestic judgments, except for the purpose of evidence, the bill would not lie.

The bill in the present case is defective in that respect. It alleges only the recovery of a judgment against the corporation in Connecticut, and the issuing and return there of an execution unsatisfied. It does not allege any judgment in New York or any effort to obtain one, nor does it aver that it is impossible to obtain one. It alleges merely that the corporation has no fund or assets wherewith to pay the claim of the plaintiff.

Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any

court within such jurisdiction. *Taylor* v. *Bowker*, 111 U. S. 110; *Webster* v. *Clark*, 25 Maine, 313; *Parish* v. *Lewis*, Freeman's Ch. 299; *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671; *Dunlevy* v. *Tallmadge*, 32 N. Y. 457; *Terry* v. *Anderson*, 95 U. S. 628; *Smith* v. *Railroad Co.*, 99 U. S. 398, 401; *Hawkins* v. *Glenn*, 131 U. S. 319, 334; *McLure* v. *Benini*, 2 Ired. Eq. 513, 519; *Farned* v. *Harris*, 11 Sm. & Marsh. 366, 371, 372; *Patterson* v. *Lynde*, 112 Illinois, 196.

Decree affirmed.

ROYER *v.* COUPE.

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

No. 82. Argued December 7, 8, 1892. — Decided December 19, 1892.

The claim of letters patent No. 149,954, granted April 21, 1874, to Herman Royer, for an "improvement in the modes of preparing rawhide for belting," namely, "The treatment of the prepared rawhide in the manner and for the purposes set forth," is a claim to the entire process described, consisting of eight steps, including the removal of the hair by sweating.

Having put in a claim, in the course of his application, to the mode of preparing raw-hides by the fulling operation and the preserving mixture, and that claim having been rejected, and then withdrawn; and having also claimed the prepared rawhide as a new article of manufacture, and that claim having been rejected, and then struck out by him; his patent cannot be construed as if it still contained such claims.

As the defendants did not use the sweating process they did not infringe.

THE case is stated in the opinion.

Mr. M. A. Wheaton for appellant.

Mr. Wilmarth H. Thurston for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the District of Massachusetts, by Herman

Royer against William Coupe and Edwin A. Burgess, co-partners under the name of William Coupe & Co., founded on the infringement of letters patent No. 149,954, granted April 21, 1874, to the plaintiff as inventor, for an "improvement in the modes of preparing rawhide for belting," on an application filed December 31, 1872.

The specification of the patent is as follows: "After the removal of the hair from the hide by means of sweating — a process familiar to every tanner — the hide is dried perfectly hard. Then it is inserted in water for ten to fifteen minutes, long enough to lose its extreme stiffness. In this condition the process of fulling is commenced. This may be done in a machine constructed for this purpose and patented by me May 12, 1868, under No. 77,920. Before the hide is passed into the machine the second time it is stuffed with a mixture twenty parts tallow, two parts wood tar and one part resin. About two pounds of this mixture is put on a steer hide in a warm liquid state with a brush. After the hide leaves the machine the second time, it is ready for the next operation. It is then moistened with water four or five times during the day. The next day it is stretched and cut into pieces suitable for belting. For purposes of lacing the thinnest hides are selected, and after they have gone through the same mode of treatment as hides for belting, they are shaved, oiled and hung up to get perfectly dry, when the hide is cut into strings. In order to more fully understand my mode of preparing hides, I avoid the use of lime, acid or alkali, for just to the amount a hide is impregnated with such substances it suffers in its tensile strength and toughness; a slow but constant dissolution is going on with hides so impregnated. If the effects of the aforesaid substances are in some way neutralized, which must be a chemical one, the hide suffers again in this process. The power to resist abrasion, and the extreme tensile strength for which pure rawhide is noted, are irreparably lost. [I am aware that hides and skins have been prepared by a fulling or bending operation to render them pliable, but this mode alone does not answer for the preparation of machine belts and lacing. It is necessary to make use of a preparation substan-

tially such as before described to render the rawhide fit for use and durable.] The tallow has the effect of imparting a high degree of elasticity and keeps the moisture. The wood tar prevents dogs, cats, mice, vermin, etc., from attacking the hide, at the same time causing the tallow to enter the hide quickly and thoroughly. The resin gives the belting a certain solidity and glossy appearance, and assists also in preventing animals and vermin from attacking the belting. Belts and lacing made of such prepared hide are in all respects stronger, more lasting and cheaper than those made from common leather."

The claim is as follows: "The treatment of the prepared rawhide in the manner and for the purposes set forth."

The bill of complaint is in the usual form. The answer sets up want of novelty and non-infringement. It also avers that the process set forth in the patent is composed of a series of steps, consisting of (1) the removal of the hair from the hide by means of sweating; (2) drying the hide perfectly hard; (3) then softening the hide slightly by soaking in water; (4) fulling the hide; (5) stuffing the hide with twenty parts of tallow, two parts of wood tar, and one part of resin; (6) fulling the hide a second time; (7) repeated moistenings with water; and (8) stretching and cutting into belting. It avers that the supposed importance of the plaintiff's alleged invention is the avoidance of the use of lime, acid or alkali in the treatment of the hides, and the consequent avoidance of the use of any chemical agents to neutralize the action of such lime, acid or alkali; that the process employed by the defendants is substantially different from that of the patent; that the process of removing hair by sweating the hide was known and practised long before the supposed invention of the plaintiff; that the process of fulling hides is indispensable, and has been practised ever since the art of tanning and curing hides was known; that the process of stuffing hides with tallow and greasy substances, and with various admixtures of resinous substances, tallow and other materials, had been known from the earliest days of the art of manufacturing leather; and that a patent was granted to the defendant William Coupe,

No. 182,106, September 12, 1876, for an improvement in processes for the manufacture of rawhide, under which the defendants carry on their manufacture, and make a different product from that produced by the process of the plaintiff's patent. Issue was joined, proofs were taken, and the Circuit Court entered a decree in March, 1889, dismissing the bill, with costs. The plaintiff has appealed to this court.

The opinion of the Circuit Court is reported in 38 Fed. Rep. 113. It held that the process of the patent consisted of the series of eight steps above set forth in the answer. It considered the questions whether the claim was intended to cover all, or only a part, of the eight successive steps; and whether it meant the method of preparing rawhide in the manner set forth, or whether the words in the claim, "prepared rawhide," signified a hide which had been subjected to one or more of the eight steps, and the claim was limited to the subsequent steps of the process. The court went on to say that that inquiry was important because, if the claim covered all of the eight steps, the defendants did not infringe it, for the reason that they did not use the first step of the process, namely, the removal of the hair from the hide by means of sweating, they making use, for that purpose, of the liming process, which the plaintiff stated in his specification must be avoided. The court held that the claim covered, and was intended to cover, the whole treatment described by the plaintiff, and not a part of that treatment; that the claim meant the same as if it read "the method of preparing rawhide in the manner set forth;" and that the words "prepared rawhide" meant the finished product, and not the hides subjected to one or more of the steps of the process described. The court then referred to the contents of the file-wrapper of the case in the Patent Office, as throwing light upon the real scope of the patent.

The specification, as originally filed, contained, in its descriptive part, substantially the same description as the patent when issued; but the claim originally made was in these words: "The use of a mixture of wood tar, resin and tallow, applied to hides made into leather by a mechanical process, substan-

tially as and for the purpose herein set forth." The application was rejected January 4, 1873, on the ground that the combination of ingredients set forth, that is, wood tar, resin and tallow, had been applied to leather for similar purposes, as shown in a patent and a rejected application referred to. On June 10, 1873, the specification was amended by inserting the two sentences which are contained in brackets in the specification as hereinbefore set forth, the claim was erased, and the following two claims were inserted in its place: "First. The mode herein specified of preparing rawhides for machine belts, lacing or ropes by the fulling or bending operation and the preserving mixture, substantially as set forth. Second. A belt or rope of rawhide prepared in the manner and with the materials specified, as a new article of manufacture." The application was again rejected, June 16, 1873, in a communication from the Patent Office, which stated that the only feature of novelty presented which was not embraced in a patent granted May 12, 1868, to Herman Royer and Louis Royer, No. 77,920, for an improved machine for treating hides was the addition to the compound, of tar and resin, as ingredients for preserving leather; and reference was made to another prior patent, granted to another person, as embracing such ingredients; and it was stated that the use of the compound claimed by the plaintiff in the manufacturing process would not leave a distinguishable feature in the article when placed upon the market.

The patent of May 12, 1868, thus referred to, is the same patent of that date mentioned in the specification of the patent now in suit. The specification of No. 77,920 says: "The nature of our invention is to provide an improved machine for converting rawhides into leather, of that class which is used for belting, lacings and other purposes where it is necessary to preserve the native strength and toughness without destroying or impairing the natural fibres or grain of the leather. In order to accomplish our object, we employ a machine mounted on a suitable frame, having a vertical slotted shaft, to which is attached, at its base, a bevelled wheel between two bevelled pinions upon a horizontal shaft.

Around the vertical shaft is placed a row of vertical pins or rollers, held in place by upper and lower rings, one of which is firmly bolted to the frame. An iron weight or press is employed for crowding the coil of hide down after it has received the forward and back action around the shaft." The specification describes the operation of the machine as being, that the end of the rawhide, after it has been deprived of the hair, is introduced into a slot in the vertical shaft, and set-screws are turned against it, when motion is imparted to the machine, and the hide is wound tightly around the shaft; that, when this is accomplished, and sufficient time has elapsed, the shaft is slowly reversed by throwing a second bevelled pinion into gear, when the hide commences to uncoil or double back from the shaft, which, with the folding back and pressing against vertical pins or rollers, produces the desired result of stretching in one way, and compressing, corrugating or roughing in the opposite direction. The specification further says: "The hide so operated upon is then treated with oil and tallow in the usual way." The process of the machine of patent No. 77,920 is called in the specification of No. 149,954, "the process of fulling."

In a communication from Royer's attorney to the Patent Office, of October 9, 1873, it is stated that the material prepared according to the plan of Royer, set forth in his application for No. 149,954, is a superior article; that the use of tallow and tar upon leather was old, but rawhide fulled was not leather; and that the materials named acted with the rawhide very differently from what they did with leather. The same communication erased the second claim introduced June 10, 1873, namely, "Second. A belt or rope of rawhide prepared in the manner and with the materials specified, as a new article of manufacture." In response to that letter, the Patent Office, on October 17, 1873, informed Royer, that, independently of the process set forth in patent No. 77,920, "for which protection has already been granted," a claim for the treatment of rawhide in the manner described in the specification then pending might receive favorable consideration, and that the body of the specification should be amended

with the view of presenting a claim of the character referred to. On the 29th of October, 1873, Royer amended his specification in certain particulars, erased the remaining claim and inserted the claim contained in the patent as issued. On the 12th of November, 1873, in compliance with the suggestion of the Patent Office, Royer further amended his specification, and the patent was issued, the final fee not having been paid until April 16, 1874.

The opinion of the Circuit Court states, that on June 10, 1873, as appeared by the file-wrapper and contents, the plaintiff sought to limit his claim to a method of preparing rawhide for belting by the fulling and bending operation and the preserving mixture; that that claim was rejected, and he acquiesced in the decision; that the Patent Office intimated that a claim for the treatment of rawhide in the mode described in his patent might be allowed; that the plaintiff accordingly amended his specification and claim in conformity with that suggestion, and the patent was consequently granted; that in view of the prior state of the art, the plaintiff was not entitled to a broad claim for a process which should embrace only the fulling and bending operation and the preserving mixture composed of tallow, tar and resin, for both of these things, as applied to converting hides into leather, were old; that it followed that the only subject-matter of invention which the plaintiff could properly claim was the whole process described in his patent, comprising the different steps therein set forth; that the most that could be said of the plaintiff's patent was that it was for an improved process; that, in that view, it must be shown that the defendants used all the different steps of that process, or there could be no infringement; that the defendants did not use the sweating process, which was the first step in the plaintiff's treatment, and therefore did not infringe; that the patent had been construed by Judge Drummond, in the Circuit Court of the United States for the Northern District of Illinois, in *Royer* v. *Chicago Manufacturing Co.*, 20 Fed. Rep. 853, in which it was said: "If this is a valid patent for a process, it must be limited to the precise, or certainly, substantial, description which has been given in the

specifications; and, in order to constitute an infringement of that process a person must be shown to have followed substantially the same process, the same mode of reaching the result as is described in the specifications;" that the court agreed with that conclusion; that if the contention of the counsel for the plaintiff were correct, that the plaintiff had invented an entirely new process, which had revolutionized the art of preparing rawhide for belting and other purposes, it might be that the court ought to give that broad construction to the patent which was justified in the case of a foundation patent; but that when, as in this case, all the substantial steps in the process were old, the utmost that the plaintiff was entitled to was protection against those who used, in substance, his precise process.

We are of opinion that the views set forth by the Circuit Court are sound, and that the decree must be affirmed. The words in the claim, "prepared rawhide," refer to the completed article as prepared for final use by the treatment set forth in the specification; and the claim is one for the treatment or process by which rawhide is put into the condition resulting from the treatment it receives by the entire process applied to it. After the hair is removed from the hide by the process of sweating, and it has afterwards lost its stiffness by being inserted in water, it is subjected to "the process of fulling," with a mixture of tallow, wood tar and resin applied to it. The specification states, in substance, that Royer's mode of "preparing hides" comprehends, as a part of such mode, the sweating of the hides, because the specification states that in such mode of "preparing hides" he avoids "the use of lime, acid or alkali." Therefore, the sweating must necessarily be included as a part of the preparation "of the prepared rawhide" mentioned in the claim, and therefore is a part of "the treatment" claimed.

The plaintiff contends that the treatment covered by the claim consists only in subjecting rawhide to a fulling process, and, at the same time, by the same mechanical action, working into it the stuffing composed of tar, resin and tallow, and that he was the first to manufacture rawhides into a new article of commerce, called "fulled rawhide."

If the plaintiff did make such an invention, and was entitled to claim a patent for it, he has failed to secure such a patent. On June 10, 1873, he put in a claim to the mode of preparing rawhides by the fulling operation and the preserving mixture. That claim was rejected by the Patent Office, and he withdrew it on October 29, 1873. Nor can he, under the present patent, claim as a new article of manufacture the rawhide thus prepared; for he made that claim on June 10, 1873, it was rejected, and he struck it out on October 9, 1873.

It is well settled, by numerous cases in this court, that under such circumstances a patentee cannot successfully contend that his patent shall be construed as if it still contained the claims which were so rejected and withdrawn. *Roemer* v. *Peddie*, 132 U. S. 313, 317, and cases there cited. The principle thus laid down is, that where a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. See, also, *Phœnix Caster Co.* v. *Spiegel*, 130 U. S. 360, 368; *Yale Lock Co.* v. *Berkshire Bank*, 135 U. S. 342, 379; *Dobson* v. *Lees*, 137 U. S. 258, 265.

The present patent was under consideration in *Royer* v. *Schultz Belting Co.*, 40 Fed. Rep. 158, in October, 1889, in the Circuit Court of the United States for the Eastern District of Missouri, where Judge Thayer took the same view of it that was taken by Judge Colt in the present case, and held that the claim of the patent did not cover broadly the method of making belting-leather by stuffing the rawhide by means of a fulling machine, with a mixture composed of tallow, wood tar and resin, and that, as the defendants in that case did not use the sweating process, but used the liming process, they did not infringe. Judge Thayer gave much force to the proceedings in the Patent Office, as showing that Royer modified his claim, which was so worded as to cover the stuffing process with the preserving mixture, and put his claim into its present form, solely in view of a communication from the Patent Office to

the effect that the whole method described by him of making belting-leather out of green hides might be patentable, thus indicating the extent of the monopoly intended to be granted.

As the defendants in the present case do not use the sweating process, but use the liming process, it follows, under the proper construction of the claim of the patent, that they do not infringe.

Decree affirmed.

CAMERON *v.* UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 42. Argued November 14, 15, 1892. — Decided December 19, 1892.

The writ of error in this case is dismissed because it does not appear that the jurisdictional amount is involved.

THIS was a proceeding by the United States to compel the defendant to abate a wire fence, by which he was alleged to have inclosed a large tract of public lands, belonging to the United States, and subject to entry as agricultural lands, in violation of the act of February 25, 1885, 23 Stat. 321, c. 149, to prevent the unlawful occupancy of public lands. The first section of the act reads as follows: "All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected or constructed by any person, . . . to any of which land included within the inclosure the person . . . making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United

States in any State or any of the Territories of the United States, without claim, color of title or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

The answer denied in general terms that the defendant had inclosed any of the public lands without any title or claim or color of title, acquired in good faith thereto, or without having made application to acquire the title thereto, etc. The answer was subsequently amended by setting up a Mexican grant of the lands in question, and an application then pending before Congress for the confirmation of such grant. Upon the trial, the court found the issue in favor of the United States, and decreed that the inclosure was of public land, and was, therefore, unlawful, and rendered a special judgment in the terms of the act, that the fence be removed by the defendant within five days from date, and if defendant fail to remove said fence, that the same be destroyed by the United States marshal, etc.

Defendant thereupon appealed to the Supreme Court of the Territory, by which the judgment was affirmed. Defendant was then allowed an appeal to this court.

Mr. Rochester Ford and *Mr. James C. Carter* for appellant.

Mr. Solicitor General for appellee. *Mr. William H. Barnes* filed a brief for same.

Mr. Justice Brown delivered the opinion of the court.

By the act of March 3, 1885, 23 Stat. 443, c. 355, "no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity . . . in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." The proceeding in this case was a special one to compel the abatement and destruction of a wire fence, with which the defendant was alleged to

enclose 800 acres of the public lands of the United States, without title or claim or color of title thereto, acquired in good faith. Defendant's answer was a general denial of the fact, and in an amended answer he set forth the title claimed by him. The question at issue between the parties, then, was whether the defendant had color of title to the lands in question, acquired in good faith. Defendant justified under a Mexican grant of "cuatro sitios de tierra para cria de ganado mayor," (literally, four places or parcels of land for the raising of larger cattle,) and the case turned largely upon the question whether, under the laws, usages and customs of the country and the local construction given to these words, a grant of four square leagues or four leagues square was intended. The court found for the United States, and held that the defendant had no colorable title to the four leagues square which he had fenced.

We are of the opinion that this case must be dismissed for want of jurisdiction by this court. The only evidence that it involves the requisite jurisdictional amount consists of three affidavits of persons who swear they are acquainted with the property in dispute, and that the value of said property is more than $5000; and the finding of the Chief Justice in his allowance of an appeal, that the property in controversy in this action exceeds in value this sum. This evidently refers to the value of the land inclosed by the fence in question. It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case. Had the defendant succeeded in the action he would not have established a title to the property, but a color of title to it, and the adjudication would have been of no value to him, except so far as to permit the fence to stand. He could not have made it the basis of an action of ejectment or other proceeding to test his actual title to the premises in question. If the proceeding be considered as one involving the value of the fence only, it is also sufficient to say there is no evidence of such value.

Syllabus.

Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5000 shall not apply to any case "in which is drawn in question the validity of a . . . statute of or an authority exercised under the United States;" since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute, or an authority exercised, under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the validity of a statute, but merely as to the application of the statute to this case.

The appeal is, therefore,

Dismissed.

McGOURKEY *v.* TOLEDO AND OHIO CENTRAL RAILWAY COMPANY.

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

No. 35. Argued November 4, 1892. — Decided December 19, 1892.

On the 2d of April, 1884, M. filed a petition to intervene in a suit which had been commenced January 2, 1884, for the purpose of foreclosing a mortgage on a railroad. A receiver had been appointed and was in possession of the road and rolling stock. The intervenor claimed title to a large part of the latter. The petition prayed (1) that the receiver perform all the covenants of the lease, and pay all sums due, etc.; (2) or that he be directed to deliver to petitioner the rolling stock in order that the same might be sold; (3) that he be directed to file a statement of the number of miles run, and of the sums received for the use of such rolling stock; (4) that it be referred to an examiner to take testimony and report the value of the use of such rolling stock while in the custody of the receiver, and that the receiver be directed to pay the amount justly

Statement of the Case.

due, etc. On the 10th of December, 1884, a decree of foreclosure and sale of the railroad and after acquired property was entered. On the 9th of June, 1885, a decree was rendered upon the intervening petition ordering the receiver to deliver up to the petitioner certain cars and locomotives to be sold. On the 14th of August, 1886, answers were filed, under leave, to the intervening petition, setting up title in the respondents to the rolling stock. The court found against the intervenor as to most of the stock, and his petition was dismissed. *Held*, that the decree of June 9, 1885, was not a final judgment.

If a court make a decree fixing the rights and liabilities of the parties and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court, and for a judicial purpose, the decree is not final.

The cases respecting final and interlocutory judgments, and the distinction between them, reviewed.

Any arrangement by which directors of a corporation become interested adversely to the corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is a party, are looked upon with suspicion.

On all the facts in this case, as detailed in the opinion of the court, *infra*, *Held:*

(1) That the contracts with the trustee for the holders of the car-trust certificates was voidable at the election of the corporation;

(2) That it was in law a purchase by the railway of the rolling stock in question;

(3) That the device of the certificates was inoperative to vest the legal title in the petitioner, or to prevent the lien of the railway mortgage from attaching to it, or to prevent the delivery of the rolling stock to the road;

(4) That being the property of the road the petitioner was not entitled to rent;

(5) That the leases might be treated as mortgages, and that the petitioner's interest thereunder was subordinate to that of the mortgage bondholders;

(6) That the transaction, though not an actual fraud, was a constructive fraud upon the mortgagees.

THESE were two intervening petitions, filed by McGourkey as trustee for the holders of certain car-trust certificates, to compel the performance, by the receiver of the defendant railway company, of the covenants of certain leases made by the petitioner with said company, or the delivery by the receiver

to the petitioner of a large amount of rolling stock described in these leases, in order that the same might be sold, and for an account and payment of the rental value of such rolling stock, while in the custody of such receiver.

On January 7, 1884, the Central Trust Company of New York filed its bill in equity in the Circuit Court of the United States for the Northern District of Ohio, for the foreclosure of a certain mortgage for $3,000,000, for non-payment of interest, the mortgage covering not only the line of the railroad between the terminal points, but the rolling stock, "together with all the engines, cars, machinery, supplies, tools and fixtures, now or at any time hereafter held, owned or acquired by the said party of the first part for use in connection with its line of railroad aforesaid." There was also a covenant for further assurance applicable to "all such future acquired depots, grounds, estates, equipments and property as it may hereafter from time to time purchase for use in and upon said line of railroad, and intended to be hereby conveyed." Upon the filing of the bill, the railroad company entered its appearance, waived a subpœna, and consented to the appointment of a receiver; and upon the same day, John E. Martin was appointed receiver with the usual powers in such cases.

On April 2, 1884, the petitioner, George J. McGourkey, intervened by leave of the court and filed two petitions based upon three car-trust leases known as Lease A, Lease B No. 1, and Lease B No. 2. The first petition represented that the agreement known as Lease A was entered into on August 20, 1880, whereby the railroad company agreed to hire from petitioner, as trustee, 800 coal cars and 14 locomotives for a period of ten years from the date of their delivery to the company, the company agreeing to pay as rent $100,000 on their delivery, and in addition thereto $40,000 per year, with interest at the rate of 8 per cent; that in case of default in payment of rent, petitioner might, at his option, remove such locomotives and cars, sell them at public or private sale, apply the proceeds to the payment of any instalment of rent and interest not theretofore paid, for the whole term, whether such

instalment was due or not, the surplus to be paid to the company; but if the proceeds should not be sufficient to pay the expense of removal and sale, together with the rent and interest, the company was to pay the petitioner the difference. That under this agreement he delivered 14 locomotives marked "Ohio Central Car Trust," numbered 17 to 30 inclusive; also 800 coal cars, bearing the same marks; that the company defaulted in the payment of interest; and that petitioner demanded possession of the cars and locomotives, and was placed in possession of the same, but they afterwards passed into the possession of the receiver, who refused to deliver them up without the authority of the court. There were other covenants in the lease, a copy of which was annexed to the petition as an exhibit, not necessary now to be mentioned.

The second intervening petition was based upon car-trust Leases B No. 1 and B No. 2, copies of which were attached to the petition as exhibits. Lease B No. 1 bore date March 1, 1881, and embraced 1400 coal cars. Lease B No. 2 bore date March 1, 1882, and embraced 2500 coal cars, including the 1400 covered by Lease B No. 1; also 340 box cars and 13 locomotives. The two leases attached to this petition were not substantially different from Lease A in their general provisions. Both provided for the leasing of equipment not then in existence, bearing the numbers set out in the schedule thereto attached, to be delivered "as per the contract of the said McGourkey with the said makers." Leases A and B No. 1 provided that the railroad company might, for convenience, make the contract for the rolling stock directly with the makers. Lease B No. 2 also provided that the railroad company might, for convenience, "make the contracts for delivery direct with the makers of said locomotives and cars, but so as in no way to affect the title of said party of the first part to said equipment." All the leases provided that at all times the name, number and plate, or other signs of ownership of the said trustee, viz., "'Ohio Central Car Trust,' or the initials, to wit, 'O. C. C. T.,' shall be affixed and retained upon each of the cars aforesaid for the purpose of making the ownership known, and in the event of any such marks or sign being

destroyed, the Ohio Central Railroad Company will immediately restore the same, and that such other things shall be done as by the counsel of said trustee shall be deemed necessary and expedient for the full and complete protection of the rights of said trustee as the owner of said cars for the benefit of the holders of said obligations." Neither of these leases was ever recorded.

On December 10, 1884, a decree of foreclosure and sale was entered, describing the property mortgaged as composed of the railroad between the specific termini, together with the after-acquired property, in the language in which the same was described in the mortgage. The property was bid in by a committee of the bondholders, who, with some of the stockholders, proceeded to reorganize the road under the name of the Toledo & Ohio Central Railway Company, the real defendant in this proceeding.

On June 9, 1885, a decree was rendered upon the intervening petitions of McGourkey, purporting to be after due proof of service of notice upon the Central Trust Company, the Ohio Central Railroad, and the receiver. By this decree the receiver was ordered to deliver up to McGourkey the cars and locomotives described in said Lease A and said Leases B, at convenient points to be designated by petitioner, being in all 27 locomotives, 340 box cars and 3300 coal cars. The equipment was redelivered to McGourkey in pursuance of this order, and was by him, after leases of portions to the Baltimore and Ohio Railroad and the Toledo & Ohio Central Railway Companies, respectively, all sold at public auction for the benefit of his fiduciaries in December, 1885.

On August 14, 1886, the Toledo & Ohio Central Railway Company, and on the 1st of October, 1886, the Central Trust Company, answered under leave of the court the intervening petitions of McGourkey, averring that the locomotives and cars were sold and were paid for by the Ohio Central Railroad Company, and passed under and became subject to its mortgage; that they were sold under the decree of foreclosure, and duly conveyed to the purchasing trustees, and thereby the leases from McGourkey became inoperative and of no effect;

that the purchasing trustees afterwards transferred all their right, title and interest in the same to the Toledo & Ohio Central Railway Company; and that the same are now the property of such company. The answer closed with a prayer that both said leases and agreements be declared null and void; that McGourkey might be decreed to have no title or interest in said rolling stock; and that the railway company be put in possession thereof. The answer of the railway company was much more specific in its details, setting forth particularly how the same had been purchased and paid for.

On June 7, 1887, the special master filed his report, to which exceptions were filed by McGourkey to the amount allowed; and by the Toledo & Ohio Central Railway Company and the receiver to the special findings of facts, and also to the amount allowed.

The case subsequently came before the court upon exceptions to the report of the special master. The court found against the title of McGourkey to most of the property, and that, so far as he had established any right to, or lien upon, the rolling stock, it appeared that he had already been paid therefor by the company and the receiver more than he was entitled to, and his exceptions were, therefore, overruled and his petitions dismissed. 36 Fed. Rep. 520. McGourkey thereupon appealed to this court. The material facts are fully stated in the opinion of the court, [see *infra*, pages 553 to 563].

Mr. George Hoadly and *Mr. Fisher A. Baker* for appellant, upon the question of estoppel.

Appellees are estopped to dispute appellant's title.

The decree of June 9, 1885, was made upon the intervening petitions of McGourkey, filed more than fourteen months previously, and on "due proof of service of notice of application for an order granting the prayer of said petition on the Central Trust Company of New York, the Ohio Central Railroad and on J. E. Martin, Esq., Receiver," and after hearing counsel for the receiver and the Central Trust Company. At that time the Toledo & Ohio Central Railroad Company was not a party to the cause, or interested in the property.

This decree was final, between the parties, as to the title and right of possession of the engines and cars. It left no open question; it granted the prayer of the intervening petitions. It was submitted on argument, counsel for the receiver and the Central Trust Company having been heard in opposition to the decree, and it finally disposed of all that part of the case which involved the title to the equipment and the right to receive rental for its use by the receiver, leaving for future consideration only the question how much additional rental would justly be payable. It is within the principles laid down in the case of the *Central Trust Company* v. *Grant Locomotive Works*, 135 U. S. 207. It has never been appealed from, and required and bound the learned Judge of the Circuit Court, on the principles established in that case, to proceed to hear and determine, upon the report of the master, what a fair compensation for the rental would be, and did not justify him in disregarding the report of the master, and determining that appellant under no circumstances was entitled to any compensation, or in reopening the question of title, as he attempted to do by the leave given to the Central Trust and the Toledo & Ohio Central Railway Companies to file such additional pleadings, "as in their judgment may be necessary to enable them to recover the rolling stock, cars and engines in the pleadings mentioned, or the value thereof."

It is proper, however, to say that the case of the *Central Trust Company* v. *The Grant Locomotive Works*, was decided by this court April 21, 1890; that at the time of Judge Jackson's decree in this case, Judge Baxter's order, which was reversed in that case, was in force, and was supposed to establish the law within the Sixth Circuit, so that the question of the conclusiveness and binding effect of the decree of June 9, 1885, could not, and did not, receive the consideration at the hands of counsel, or of his Honor, Judge Jackson, that it would have done at a later date.

The decree directing the delivery of possession to McGourkey could be changed or modified only upon petition for rehearing filed during the same term of the court, or upon appeal to this court, or by bill of review. In *Forgay* v. *Con-*

rad, 6 How. 201, 204, it was held that: "When the decree decides the right to the possession of the property in contest, and directs it to be delivered up by the defendant to the complainant, . . . and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, . . . although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

In *Thomson* v. *Dean*, 7 Wall. 342, the court reaffirmed the rule laid down in *Forgay* v. *Conrad*. An order to deliver up stock was held final in this case, although an account was decreed to be taken as to the amount paid and to be paid for the stock, and as to dividends.

In *St. Louis, Iron Mountain & Southern Railroad* v. *Southern Express Co.*, 108 U. S. 24, two questions were presented: first, whether the railroad was obliged to do certain transportation in question, and secondly, what was a reasonable compensation *pendente lite*. The decree required the railroad company to do the express company's business at reasonable rates. This was held to be final, to which was added, "Matters relating to the administration of the cause, and accounts to be settled in accordance with the principles fixed by the decree are incidents of the main litigation which may be settled by supplemental order after final decree." See also *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Grant* v. *Phœnix Insurance Co.*, 106 U. S. 429.

In *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180, Chief Justice Waite (page 184) cites with approval the words of Mr. Justice McLean in *Craighead* v. *Wilson*, 18 How. 201, to the effect that:

"The decree is final 'on all matters within the pleadings,' and nothing remains to be done but to adjust the accounts between the parties growing out of the operations of the defendants during the pendency of the suit." See also *Hill* v. *Chicago & Evanston Railroad*, 140 U. S. 52; *Lewisburgh Bank* v. *Sheffey*, 140 U. S. 445.

We respectfully submit that it would be the height of bad faith now to allow the Toledo & Ohio Central Railroad Company — the prayer of McGourkey's petition having been granted, the equipment having been placed in his possession for sale, in accordance with the terms of his lease, no appeal having been taken from the decree, part of the equipment having been leased to it, and the whole sold at auction in December, 1885, and dispersed, — to claim that all the while, and notwithstanding the decree, the equipment remained the property of the Ohio Central Railroad Company, or subject to the prior lien of the Central Trust Company, whose counsel were heard in opposition to the decree, and passed to the Toledo & Ohio Central Company, by a sale confirmed, and in pursuance of a deed executed after the date of this decree, and while McGourkey was in possession of the engines and cars and engaged in the execution of the decree.

Mr. Stevenson Burke, for appellees.

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

The controversy in this case turns principally upon the title of the petitioner McGourkey to the rolling stock in question, and upon the relative priorities of the holders of the car-trust certificates, whom he represents, and the purchasers of the railway, who succeeded to the rights of the first mortgagees under the after-acquired property clause of the mortgage.

(1) We are confronted upon the threshold of the case with the proposition that the decree of June 9, 1885, ordering this property to be turned over by the receiver to the petitioner, was a final decree, which it was not in the power of the court at a subsequent term to disturb, and hence that the court was estopped to render the decree of February 4, 1889, from which this appeal was taken, at least in so far as it assumed to upset the title of McGourkey.

Probably no question of equity practice has been the sub-

ject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from decrees claimed to be interlocutory, but it has occasionally happened that the power of the court to set aside such a decree at a subsequent term has been the subject of dispute. The cases, it must be conceded, are not altogether harmonious. Upon the one hand it is clear that a decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage. *Ray* v. *Law*, 3 Cranch, 179; *Whiting* v. *Bank of the United States*, 13 Pet. 6; *Bronson* v. *Railroad Co.*, 2 Black, 524. If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold ascertained and defined, it is not final. *Railroad Co.* v. *Swasey*, 23 Wall. 405; *Grant* v. *Phœnix Insurance Co.*, 106 U. S. 429. A like result follows if it merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report. *Burlington, Cedar Rapids &c. Railway* v. *Simmons*, 123 U. S. 52; *Parsons* v. *Robinson*, 122 U. S. 112.

It is equally well settled that a decree in admiralty determining the question of liability for a collision or other tort, (*The Palmyra*, 10 Wheat. 502; *Chace* v. *Vasquez*, 11 Wheat. 429; *Mordecai* v. *Lindsey*, [*The Mary Eddy*,] 19 How. 199,) or in equity establishing the validity of a patent and referring the case to a master to compute and report the damages, is interlocutory merely. *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106.

It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. *Craighead* v. *Wilson*, 18 How. 199; *Beebe* v. *Russell*, 19 How. 283.

But even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final. *Craighead* v. *Wilson*, 18 How. 199; *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180.

In the case under consideration the petitioner prayed for four distinct reliefs:

1. That the receiver perform all the covenants of the lease, and pay all sums due, etc.;

2. Or that he be directed to deliver to petitioner the rolling stock in order that the same might be sold;

3. That he be directed to file a statement of the number of miles run, and of the sums received for the use of such rolling stock;

4. That it be referred to an examiner to take testimony and report the value of the use of such rolling stock while in custody of the receiver, and that the receiver be directed to pay the amount justly due, etc.

The decree followed the general terms of the petition by ordering the rolling stock claimed to be delivered to McGourkey, and referring the case to a special master to determine the rental of the same while used by the receiver; the value of the rolling stock over and above the sums paid by the receiver to the petitioner while the same was in the custody of the receiver; the number of miles run by the receiver; the money received for the use of the same by other roads; the loss, damage, and destruction to the same while in the custody of the receiver; and also to "determine and report upon *all questions and matters of difference* between said receiver and said McGourkey, growing out of the use and restoration of said cars and locomotives." It is claimed that inasmuch as the court granted the prayer of the petitioner, and turned the property over to him, it was a final adjudication of his right to the same, notwithstanding the reference to a master for an accounting; and we are referred to certain cases in this court as sustaining this contention.

In *Forgay* v. *Conrad*, 6 How. 201, the object of the bill was

to set aside sundry deeds for lands and slaves, and for an account of the rents and profits of the property so conveyed. The court entered a decree declaring the deeds fraudulent and void, directing the property to be delivered up to the complainant, directing one of the defendants to pay him $11,000, and "that the complainant do have execution for the several matters aforesaid." The decree then directed that the master take an account of the profits. Under the peculiar circumstances of the case the decree was held to be appealable, although, said Chief Justice Taney, "Undoubtedly it is not final in the strict technical sense of that term." The opinion was placed largely upon the ground that the decree not only decided the title to the property in dispute, but awarded execution.

In the very next case, *Perkins* v. *Fourniquet*, 6 How. 206, where the Circuit Court decreed that complainants were entitled to two-sevenths of certain property, and referred the matter to a master to take an account of it, the decree was held not to be final. And again in the next case, *Pulliam* v. *Christian*, 6 How. 209, a decree setting aside a deed by a bankrupt, directing the trustees under the deed to deliver up to the assignee all the property in their hands, and directing an account to be taken of the proceeds of sales previously made, was also held not to be a final decree. Indeed, the case of *Forgay* v. *Conrad* has been generally treated as an exceptional one, and, as was said in *Craighead* v. *Wilson*, 18 How. 199, 202, as made under the peculiar circumstances of that case, and to prevent a loss of the property, which would have been disposed of beyond the reach of an appellate court before a final decree adjusting the accounts could be entered. A somewhat similar criticism was made of this case in *Beebe* v. *Russell*, 19 How. 283, 287, wherein it was intimated that the fact that execution had been awarded was the only ground upon which the finality of the decree could be supported.

In *Thomson* v. *Dean*, 7 Wall. 342, the decree directed the defendant to transfer to the plaintiff certain shares of stock, and that an account be taken as to the amount paid and to be

paid for the same, and as to dividends accrued. But this was held to be a final decree upon the ground that it changed the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. In this case the court did distinctly approve of *Forgay* v. *Conrad*, although the decree was put upon the ground that it decided finally the right to the property in contest.

In *Winthrop Iron Company* v. *Meeker*, 109 U. S. 180, a bill was filed to set aside as fraudulent the proceedings of a stockholders' meeting, and to have a receiver appointed. The decree adjudged that the proceedings of the meeting were fraudulent; that a certain lease executed in accordance with the authority then given was void; that a receiver should be appointed with power to continue the business; and that an account be taken of profits realized from the use of the leased property, and also of royalties upon certain ores mined by the defendants. The court held the decree to be final, because the whole purpose of the suit had been accomplished, and the accounting ordered was only in aid of the execution of the decree, and was not a part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the lease, and a transfer of the management of the company to a receiver. The language of Mr. Justice McLean in *Craighead* v. *Wilson*, 18 How. 201, was quoted to the effect that the decree was final on "all matters within the pleadings," and nothing remained to be done but to adjust accounts between the parties growing out of the operations of the defendants during the pendency of the suit. The case was distinguished from suits by patentees in the fact that, in such suits, the money recovery is part of the subject-matter of the suit. In this particular, too, the case is clearly distinguishable from the one now under consideration, inasmuch as here the account which the special master was directed to take was within the issue made by the pleadings and a part of the relief prayed for in the petition, the absence of which was held by the court in the *Winthrop Iron Case* to establish the finality of the decree.

In *Central Trust Company* v. *Grant Locomotive Works*, 135

U. S. 207, certain decrees were set aside at a subsequent term of the court of its own motion. The decrees "determined the ownership of the locomotives and the right to their possession; that they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the purchase price, which amounts were made a charge upon the earnings, . . . and that the amounts should be paid by the receiver." Apparently there was no reference at all to a master for an accounting, and the decrees were held to be final. Obviously the case is not decisive here.

Upon the other hand, in *Beebe* v. *Russell*, 19 How. 283, 285, the court decreed that the defendants should execute certain conveyances, and surrender possession, and then referred it to a master, to take an account of the rents and profits received by the defendants, with directions as to how the account should be taken. This decree was held not to be final, Mr. Justice Wayne remarking that it might be so "if all the consequential directions depending upon the result of the master's report are contained in the decree so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court;" and that the decree is final when ministerial duties only are to be performed to ascertain the sum due. Practically the same ruling was made in the next case of *Farrelly* v. *Woodfolk*, 19 How. 288.

In the case of the *Keystone Manganese Co.* v. *Martin*, 132 U. S. 91, the bill was in the nature of an action of trespass for removing minerals from the plaintiff's land, and prayed for an injunction restraining the defendant from the commission of further trespasses, and for an account of the quantity and value of the ore taken. The court made a decree perpetually enjoining the defendant from entering upon or removing minerals from the land, and further ordering an account, etc. This was held to be not a final decree from which an appeal could be taken to this court, because it did not dispose of the entire controversy between the parties. This case is directly in point, and was referred to with approval in *Lodge* v. *Twell*, 135 U. S. 232.

There are none of these cases which go to the extent of holding a decree of this kind final. While it directed the surrender of the rolling stock in question to the petitioner, it did not purport to pass upon his *title* to the same, and referred the case to a master, in accordance with the prayer of the bill, to take an account not only of rents and profits and of damage to the rolling stock, but of "all questions and matters of difference" between the receiver and the petitioner "growing out of the use and restoration of the same." This decree could not be said to be a complete decision of the matters in controversy, or to leave ministerial duties only to be performed, or to direct an accounting merely as an incident to the relief prayed for in the bill.

But if the finality of this decree were only a question of doubt, we think that, in view of the manner in which it was treated by the court below, that doubt should be resolved in favor of the defendant. The decree was pronounced on June 9, 1885; on August 14, 1886, the Toledo & Ohio Central Railway Company, under leave of the court, and without objection, filed an answer, averring the ownership of the rolling stock to have been in the Ohio Central Railroad Company, and setting forth in detail the manner in which it had been purchased and paid for, and, without praying in terms that the former decree be set aside, asked that the leases be rescinded and declared to be null and void; that the money and evidences of indebtedness received by the petitioner be refunded; that the ownership of the cars be decreed to be in the defendant as purchaser under the foreclosure sale; and that it be put in possession thereof. A similar answer, adopting the allegations of the other, was filed by the Central Trust Company on October 1, 1886. If the former decree were final these answers were impertinent, and should have been stricken from the files. The special master to whom the case was referred stated in his report that the first contention related to the title to the property; that the order of reference to him treated it as the property of the trustee McGourkey; and that, in his opinion, the testimony failed to sustain the claims of the purchaser. Testimony upon the

question of title was taken by both parties to the proceeding. In the opinion of the court, too, which was filed September 3, 1888, it is stated to have been "conceded by counsel for petitioner McGourkey (and, as this court thinks, properly so) that complainant and the Toledo & Ohio Central Railway Company are not estopped by anything that has occurred during the progress of the foreclosure suit from setting up the claims they insist upon in respect to said equipment." In short, it was only in this court that the finality of this decree was claimed. The decree entered in pursuance of this opinion did not even assume to vacate the former decree, but treated the title to the property as distinct from the right of possession; found the issue joined in favor of the trust company and the railway company; overruled the exceptions of petitioner; set aside the report of the special master; disallowed McGourkey's claim; and dismissed his petitions. We lay no stress upon the fact that the Toledo & Ohio Central Railway Company was not made a party to the proceedings under the McGourkey petitions, since, having purchased the property while those proceedings were pending, at the foreclosure sale, it was affected with notice of the litigation.

(2) Counsel for the receiver and the Toledo & Ohio Central Railway Company, the real defendant in this proceeding, take the position that the so-called leases of McGourkey, under which he claims title to this rolling stock, and compensation for its use, were a mere device on the part of the syndicate, which organized and controlled the road, to keep the property covered by these leases from passing, under the subsequently acquired property clause of the mortgage, to the trust company, and to reserve it for their own use and emolument, or for the holders of the car-trust certificates. Contracts, by which railways, insufficiently equipped with rolling stock of their own, lease or purchase, under the form of a conditional sale, such equipment from manufacturers, are not of uncommon occurrence, and, when entered into *bona fide* for the benefit of the road, have been universally respected by the courts. *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Fosdick* v. *Schall*, 99 U. S. 235; *Myer* v. *Car Company*, 102 U. S. 1.

Indeed, the business of manufacturing rolling stock and loaning it to railways which have not a sufficient capital to purchase a proper equipment of their own, has become a recognized industry. If, however, such contracts are made by directors of the road with themselves, or with others with whom they stand in confidential relations, they are open to the suspicion which ordinarily attaches to transactions between a corporation and its directors; and, if they appear to have been made directly or indirectly for their own benefit, courts will refuse to give them effect. *Drury* v. *Cross*, 7 Wall. 299; *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Wardell* v. *Railroad Company*, 103 U. S. 651, 658.

It is earnestly insisted by the petitioner in this case that, if there were any fraud in this transaction, it was perpetrated not by him, but by the syndicate upon the railroad company, which they represented; and that, as the latter has made no complaint, neither the Trust Company, who took only the rights of the mortgagor, the Railroad Company, nor the Toledo & Ohio Railway Company, which succeeded only to the rights of the Trust Company, are in a position to take advantage of this fraud; and that the Toledo & Ohio Railway Company acquired no higher, better or other title than that of the parties to the suit in which the foreclosure sale was made.

There is no doubt that, if this railway company entered into a *bona fide* contract with McGourkey to lease of him rolling stock which legally or equitably belonged to him, his title would not be divested by the delivery of the property to the railroad company; the rolling stock would continue to be his property, and he would be entitled to the stipulated compensation for its use. It is also true that the future acquired property clause of a railway mortgage attaches only to such property as the company owns, or may thereafter acquire, subject to any liens under which it comes into the possession of the company. *United States* v. *New Orleans Railroad Company*, 12 Wall. 362. If, however, the property, though nominally leased by the railway company, was acquired under an arrangement which amounted in law to a purchase by it,

we know of no rule of law which will estop the mortgagee or a purchaser at a foreclosure sale from insisting that the railway thereby acquired the title to the property, and that it had become subject to the lien of the mortgage — in other words, the mortgagee is not bound by the construction put upon the contract by the mortgagor. Indeed, it is not the railway so much as the mortgagee, whose rights are impaired by a transaction of this kind; and, if the latter cannot take advantage of its illegality, it is probable that no one else would, since the railway is represented by directors who are charged with being parties to the scheme. It would be a strange anomaly if the very parties against whom the alleged device was directed were estopped to take advantage of it by the acts of a corporation represented and controlled by directors who were themselves parties to it. The gist of the complaint in this case is that it is *their* property which the petitioner is seeking to recover; that the title to it became vested in the railway company by its purchase, and that they have legally succeeded to the rights of the company.

The history of this case properly begins with a contract made on December 3, 1879, between a syndicate, known as the $3,000,000 pool, through its committee, composed of three prominent capitalists, and the firm of Brown, Howard & Co., who were also members of the syndicate, wherein the firm agreed to purchase two lines of railway, and to organize a new company under the name of the Ohio Central Railway Company, with a capital stock of $4,000,000, which was to be delivered to the syndicate, to proceed and complete the road, and to purchase at the lowest cost $560,000 worth of equipment and place it on the line, free from liens or charges. They further agreed to procure the issue of $3,000,000 of first mortgage bonds, and also $3,000,000 of income bonds, secured by a mortgage upon the same property, inferior only to the first mortgage. These bonds were placed in the Metropolitan National Bank of New York, for delivery to the subscribers to the $3,000,000 pool represented by the syndicate, as their assessments were paid. In consideration of this, the syndicate agreed to pay the firm $3,000,000 in cash. Brown, Howard

& Co. proceeded to organize the company under this contract, received from the syndicate the $3,000,000, and turned over to them the ten millions of stock and bonds, which were distributed among the members of the syndicate in proportion to their subscriptions to the pool. This first mortgage provided for was executed January 1, 1880, and was signed by the president and secretary of the company. Brown, Howard & Co., however, never furnished the $560,000 of equipment provided for in their contract, but, it seems, by subsequent agreement with the pool or syndicate committee, they were released from their obligation to furnish the equipment, and instead of it were required to make further expenditures on the railway property, which were said to have exceeded the $560,000, the firm accepting the notes of the railway company for the excess.

On July 7, 1880, the president of the Ohio Central Railroad Company, acting in his capacity as president, ordered of the Brooks Locomotive Works of Dunkirk five locomotives, to be delivered in December, 1880, and January, 1881. On July 19 he ordered five others, and on August 22 four others. These were all ordered for the railroad company. On August 20 the first lease, known as Lease A, was executed between McGourkey and the railroad company. By this instrument the railroad company agreed to hire of the petitioner, as trustee, and he agreed to lease, 800 coal cars and 14 locomotives for the period of ten years from the date of the delivery of the same to the company, the company agreeing to pay him as rent $100,000 on the delivery thereof, and in addition thereto $40,000 per year, with interest thereon at 8 per cent; in case of default in the payment of any instalment of interest, the lessor reserved the right of entering upon the premises of the company, removing any of the locomotives and cars, selling them at public or private sale, and applying the proceeds upon any and all instalments of rent or interest thereon, not theretofore paid, for such cars, for the whole of said term, whether said instalments had then fallen due or not, and if there should prove a surplus after paying such rent, interest and expenses, the same should be paid to the company, but if there

should be any deficit, the company should be liable to pay the same upon demand. The company was to keep the property in good repair, and keep the name, number and plate or other marks, to wit: "Ohio Central Car Trust" or "O. C. C. T." fixed and retained upon each of the cars and locomotives for the purpose of making the ownership publicly known; also to keep all property insured against fire, loss payable to the trustee, and to replace any cars or locomotives lost by fire. Schedule A, referred to in the lease, was not actually annexed until February 23, 1881. The 14 locomotives were ordered, as above stated, by the president of the company, and marked "Ohio Central C. T.," and numbered from 17 to 30, inclusive. The 800 coal cars were also marked in the same manner.

Mr. McGourkey, who, by this and two other similar instruments, assumed to own and to lease to the railroad company this large amount of rolling stock, was not a manufacturer or dealer in locomotives or cars; he was not a resident of Ohio, nor engaged in the railroad business, and, so far as appears, never saw the property, at least until after it went into possession of the receiver, nor knew of the contracts which were made for its purchase. He was the cashier of the Metropolitan National Bank of New York, the correspondent bank of the Commercial National Bank of Cleveland, of which the president of the railroad company was also president. He had very little knowledge as to the origin of the car trusts, which he represented, and knew very little about the arrangements which were made for paying in and paying out the money; he says the understanding was that he was to have little or no trouble in regard to the details; "that B. G. Mitchell, who is present here, and who is connected with the bank, was to take charge of that part. . . . I mentioned to him [the president] that I was made trustee of this car trust, and I was sorry. He said Mr. Mitchell will attend to the details, and it will not give you much trouble." Beyond taking the receipts for the cars from the road, signing the subscription certificates and endorsing the payments, he appears to have had nothing to do with the transaction. In short, Mr. McGourkey was a mere figure-head. Mr. Mitchell, who attended to the details,

was secretary of the railroad company and a clerk in the Metropolitan National Bank; he had no more than Mr. McGourkey to do with ordering the cars, but attended to the finances of the trust. The names of the subscribers to the trust were given to him by three persons, who were all directors of the road. They instructed him to make a subscription certificate, which would be signed by the bank as fiscal agent, certifying that the holders would be entitled to so many thousand dollars of car-trust certificates when the several instalments were endorsed as paid in full. The subscription certificates were signed by the cashier, or stamped by him as paid for the cashier. The money received was credited to an account called the "Equipment account of the Ohio Central Railroad" in the Metropolitan National Bank, and was paid out to the president of the road, who had charge of buying the equipment, by transferring it to the account of the Commercial National Bank of Cleveland, of which he was also president; also by paying equipment notes issued by the equipment company, so called, which were endorsed individually by the president and one of the directors. Mr. Mitchell further says: "When these instalments were all paid on the subscription certificates, and a certificate from the general manager of the road with a schedule of the numbers and marks of the equipment under the several trusts which were on the road was returned to me, I turned them over to Mr. McGourkey and he certified to the car-trust certificates. These certificates I turned over to the several subscribers, as appeared on my record, cancelling their subscription certificates as they surrendered them." It appears from the testimony of the president that the men who furnished the money to purchase this equipment were most of them interested in the organization of the company; that it was all paid in New York except $50,000, which he subscribed himself; that the contracts were all made by him, or by his authority; that the moneys were received from the Metropolitan National Bank and credited upon the books of the Commercial National Bank to the Ohio Central Railroad Company, without distinguishing these moneys from others that were credited to the same company;

and that no separate accounts were kept with the car trusts. This account was drawn upon from time to time for the general purposes of the company, as well as for the payment of the rolling stock covered by the leases in question.

Mr. Mitchell, who appears to have been more familiar with these car-trust certificates than any one, except possibly the president of the company, says that the same persons who controlled the subscriptions for the $3,000,000 pool, also, to a certain extent, controlled the subscriptions for the equipment. "There were other subscribers, but they controlled the matter." And again: "There were different subscribers for the equipment to what there were for the main line, although many of them were the same." Again, in answer to the question who constituted the Ohio Central Car Trust, he mentioned the names of several gentlemen, all of whom were directors or connected with the organization of the road. Mr. Martin, himself a director, states: "I myself held about in the neighborhood of $150,000; Mr. Lyman, A. A. Low & Bros. had, I think, about the same amount, and Mr. Lyman would naturally speak for his friend A. M. White. I think he was in the pool for about $150,000." It is true that another director states: "The names of the various subscribers I do not recollect, but may say in a general way that they were a different class of persons from those who subscribed to the syndicate, or held the stock or bonds of the Ohio Central Railway Company." But he does not seem to have had that acquaintance with the details of the transaction which the other witnesses had, and his testimony is outweighed in that particular.

The car-trust associations were not corporations or partnerships, nor legal entities of any description, but were simply car-trust certificates in the hands of various persons, who were represented by the petitioner McGourkey. The 14 locomotives included in the schedule attached to the Lease A were those which had been ordered by the president of the railroad, before the organization of the first car trust, and were all delivered between December 20, 1880, and February 10, 1881, billed to the Ohio Central Railroad Company, and paid for by drafts drawn by G. G. Hadley, general manager,

upon H. G. Eells, assistant treasurer of the company at Cleveland. Of the 800 coal cars, 606 appear to have been purchased of the Lafayette Car Works, and paid for by the railroad company. These 606 cars were mostly received by the company during the fall of 1880. The remaining 194 coal cars were constructed by the Peninsular Car Works of Detroit under a contract made by Mr. Hadley, general superintendent, in the name of the Ohio Central Railroad Company; and they were paid for by the railroad company by drafts drawn by Mr. Andrews, the assistant treasurer at Toledo, where the cars were turned over to the company. These locomotives and cars were by direction of Mr. Hadley, the general manager, marked in large letters "Ohio Central," and in small letters "Ohio Central C. T.," either placed upon a small plate so as to be removed easily, or upon the end of the sill of the coal cars.

Lease B No. 1 was executed March 1, 1881, and is not substantially different from Lease A in its general provisions. Both provide for the leasing and equipment not then in existence, according to a schedule subsequently attached. By this instrument, petitioner assumed to lease certain coal cars for thirteen years from the date of delivery of the cars to the company; "said coal cars to be delivered as per the contract of the said George J. McGourkey with the said makers, and it is understood that the said George J. McGourkey shall in no way be liable for any delay that may arise in the delivery of the said cars by the said makers. And the said railroad company may, for convenience, make the contract direct with said makers." There was to be paid as rental $80,000 on the 1st day of September in each year for ten years, with interest at 8 per cent, at the Metropolitan National Bank, the said yearly instalments being evidenced by 800 obligations of $1000 each, of the Ohio Central Railroad Company maturing at different times, with interest coupons attached. There was a provision that, in a case of default in payment, McGourkey should have the right to take possession and remove all rolling stock and sell the same, "together with thirty thousand shares of $100 each of the capital stock of the Ohio Central

Coal Company, pledged by said lessees as security for the performance of said contract, and the payment of the principal and interest of the said rental certificates, at public or private sale." There were other provisions similar to those contained in Lease A, concerning the payment of the surplus to the railroad company, its liability for any deficit, and its obligation to fix and retain upon each of the cars the words, "Ohio Central Car Trust," or the initials, to wit, "O. C. C. T.," for the purpose of making their ownership known, etc. There was a further provision that in case all payments were promptly made the coal cars should become the absolute property of the railroad company, and the trustee should make conveyance thereof on demand. The schedule, which was not annexed to this lease until December 9, 1881, covered 1400 cars, 1000 of which were constructed under contracts made by Mr. Hadley, general manager of the Ohio Central Railroad Company, with the Peninsular Car Works of Detroit, on January 3, 1881, two months before the lease was executed. The manager of the Peninsular Car Works testified that the contracts were the result of personal conferences with some of the railroad managers, in which it was mentioned that these cars were for the car-trust association, and that directions were given to stencil the cars in such manner as to show that they belonged to a car-trust association. Ten of these cars were delivered to the company before the lease was executed, and the residue after the date of the lease. They all went into possession of the railroad company between February 26 and the early fall of 1881. They were paid for by drafts drawn by the auditor of the company upon H. P. Eells, assistant treasurer, presumably out of the moneys transferred from the equipment account in the Metropolitan National Bank of New York to the Commercial National Bank of Cleveland. Two hundred and fifty of these cars were built by the Michigan Car Company under a contract made with the railroad company by correspondence during the month of December, 1880, delivery to be made during the months of April, May and June, 1881. On February 1, 1881, Mr. Hadley, the general manager, instructed the builders by

letter to number the cars, and to letter them "Ohio Central" in large letters, and "Ohio Central C. T." in small letters on the side sill. They were to be delivered after the date of Lease B No. 1, and they were all paid for in the same manner as the other one thousand cars. The remaining one hundred and fifty of these cars were built under a contract of the railroad company with the Peninsular Car Works, entered into on February 11, 1881, and were delivered in November, 1881, after the execution of the lease, and were paid for in the same manner. While no instructions appear to have been given as to numbering or lettering these cars, the testimony indicates that the same policy was pursued as before.

Lease B No. 2 was executed March 1, 1882, and covered 2500 coal cars, including the 1400 described in Lease B No. 1, 340 box cars and 13 locomotives, according to a schedule annexed to the lease, the date of which is not given. The railroad agreed to pay as rental therefor $180,000 on the first day of March in each year, from 1885 to 1894, with interest thereon at 8 per cent per annum, payable semi-annually on the 1st day of March and September during each and every year during the term of twelve years, with the same right to take possession and sell as contained in the prior leases. The eighth paragraph of this lease provided that the railroad should "evidence by lithographed certificates or obligations the several annual payments for rentals hereunder due at the time of the maturity of said payments, as provided in this agreement, and having attached thereto interest coupons," etc., such certificates or obligations to be delivered to McGourkey *pro rata* as the rolling stock was delivered to the railroad. There was a further provision for the rolling stock becoming the absolute property of the railroad upon the payment of the instalments and interest. It also recited that the Ohio Central Coal Company had executed contemporaneously a mortgage of $1,000,000 upon its coal property as additional security for the payment of the car-trust certificates provided for, which was accepted for a down payment upon said equipment. There was a further provision that sufficient of these car-trust certificates to take up and replace the prior car-trust

certificates of the company, amounting to $600,000, were to be used by McGourkey, and the original car-trust agreements were to be cancelled, and the equipment covered thereby released under this agreement; but if the holders of the said prior certificates failed or refused to make the change, the railroad was only to issue $1,200,000 of certificates thereunder. If a portion of the holders of the prior certificates elected to exchange them for certificates issued thereunder, then to such extent the company would issue certificates thereunder in addition to said $1,200,000, it being the intent to maintain the aggregate of $1,800,000 in car-trust certificates issued. The 1100 cars mentioned in this lease, which were in addition to the 1400 included in Lease B No. 1, were manufactured under a contract with the Peninsular Car Works of Detroit, dated October 22, 1881, and were to be delivered in Toledo during the following winter. Subsequently to the making of this contract, and on November 25, it was modified by releasing the railroad company, and substituting the Ohio Central Car Trust Association, Series B, in its place. Provision was also made for payment at the option of the trust association in cash on delivery of lots of one hundred cars each, or in the paper of the association, endorsed by two directors of the road. This modification of the agreement was signed by the railroad company, by its president and also by McGourkey, as trustee, by D. P. Eells. These cars were paid for by notes of the Ohio Central Car Trust Association, Series B, signed by G. G. Hadley, general manager, and endorsed by the same two directors. All of these 1100 cars were delivered before the first of March, 1882, the date of the lease, except 110, which were delivered afterwards; and forty of the three hundred and forty box cars were delivered on January 26, 1882. These cars were thus contracted to be built by the car-trust association, and there seems to be no reason for supposing that the railroad company paid anything for their purchase.

Of the thirteen engines, eight were built by the Brooks Locomotive Works of Dunkirk, N. Y., under like contracts as were made with the Michigan Car Company and the Penin-

sular Car Company. The locomotive works were instructed to mark five of them "Ohio Central Car Trust, Series B." Three more were ordered on December 15, 1881, and on the following day the president of the railroad wrote the secretary of the company that he had inadvertently given the order as president of the Ohio Central Railroad Company; that the engines were for the Car Trust, Ohio Central Railroad, Series B. The remaining five of the thirteen, and the locomotive Bucyrus, were built by the Ohio Central Railroad Company in its shops at Bucyrus, for the Ohio Central Car Trust, Series B, and were paid for by moneys furnished by Mitchell, and charged to the equipment fund of the Ohio Central Railroad Company upon the books of the Metropolitan National Bank. The evidence sufficiently indicates that these engines were built under the agreement with the Ohio Central Car Trust Association, No. 2, represented by McGourkey as trustee, by which the railroad company was to build them at its shops, and to identify them as belonging to the car trust by proper labels, and were paid for out of money furnished by the car-trust certificates, represented by McGourkey.

The 340 box cars were delivered to the railroad prior to June 7, 1882. Forty of them appear to have been in the possession of the company before the date of the lease of March 1. It does not appear from the testimony how or from whom they were acquired by the railroad company, nor how nor out of what fund they were to be paid for.

In relation to this rolling stock, the president testifies that the understanding was that the railroad company expected to own this equipment, when all the car-trust certificates were paid, as the company had agreed to pay; that they had, therefore, a large interest in getting the best contracts they could for the purchase of the equipment; that he made all the contracts himself for such equipment, or authorized Mr. Hadley to make them, under the stipulation in the leases that the railroad company might make the contracts direct with the makers. It is somewhat difficult to see how the president could have acted as the agent of the car-trust certificates holders, or of McGourkey, in making the contracts for this

rolling stock, inasmuch as the greater portion of these contracts were entered into before the associations were formed, the leases executed, or the certificates issued.

The facts of this case, then, briefly stated are as follows: A syndicate of capitalists known as the three-million-dollar pool contracted with Brown, Howard & Co. for the purchase of certain lines of railroad for the purpose of organizing the Ohio Central Railroad Company. They raised three million dollars in cash, paid it to Brown, Howard & Co., and in return received four millions in stock and three millions in first-mortgage bonds and three millions of income bonds, a total of ten millions in stock and securities, which were distributed among the members of the syndicate according to their subscriptions. In further consideration of the three million dollars in cash, Brown, Howard & Co. agreed to complete and organize the road and furnish it with $560,000 of rolling stock. The latter provision was never complied with, though it is said they expended that amount for the benefit of the road. It does not satisfactorily appear what the actual value was of the ten millions in stock and securities turned over to the syndicate, although, in the opinion of the court below, it is said that they were "at the date of issuance or very soon thereafter worth in the market largely more by several millions than the sum of $3,000,000 paid out therefor." If the law were complied with the four millions of stock should have been represented by money or property to that amount, and if the market value of this stock were merely nominal it is probably because little, if anything, was ever paid upon it, and it was used merely as a method of retaining control of the corporation. It is safe to say that if the stock had been actually paid up in money or property, and the money raised by the bonds had been applied to the construction and equipment of the road, these securities would have been worth far more than the three millions of dollars that were paid for them, and the device of borrowing money upon car-trust certificates might not have been necessary. Evidently the syndicate took this stock without recognition of any obligation imposed upon them by their subscriptions to the same, but

looked upon it simply as a voting power in stockholders' meetings, and as a means of retaining control of the corporation. Finding that the road was in need of further equipment, and assuming that there was no other way of providing the money for that purpose, they proceeded to purchase rolling stock in the name of the road and to raise money by certificates issued to subscribers of an equipment fund. Had the directors of the road made a *bona fide* arrangement with the manufacturers to lease a certain amount of rolling stock for their equipment of this road there could be no doubt of the propriety of their action, though the arrangement had contemplated an ultimate purchase by the railroad.

The vice of this arrangement, however, consisted in the fact that the directors were, so far as it appears, the subscribers to most if not all these certificates, and had complete control of the purchase of the stock; and the money realized from them though kept in a separate account in the Metropolitan Bank, was mixed with the other moneys of the railroad company on the books of the Commercial Bank at Cleveland; that the rolling stock in question was purchased in the name of the road largely before the leases were made, and was paid for out of the money of the road thus deposited with the Commercial Bank; that so far from it appearing that the money raised upon these certificates went solely to the purchase of this rolling stock, it appears affirmatively by the minutes of a directors' meeting held at New York, March 1, 1882, that the company was indebted to the bank in the sum of $400,000, for a portion of which the president and one director were indorsers, an indebtedness created for the purpose of raising money for equipment *and other purposes;* that $1,200,000 of car-trust certificates were pledged to the bank as security for this indebtedness, and that the president and treasurer were authorized to liquidate the same out of the said certificates and their proceeds. How much of this indebtedness was incurred for equipment purposes was left entirely uncertain.

It also appears from the testimony of one of the directors that the estimated cost of the equipment for which these $1,200,000 of certificates were issued was but $850,000, and

that the remaining $350,000 was to be expended by the company at its pleasure.

The directors of this road were evidently acting in two inconsistent capacities. As directors, they were bound to watch and protect the interests of the road and obtain the rolling stock upon the most advantageous terms. As holders of the car-trust certificates or representatives of such holders, it was to their interest to lease the same at the best possible rate and to make sure that as directors this rolling stock should never become their property except at the highest price. In other words, they were both buyers and sellers or lessors and lessees of the same property.

No principle of law is better settled than that any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, will be looked upon with suspicion. A leading case upon this subject is that of *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658, wherein a committee of the board of directors of a railway company entered into a contract with a coal company, the stock of which was largely owned by directors of the railway company. The contract was held to be a fraud upon the latter. It was said by the court in this case that "all arrangements, by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration." A somewhat similar case was that of *Gilman &c. Railroad* v. *Kelly*, 77 Ill. 426, in which it was held to be

unlawful for directors of a railroad company to become members of a company with which they have made a contract to build and equip the road, and that, in such case, the stockholders might at their election ratify the act, and insist upon the profits of the contract, or disaffirm it *in toto*. See also *Whelpdale* v. *Cookson*, 1 Ves. Sen. 9; *Drury* v. *Cross*, 7 Wall. 299; *York Buildings Co.* v. *McKenzie*, 3 Paton, 378; *Hoffman Steam Coal Co.* v. *Cumberland Coal Co.*, 16 Maryland, 456; *Cumberland Coal Co.* v. *Sherman*, 30 Barb. 553; *Aberdeen Railway* v. *Blakie*, 1 Macqueen, 461; *People* v. *Overyssel Township Board*, 11 Michigan, 222; *Flint & Père Marquette Railway Co.* v. *Dewey*, 14 Michigan, 477.

A contract of this kind is clearly voidable at the election of the corporation; and when such corporation is represented by the directors against whom the imputation is made, and the scheme was in reality directed against the mortgagees, and had for its very object the impairment of their security by the withdrawal of the property purchased from the lien of their mortgage, it would be manifestly unjust to deny their competency to impeach the transaction. The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it.

In fine, we are of opinion that this transaction should be adjudged to be in law what it appeared to be in fact, a purchase by the railway of the rolling stock in question, and that the device of the car-trust certificates was inoperative either to vest the legal title in McGourkey, or to prevent the lien of the mortgage from attaching to it upon its delivery to the road. At the same time the holders of these certificates, who stand in the position of having advanced money toward the equipment of the road, and particularly those who purchased them for value before maturity, are entitled to certain rights with respect to the same which must be gauged in a measure by a consideration of the so called leases themselves. The title to this property being, as we hold, in the railroad company, obviously the petitioner is not entitled to rent; his position is that of one who has advanced money to a railroad company for the purchase of equipment with the understand-

ing, which, though not raised directly from the instruments themselves, may perhaps be implied from the nature of the transaction, that he was to have a lien upon certain rolling stock, to be thereafter designated upon a schedule to be furnished by the railway company. As the lien upon this property, evidenced by these leases, was acquired after the purchase of the property by the railway, and the property to which it was to attach was not designated until after it had passed into the possession of the company, and after the lien of the future-acquired property clause of the mortgage had attached to it, the lien of these certificates, if any there be, should be postponed to that of the bondholders.

If transactions such as this is claimed to be, could be sustained, there is nothing to prevent any syndicate of men, who obtain the capital stock of a railway, from organizing car-trust associations, and equipping the road with their own property, regardless of the capital which they may have at their disposal, and holding it as against the mortgagees. Persons investing their money in the bonds of railways in active operation do so upon the theory that their security consists largely in the rolling stock of the road, and hence any arrangement, by which the road is equipped with rolling stock belonging to another corporation, should be distinct, unequivocal and above suspicion. Much reliance is placed in this connection upon the fact that the leases provided that the railway company might contract, for the delivery of this stock, directly with the makers; that the property should be marked or stenciled in such manner as to indicate that it belonged to the car-trust associations, and that the mortgagees and the public were thereby duly apprised of the fact that it was no proper part of the equipment of the railway. Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract — if there be a thread of covin running through the web and woof of the entire transaction — in other words, if the purpose be unlawful, it is not perceived that an

open avowal of such purpose makes it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily involved actual fraud on the part of those participating in it. As before observed, contracts of this description, for the purpose of leasing rolling stock, are by no means uncommon, and it is not improbable that this syndicate may have taken it for granted that the raising of money by car-trust certificates, issued to themselves, or to those in confidential relations with them, was but another mode of accomplishing the same result. The law, however, characterizes the transaction as a constructive fraud upon the mortgagee.

We think the court below was correct in holding that these leases, so far as they are a security at all, must be treated as mortgages. Reading between the lines of these instruments, it is quite evident that no ordinary letting of property for a fixed rental was contemplated, but that the retention of title by the lessor was intended as a mere security for the payment of the purchase money. Thus, by Lease A there was to be a payment of a gross sum of $100,000 upon the delivery of the property, and an annual rental of $40,000, with interest at 8 per cent, with a further provision that if such payments were promptly made for the ten years specified, the property should belong to the railroad company without further conveyance. In case of default, however, the lessor made no provision for resuming his title to the property, but merely for the resumption of possession for the purpose of sale, as in an ordinary foreclosure of a mortgage. All these provisions are inconsistent with the idea of an ordinary lease of personal property.

Lease B No. 1 contained similar provisions, with a further stipulation that in case of default in payment the petitioner should have the right to sell the property, together with thirty thousand shares, of $100 each, of the capital stock of the Ohio Central Coal Company, pledged by such lease as security for the performance of the contract. The inconsistency of these contracts with an ordinary lease becomes the more apparent in the case of Lease B No. 2, which covered fourteen hundred coal cars, included in the former leases, and provided for the

taking up and replacing of the prior car-trust certificates to the amount of $600,000, and in case of refusal to make the exchange, for the issue of twelve hundred thousand of certificates, which were to be used to pay a debt to the bank to the amount of $400,000, and also to pay a contemplated loan of $350,000 to aid the railroad in developing its coal property and in its general business, leaving only the remainder to be applied to the purchase of the equipment. Instructive cases upon the relative rank of railway mortgages and instruments of this description are *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664; *Murch* v. *Wright*, 46 Illinois, 488; *Heryford* v. *Davis*, 102 U. S. 235; *Frank* v. *Denver &c. Railway Co.*, 23 Fed. Rep. 123.

The court below held that the petitioner had shown a superior right to three engines included in the schedule to Lease B No. 2, and as no appeal was taken by the defendant from this decree, of course it is not entitled to complain of this finding in this court. The court further found that, so far as the petitioner had established any right to or lien upon the property in controversy, regarding him as a mortgagee, it appeared that he had already been paid by the company and the receiver more than he was entitled to, and his claims for further payments and additional compensation were disallowed. We see no reason to question this finding, and, as we are of opinion that the court was correct in holding the rights of petitioner subordinate to those of the first mortgage bondholders, its decree dismissing the petitions is, therefore,

Affirmed.

The Chief Justice and Mr. Justice Brewer dissented.

Syllabus.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

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

Nos. 921, 922.[1] Argued November 9, 10, 1892. — Decided December 12, 1892.

The intent of Congress in each and all of its railroad land grants was that the grant should operate at a fixed time, and should cover only such lands as at that time were public lands, grantable by Congress, and such a grant is not to be taken as a floating authority to appropriate lands within the specified limits which, at a subsequent time might become public land.

The grant of land made to the Atlantic and Pacific Railroad Company by the act of July 27, 1866, 14 Stat. 292, c. 278, and the grant to the Southern Pacific Railroad Company by the act of March 3, 1871, 16 Stat. 573, c. 122, were grants *in præsenti* which, when maps of definite location were filed and approved, took effect, by relation, as of the dates of the respective statutes.

The filing by the Atlantic and Pacific Company of a map of definite location from the Colorado River through San Buenaventura to San Francisco, under a claim of right to construct a road for the entire distance, was good as a map of definite location from the Colorado River to San Buenaventura.

The Atlantic and Pacific Railroad Company having duly filed a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean, which was approved by the Secretary of the Interior, the title to the lands in dispute passed thereby to that company under the grant of July 27, 1866, and remained held by it, subject to a condition subsequent, until their forfeiture under the act of July 6, 1886, 24 Stat. 123, c. 637; and by that act of forfeiture the title thereto was

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[1] In No. 921, D. O. Mills and Garrit L. Lansing, Trustees, and Joseph E. Youngblood, were codefendants and appellees, with the Railroad Company. In No. 922, D. O. Mills and Garrit L. Lansing, Trustees, The City Brick Company, Thomas Goss, Edward Simmons and Albert A. Hubbard, were such codefendants and appellees.

retaken by the United States for its own benefit, and not for that of the Southern Pacific Railroad Company, whose grant never attached to the lands, so as to give that company any title, of any kind, to them.

THESE cases were argued, together with Nos. 862, 863 *post*, on the 6th, 7th and 8th of April, 1892, at October term, 1891. On the 18th of the same April, at the same term, they were ordered for reargument, before a full bench.

The reargument took place at this term on the 9th and 10th of November, 1892. The case then made, so far as it related to Nos. 921 and 922, was stated by the court as follows:

On July 27, 1866, Congress passed an act granting lands to aid in the construction of a railroad from the States of Missouri and Arkansas to the Pacific coast. 14 Stat. 292, c. 278. By the first section, a corporation to be known as the Atlantic and Pacific Railroad Company was created, and authorized to construct and operate a road from a point near the town of Springfield, in the State of Missouri, westward through Albuquerque, "and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific." The third section making the land grant is, so far as touching any question in this case is concerned, as follows:

"SEC. 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any State, and whenever, on the line thereof, the United States have full title,

not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, so far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

The 18th section was in these words:

"SEC. 18. That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

On March 3, 1871, Congress passed an act, 16 Stat. 573, c. 122, to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, the 23d section of which act reads:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from

a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

Under the act of July, 1866, the Atlantic and Pacific Company proceeded to construct a part of its road, but did no work west of the Colorado River, the east line of the State of California. It did, however, file maps of that which it claimed to be its line of definite location from the Colorado River to the Pacific Ocean, which, on April 11, 1872, and August 15, 1872, were accepted and approved by the Secretary of the Interior. On July 6, 1886, Congress passed this act of forfeiture:

"An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company, etc.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables and water-stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within

both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be and the same are hereby declared forfeited and restored to the public domain." 24 Stat. 123, c. 637.

On April 3, 1871, just a month after the passage of the act of March 3, the defendant, the Southern Pacific Company, filed a map of its route from Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad, and proceeded to construct its road, and finished the entire construction some time during the year 1878. Its road crossed the line, as located, of the Atlantic and Pacific Company. The lands in controversy in these cases are within the granted or place limits of both the Atlantic and Pacific and the Southern Pacific Companies at the place where these lines cross. As the Atlantic and Pacific Company did not construct its line, and as its rights were subsequently forfeited by Congress, and as the Southern Pacific Company did construct its line, the latter claimed that by virtue of its grant and the construction of its road these lands became its property. It was to test this claim of title, and to restrain trespasses by the railroad company, and those claiming under it, on the lands, that these actions were brought in the Circuit Court of the United States for the Southern District of California. In that court the decisions were in favor of the defendants, and decrees entered dismissing the bills, from which decrees the government brought its appeal to this court. See 39 Fed. Rep. 132; 40 Fed. Rep. 611; 45 Fed. Rep. 596; 46 Fed. Rep. 683.

Mr. Assistant Attorney General Maury for appellant.

A careful examination of the several statutes will show that the Southern Pacific Company, the defendant, is an essentially different corporate entity from the beneficiary of the land grant of the same name, and therefore was not authorized to earn the grant or receive the patents. On the other hand the

Atlantic and Pacific Company was not only created by Congress but required, as a condition of its being, to carry forward the enterprise of constructing and operating a transcontinental highway, from Springfield, Missouri, to the Pacific Ocean, assigned to it by the act of July 27, 1866, while on the other hand the Southern Pacific Company was merely "authorized" by that act, as a state instrumentality, to connect with the Atlantic and Pacific road, at such point near the boundary line of California as should be deemed most suitable for a railroad line to San Francisco, and was merely "authorized" by the act of March 3, 1871, "subject to the laws of California," to construct a road from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific road at or near the Colorado River. In other words, it became the legal duty of the Atlantic and Pacific Company, on accepting its grant and charter, to build and maintain its road, whereas the Southern Pacific Company had a mere option in the premises and was not bound to do anything.

So far, therefore, from it being a matter of surprise that the rights and privileges conceded by Congress to this state corporation are so guarded and so subordinated to the grant to its own corporation as not to endanger or obstruct the attainment of the important object for which that corporation was instituted, it was to be expected that it would be so.

The Southern Pacific Company accepted its two grants with full notice of their subordinate and secondary character. It was warned by the act of March 3, 1871, that if it selected a route that was to any extent upon the same general line as that of the Atlantic and Pacific Company a proportionate deduction would be made from the lands called for by the Southern Pacific grant; in short, that in such a contingency the state corporation should be stripped of its grant *pro tanto*, in order to prevent a failure *pro tanto* of the grant to the Federal corporation.

It was further warned by the proviso of section 23 of the act of March 3, 1871, that its grant by that act "shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad

company." The language of this proviso was exceptional and, it is believed, unprecedented in the history of Congressional land grants. It was made so because Congress intended that the subordination and subjection of the Southern Pacific grant to the Atlantic and Pacific should be exceptional in its rigor, so that it should not happen that the Atlantic and Pacific grant would be involved in any entanglement with that of the Southern Pacific, whose line it would probably intersect somewhere near the Pacific coast.

To interpret these grants properly we must look at the condition of things that existed in March, 1872, when the intersecting part of its line of route was filed by the Atlantic and Pacific Company, which had begun to build from the eastern end of its road and believed in its ability to complete the work from end to end.

It would seem to be absolutely clear, in the light of the decisions of this court, that the lands covered by the overlap never came within the reach of the Southern Pacific grant of 1871, because the title to them passed to the Atlantic and Pacific Company on July 27, 1866. This was the necessary and inevitable effect of the latter company's location of its route in March, 1872.

If, then, the effect of locating the route of the Atlantic and Pacific Company on the earth's surface in March, 1872, was to vest the title of the lands in suit in that company as of the 27th day of July, 1866, as was undoubtedly the case under the decisions of this court, it is difficult to comprehend by what legal process the title so vested was cast upon the Southern Pacific Company. The argument does not appear to be advanced by showing that the Atlantic and Pacific Company constructed no road in California, unless it can be also shown that the lands in question, which, be it observed, were never subject to the Southern Pacific grant, became, nevertheless, vested in that company after Congress had declared them forfeited to the United States and restored to the public domain by the act of 1886. Nor is it by any means apparent how the judicial department of the government could, in any event, decree lands to belong to the Southern Pacific Company which

Congress has declared by law shall be "restored to the public domain," as forfeited by a delinquent grantee.

I. As to the lands lying within the granted limits of both roads.

The objections to be first considered under this head are that the Atlantic and Pacific Company never lawfully designated its line of route, (1) because it filed maps, at different times, of segments of its route, (2) because these maps were filed in the office of the Secretary of the Interior, instead of the General Land Office, and (3) because the route, as originally designated, ran all the way from Springfield to San Francisco *via* San Buenaventura.

The maps, thus filed, made, together, one continuous line of location, and were approved by the Secretary of the Interior; and it is no objection that they were filed at different times. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 18, 19.

The second objection is entirely confuted by the case of *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 72, where the grant required that the line of definite location should be filed in the office of the Commissioner of the General Land Office, but it was really filed in the office of the Secretary of the Interior. The court, however, considered it as a matter of indifference whether the filing was in the one office or the other, the filing in the office of the Secretary being, to all intents and purposes, a filing in the land department of the government.

The remaining and third objection is, that if any line of location at all is to be considered as having been filed, it was one extending from Springfield to San Francisco, which, having been disapproved as to the part running from San Buenaventura to San Francisco, must be taken to have been rejected *in toto*, being an entirety.

This theory is diametrically opposed to the action of the Interior Department, which has treated the line of route from Springfield to San Buenaventura as a valid designation under the law. It is, furthermore, opposed to the well-known principle that where a transaction cannot have effect in the

manner intended by the parties to it, it will be allowed to operate in some other way, if possible, *quando res non valet ut ago valeat quantum valere potest. Kanawha Coal Co.* v. *Kanawha and Ohio Coal Co.*, 7 Blatchford, 391; *Jackson* v. *Bowen*, 7 Cowen, 13; *Robinson* v. *Ryan*, 25 N. Y. 325; *Ruggles* v. *Barton*, 13 Gray, 506; *Grover* v. *Thatcher*, 4 Gray, 526; *Hunt* v. *Hunt*, 14 Pick. 374; *S. C.* 25 Am. Dec. 400; *Freeman* v. *McGraw*, 15 Pick. 82.

Assuming that there was a valid location of the Atlantic and Pacific route on March 12, 1872, it does not admit of question that the lands involved became, by operation of law, subject to the grant of July 27, 1866, as of that day and date. *Schulenberg* v. *Harriman*, 21 Wall. 44; *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491; *Railway Co.* v. *Alling*, 99 U. S. 463; *Van Wyck* v. *Knevals*, 106 U. S. 360; *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720.

It is true, the Atlantic and Pacific Company did not earn the right, under the grant, to appropriate the lands in question as absolute owner, and that it lost all its rights in them by forfeiture in 1886; but that had no relevancy to the matter in hand, seeing that the moment the line of its road was located the legal title to the lands granted vested in the company with the same force and effect as if they had been described in the grant by metes and bounds. If the title, thus vested, was divested before the act of forfeiture in consequence of the defaults of the Atlantic and Pacific Company, there was no occasion for the enactment declaring that the lands were "forfeited and restored to the public domain?" And if, in consequence of such defaults, the subsequent grant to the Southern Pacific Company attached to these lands in some magical way, as yet undefined and unknown, why were they "restored to the public domain" by the act of 1886, when they belonged to that company?

The vitality of the grant to the Atlantic and Pacific Company was in no degree impaired by the default of the Company touching the construction of its road in California. *Lake*

Superior Ship Canal, etc. v. *Cunningham*, 44 Fed. Rep. 820. So long as the United States chose to indulge that company and condone its default under the grant, no person, natural or artificial, had a right to treat the vested interests of the Atlantic and Pacific Company otherwise than they would have treated them if that company had been punctually performing the conditions of its grant. *Schulenberg* v. *Harriman*, 21 Wall. 44, 62; *Frost* v. *Frostburg Coal Company*, 24 How. 278.

The author of the grants here involved is the sovereign owner of the land granted. It is not to Coke on Littleton or Cruise's Digest that we go for the law of the grants, but to the grants themselves; and when the grantor says that the grant of a float shall take effect from its date and not the date of its location, the sovereign will must have effect regardless of consequences. Nothing could be more conclusive on this subject than the language of Mr. Justice Field in *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 497.

From the ground taken by the appellees' counsel, one might suppose that the retroactive feature of land grants was an anomaly in the law, instead of being a recent application of a principle which has been commonly employed for ages, which is known at common law as the doctrine of relation, and which, as Maule, J., defined it in *Graham* v. *Furber*, 14 C. B. 152, is "treating a thing as happening at some preceding time." See also *Panter* v. *Attorney General*, 6 Bro. P. C. 486; *Latless* v. *Holmes*, 4 T. R. 660; *Regina* v. *Riley*, Dearsly, C. C. 149.

And do not our recording statutes all over the land provide that, in certain cases, deeds shall operate from delivery by relation, and not merely from the date of their recording?

And by relation the executor's and administrator's title goes back to the decedent's death.

The doctrine of ratification, also, furnishes many examples where the principle of relation operates precisely as it does in land grants.

By the Roman law the birth of a posthumous child annulled the father's will although he knew his wife to be *enceinte;* for

by that law a child *in utero* could neither be instituted as heir nor disinherited, and thus we see, that the father was by relation made to die intestate in consequence of an event against which it was impossible for him to provide. 1 Demangeat, Cours de Droit Romain, 667, (3d ed. Paris, 1876.) This example is the more instructive when we remember that with the Romans intestacy was a kind of misfortune, and sometimes a blot on the intestate's memory.

A Roman taken by the enemy became a slave, and from the moment of capture all his rights as a Roman citizen ceased to be operative; but if he returned to his country they revived by the *jus postliminii*, and he was reinstated in them not only for the future, but for the past, and just as if he had never been in the power of the enemy. 1 Ortolan Inst., 128, (10th ed. Paris, 1876.) Here, then, was another class of cases where the doctrine of relation was applied with severity. The returned captive resumed the rights he had left behind him (*post limen*) utterly regardless of anything that had occurred during his captivity.

It would be a waste of time to argue further in support of the proposition that the land lying within the granted limits of the two companies was absolutely vested in the Atlantic and Pacific Company from the date of the grant, and, therefore, was never subject to the Southern Pacific grant; and that, as a corollary, the forfeiture of the Atlantic and Pacific grant inured to the benefit of the United States alone.

II. As to lands within the indemnity limits of the Atlantic and Pacific and within the primary limits of the Southern Pacific. This is the status of the lands involved in cases numbered 862 and 863.

When the Atlantic and Pacific road was located in March, 1872, it not only supplanted the Southern Pacific road as to granted but also as to indemnity lands at the point of intersection. This was absolutely necessary to give proper effect to the proviso. If the lands in the indemnity belt of the Atlantic and Pacific were not subject to the grant of the Southern Pacific at the time the latter's grant took effect, then no change in their condition afterwards could bring them

within the operation of the grant. *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733.

Every right of the Atlantic and Pacific Company as to its grant was as vital and operative up to the act of forfeiture as it was when the grant was accepted in 1866. The unreasonableness of the opposite view is shown, at once, by asking: At what time before the forfeiture did the grant begin to wane and lose vigor? Certainly its force was unimpaired in 1871, five years after its date, when Congress authorized the grantee to mortgage its road. 17 Stat. 19, c. 33.

But if it is doubtful whether these indemnity lands passed by the grant of the United States to the Southern Pacific Company the mere existence of that doubt entitles the United States to a decree for the surrender and cancellation of the patents covering these lands, on the well-established principle that public grants should be construed most strongly against the grantee, and all doubts in them resolved in favor of the government. *Leavenworth &c. Railroad* v. *United States*, *supra*; *Slidell* v. *Granjean*, 111 U. S. 412.

III. As to lands through which the two roads have the same general route.

A glance at the official map showing the lines of the two roads at and near the point of intersection, shows that for some distance before the lines cross they pursue the same general route, and thus the Southern Pacific grant is brought directly within the operation of the last proviso of section 3 of the act of July 22, 1866, which provides: "That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, so far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

It is claimed for the government that this is an express limitation on the Southern Pacific grant, and requires a withdrawal from the grant of all lands within its limits to the full extent that that road runs on the same general route as the Atlantic and Pacific.

IV. As to lands within the claimed limits of the San José

grant. These lands were *sub judice*, on the 3d of April, 1871, and came within the principle laid down in *Doolan* v. *Carr*, 125 U. S. 618, 632, where the court said: "Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

Mr. Joseph H. Call, special attorney on behalf of the United States, filed a brief for appellant.

Mr. James C. Carter for appellees.

The facts warrant us in saying that these suits, brought by the government to annul its grants, did not originate in any substantial failure, real or pretended, by the Southern Pacific Company to earn the lands by a prompt and faithful performance of every condition imposed upon it; nor in any actual inability on the part of the government to convey the particular lands in dispute arising out of other dispositions, actual or contemplated, of the said lands, and of consequent conflict with other interests. It is not questioned that the company faithfully constructed the road according to the requirements of the law, nor that the same was duly accepted. It is admitted that at the time the patents were issued the lands embraced by them were a part of the public domain, free from any appropriation or claim which constituted any obstacle in the way of conveying them to the company, and were in all respects disposable by the government for the purpose of aiding its railroad enterprises.

So far, therefore, as the main discussion goes, it resolves itself into these three questions: (1) Whether the Atlantic and Pacific Company ever designated its route; (2) whether such a designation, if made, operated, from the mere circumstance that the grant to this company was prior in time to

that made to the Southern Pacific Company, to exclude the lands in the overlapping limits at the place of crossing from the latter grant; (3) whether, if such designation was made, the proviso in § 23 of the act of March 3, 1871, protecting the rights "present and prospective" of the Atlantic and Pacific Company was designed for any other purpose than to save to it any lands which it might eventually earn by a full performance of its undertaking.

There is, however, another ground upon which a portion of the grant is assailed, viz.: that, after the confirmation by the California Land Commission created by Congress in 1851, and, on appeal, by the District Court of the United States for the Southern District of California, and by the Supreme Court of the United States, of a certain Mexican grant for a place called San José, certain surveys were had for the purpose of ascertaining and settling the bounds of the confirmed grant; that one of them, called the Hancock survey, did not embrace within its limits the lands in question, but that another, called the Thompson survey, did embrace them; that these surveys were before the proper officers of the government for many years, and were neither of them finally and completely adopted, but that on June 17th, 1871, both were set aside and another was adopted and confirmed by the proper authorities of the United States; and that, although this did not embrace any of the lands in question, yet that the circumstance that an unauthorized survey did embrace them, rendered the lands *sub judice*, as the phrase is, and took from them the character of public lands of the United States subject to grant, which otherwise they would have had; and that, consequently, they were excluded from both the railroad grants of 1866 and 1871, whether made to the Atlantic and Pacific or to the Southern Railroad Company.

I. Are there any reasons arising out of rigid and unyielding rules of law which support the claim made by the government in these suits? This is the main subject of this argument. It is a safe observation to make at the start, to say that there is nothing else to support them. Cases more destitute of substantial equity could scarcely be imagined.

It must be admitted (1) that Congress intended that the company should have these identical lands; (2) that the proviso upon the strength of which the government bases its main effort to withhold the lands from the company was inserted only by way of tender regard for the possible rights of the Atlantic and Pacific Railroad Company; (3) that the possible contingency contemplated by this proviso, in which the government would be unable to carry out its purpose of bestowing these lands upon the Southern Pacific Company, has not arisen, and can never arise; and (4) that the Southern Pacific Company has promptly, completely, in good faith and to the satisfaction of every department of the government having any concern with the matter, complied with every condition of its grant. And yet, in the face of all this, the government, by these suits, seeks to wrest these lands from the company, not because it wishes to apply them to some purpose of its own to which they had been devoted prior to the grant, nor because it needs them in order to enable it to fulfil some prior engagement with other parties; but simply in order to restore them to the public domain where they were at the time of the grant, in order that it may deal with them as its own absolute property and as it pleases. In this there is not only no equity, but an amazing inequity.

II. So far as concerns any question in these causes, the corporation formed under the laws of California, under the name of the Southern Pacific Railroad Company, on December 2, 1865, and which became amalgamated under the same name with other companies, by articles of amalgamation, dated October 11, 1870, and afterwards amended on April 11, 1871, did not cease to exist or lose its identity by the subsequent amalgamation under articles dated August 12, 1873; and was the same corporation to which the grant of March 3, 1871, was made, and which constructed the road thereunder, and is now one of the defendants in this action.

The several corporations amalgamated were of the same character. They were after, as well as before, consolidation, railroad persons, possessing powers of precisely the same nature; and the legislative intent that identity and continuity

of existence should not be destroyed is entirely clear. The legislative provision under which the consolidation was effected was a part of the general law of California. It was the evident purpose of Congress to connect and associate the franchises, which it granted, with those which its grantee had received from the State of California. It could not have contemplated that upon any such change that company would have authority under its state charter to proceed and construct the road, and yet that its own grant for that purpose would thereupon fail.

III. If it be said that the grant was of a franchise, or that a franchise was the principal subject of it, still the title of the Southern Pacific Company would not be thereby impaired. Franchises themselves are assignable with the assent of the government granting them, and such assent was in the present case given. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *New Orleans, Spanish Fort &c. Railroad* v. *Delamore*, 114 U. S. 501.

IV. The attempt made by the bill to impeach the title of the Southern Pacific Company to lands which lie within the alleged intersecting limits of the grant to that company and of the prior grant to the Atlantic and Pacific Company, where the two routes cross, is wholly destitute of support in any of the forms in which it is made.

(*a*) It would be a sufficient answer to this objection to point, as the learned judges in the court below did, to its total want of equity. Nothing can be clearer than that the lands in dispute were destined and dedicated by Congress to the object of procuring railroad lines to the Pacific. Several independent routes were designed and provided for; and, inasmuch as such routes could not be definitely located by Congress itself when it made the grants, it was necessary to leave it to the companies themselves to make the definite location, subject, of course, to certain limitations prescribed by the acts making the grants. This necessarily involves the possible consequence of an overlap when the routes should be finally located; and in such case the conflicting rights would be settled, except perhaps where the lines were found on the same general route,

by giving priority to the prior grant when the grants were of different dates, provided both grantees were otherwise entitled to the land; and, if the grants were of the same date, by applying the equitable rule of equal enjoyment, and awarding a moiety to each. In respect to lands in indemnity limits, priority would depend, not on the comparative dates of the grants, but on the dates of selection.

But to hold that the same course was to be pursued where the company having the prior grant had never done anything to earn the land which it might otherwise claim, and whose rights had been absolutely extinguished by formal forfeiture, and the company having the later grant had earned its land by a prompt compliance with every obligation, that is to say, to apply a doctrine applicable only to disputes between two grantees, both of whom had confessedly earned the land and were entitled to it as against the United States, the grantor, to a case where one had earned it and the other had not earned, and never could earn it, and thus make the default of one the very ground of robbing the other of his well-earned reward, would seem to be a mere caricature of justice, hardly entitled to the compliment of formal refutation.

(*b*) All forms of this objection now under notice rest upon the proposition that the Atlantic and Pacific Company had actually designated its route in accordance with the act of July 27, 1866. But that company never has designated any route in accordance with the terms of the grant made to it, and the objection to the title of the Southern Pacific Company now under notice, in whatever form asserted, must fail.

The route actually selected by the Atlantic and Pacific Company was made up of fragmentary portions, having no connection with each other, and adopted and filed with the Land Department at different times. If we concede that it was competent to that company to thus designate its route in fragments, it did not become designated until the filing of the last portions of it, which was on August 15, 1872, and probably not until their acceptance in August, 1874.

(*c*) But conceding, for the sake of argument, that the Atlantic and Pacific Company made a sufficient designation

of its route, the pretence that by this act, without more, the Southern Pacific Company was prevented from acquiring title to the lands in controversy, has as little foundation in technical rules as it has in the principles of equity. The settled doctrines of this court in relation to grants of land for railroads very clearly overthrow it. *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1; *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 497; *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720; *Cedar Rapids & Missouri River Railroad* v. *Herring*, 110 U. S. 27.

(*d*) The counsel for the government have made it their chief effort to show that the lands in controversy were, or have been, in some form excepted from the grant to that company, so that the grant was not operative upon them; and if this were so, it would be very true that no considerations of justice or equity would be pertinent to the discussion. That company can certainly lay no legal or equitable claim to lands never intended to be granted to it.

The Southern Pacific Company had the right to proceed at once to designate its route, which it did by filing its plat on the 3d of April, 1871. This was immediately operative to attach the grant made to the company to the lands embraced in it generally, all along that route. Nor can it be doubted that by the designation, the grant to the Southern Pacific Company became immediately operative upon the lands in controversy, and gave to that company precisely the same right or title thereto which it gave in respect to all the other lands along its route. Whether this inchoate title was subject to be overridden and displaced by a subsequent designation of route under the prior grant to the Atlantic and Pacific Company, is quite another question. Doubtless it was; but this did not prevent the grant from attaching to the lands; indeed, it assumes that the grant did attach; for, otherwise it could not be displaced. The pretence, therefore, that the lands were excepted from the grant to the Southern Pacific Company must be dismissed.

If we test this asserted exception by the rules applicable to the construction of written grants, (4 Cruise Dig. 271,) it is at once manifest that it is no exception at all. (1) The first rule is that an exception must be created by apt words. This means that the words must import an intent to except some part of a thing previously granted from the operation of the grant. But these words disclose no such intent. (2) Another rule is that the thing excepted "must be part of the thing granted; for if the exception extends to the whole it will be void." But this so-called exception applies indifferently to the entire premises, and is as applicable to one part as another. (3) Another rule is that the thing excepted "must be certainly described and set down." This is only a formal statement of what common sense teaches, that a grant of premises must be certain in respect to the subject matter granted. It must be known, and known from the terms of the grant itself, what is intended to be conveyed by it, and what not. Otherwise it can never be executed, or any title given by it enforced. If it is attempted to exclude some part of the thing from the operation of the grant, that thing must be described so that it can be known. But how could it be told when the route of the Southern Pacific Company was located, what part of the lands to which it became attached was excluded by the prior grant to the Atlantic and Pacific Company, which was then a mere float, and might never be anything more.

If, turning aside from technical rules, we look at the situation at the time of the making of the grant to the Southern Pacific Company, and the probable purposes of Congress, the just conclusion concerning the meaning of this proviso, if, upon the face of it, a doubt could be indulged, will become very manifest. The proviso that the grant to the Southern Pacific Company should not "impair the rights, present or prospective, of the Atlantic and Pacific Company," neatly and perfectly accomplished the precise intent of Congress. It made the grant of lands to the former company immediately operative and capable of execution; but saved any rights of the latter company. If the latter company ever constructed its road, it would be entitled to the lands in the overlapping

limits. If it should not construct its road, there never would be any overlapping limits, and, therefore, no impediments in the way of the grant to the Southern Pacific Company.

(*e*) This attempted exception is sought to be supported upon another provision of the grant itself, namely, that found in section 3 of the act of July 27, 1866, providing, that in case the route should be found upon the line of any other road to which a land grant had theretofore been made, a deduction should be made of so much as had been previously granted from the amount granted by the later act, "so far as the routes are upon the same general line." This view seems wholly destitute of substance.

(*f*) The conclusion of this whole discussion of the attempt of the government to make out an exception in the grant to the Southern Pacific Company is, that the case is simply that of two grants which would, if the conditions of both had been complied with, have resulted in a conflict at a certain point. Had that collision arisen, the rival claims would have been at once determined by the inquiry which is the prior, and which is the later grant. The grant to the Southern Pacific Company was the later one in two ways: first, by the express language of the proviso; and, second, by the rule of interpretation that grants take effect from their dates, and not from the dates of location of routes.

But the conditions of the prior grant never having been complied with, there has been no collision. And that grant having been absolutely forfeited, no collision ever can take place. The later grant is the only existing one, and there is nothing in the way of its complete operation.

(*g*) A final illustration of the infirmity of the position of the government may be found by looking at its attitude as a complainant in these suits, seeking to establish in itself the legal title to the lands in controversy.

There are two aspects only in which it can maintain such a suit; (1), where it can succeed in showing that it has the right to both the legal and the equitable or beneficial titles; that is to say, where the lands belong to the general public domain, to be disposed of by the government as any absolute proprie-

tor might dispose of his lands for any purpose, sale, settlement, preëmption or other; (2) where it needs the legal title in order to deal with it in conformity with some appropriation already made of the lands, which it is the duty of the government to carry out and perfect. *United States* v. *Missouri, Kansas & Texas Railway*, 141 U. S. 358, 368, 380. In neither of these aspects can these suits be maintained.

(1) They cannot be in the first aspect, which, indeed, is the one in which they are avowedly brought. The United States have no beneficial interest in these lands. It intentionally parted with all that interest by the two grants which have been discussed.

(2) Nor can these suits be maintained in the second aspect. In the first place, it is enough to say that the government does not pretend to bring the suits in that aspect. It does not pretend that it needs the legal title in order that it may hold it and in due time convey it to the Atlantic and Pacific Company. It disclaims and repudiates that attitude. It asserts that that company has wholly forfeited its rights, and that it never will convey the lands to it. But even if it did not assert this, but affected to want the title in order to bestow it upon the Atlantic and Pacific Company, that would not alter the conclusion; for, whether the one or the other of these companies has the title, is a question between them, and to be settled by a suit between them, and not in a suit brought by the United States.

(*h*) The view taken by the government to the effect that these lands have been, in some manner, excepted from the grant to the Southern Pacific Company, either by reason of that grant being subsequent in date to the grant to the Atlantic and Pacific Company, or in consequence of the proviso, seems to have been supposed by some officers of the Land Department to be supported by the decisions of this court; and the supposal was acquiesced in, in an *obiter* fashion, though the assent was afterwards withdrawn, by the learned judge of the District Court. There is no such support for this view. On the contrary, the positions and the reasoning of this brief are fully sustained by a long series of decisions of

this court. *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491; *Kansas Pacific Railroad* v. *Atchison, Topeka &c. Railroad*, 112 U. S. 414; *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, Id. 720; *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406. See also *Schulenberg* v. *Harriman*, 21 Wall. 44; and *Van Wyck* v. *Knevals*, 106 U. S. 360; both cited by the counsel for the government. The doctrine declared by these cases is well stated in the opinion in the latter by the following language: "A third party cannot take upon himself to enforce conditions attached to the grant, when the government does not complain of their breach," p. 369.

V. The ground is taken by the complainants as to some of the lands in controversy, that they were not included within the grants, either to the Atlantic and Pacific or to the Southern Pacific Company, for the reason that they were within, not, indeed, the real limits, but within the claimed limits of the Mexican grant called San José. This ground of objection cannot be maintained.

If it were indeed true that the lands in question, or any of them, were at the time of the making of the grant to the Southern Pacific Company really within the limits of a Mexican grant, which was *sub judice*, as the phrase is, they would not pass by the grant — not for the reason that they were within any express exception, but because such grants are understood to be only of public lands; and it has been held that lands within the boundaries of a Mexican grant, not fully adjudicated upon, do not fall within the description of public lands, as those words are understood in the interpretation of grants, such as these, for the purpose of aiding in the construction of railroads.

But this proposition is not sufficient for the purposes of the complainants. It is admitted that none of the lands in controversy were actually within the boundaries of the Mexican grant called San José, as the same was confirmed and finally patented. What is alleged is, that they were within the claimed limits of that grant; that is to say, that there was at some time or other, before the final survey, which was had

after the final confirmation of the grant, a claim on the part of the grantees that the boundaries of the grant embraced a larger area than that for which the patent was issued, and included some of the lands in controversy.

The proposition, therefore, which the complainants must maintain, or their case in this respect wholly fails, is, not that lands within the boundaries of a Mexican grant do not belong to the category of public lands, but that lands outside of such boundary, as well as lands within it, are in like manner excluded from that category, provided that there is a claim that the lands are included within the boundaries of the grant. This proposition finds no support in reason or in the policy upon which the rule really established, as above mentioned, stands. *Newhall* v. *Sanger*, 92 U. S. 761; *Doolan* v. *Carr*, 125 U. S. 618; *United States* v. *McLaughlin*, 127 U. S. 428.

Mr. Justice Brewer delivered the opinion of the court.

The question to be considered is not as to the validity of the grant to the Southern Pacific Company, but only as to its extent. It may be conceded that the company took title to lands generally along its line, from Tehachapa Pass to its junction with the Texas Pacific; and the contention of the government is here limited to those lands only which lie within the granted limits of both the Atlantic and Pacific and the Southern Pacific Companies, at the crossing of their lines, as definitely located. As it appears from the record that, at the time of the location of the former company's line, so many of the tracts within these overlapping limits had been taken up by preëmption and homestead entries that the indemnity limits were not large enough to supply its deficiency, it is obvious that the land to be affected by this decision is of limited area in comparison with the large body of lands covered by the grant to the Southern Pacific.

The contention of the government is, that these lands were not included within the grant to the Southern Pacific. Such contention implies no want of good faith on its part. It is not attempting to take back or forfeit that which it has once

granted. It is only seeking, a difference of opinion having arisen, an adjustment, a determination of the extent of its grant. Less than that could not be expected; more than that could not be asked of it.

The grants to both the Atlantic and Pacific and the Southern Pacific Companies were grants *in præsenti.* The language is, "there be, and hereby is, granted." The construction and effect of such words of grant have often been considered by this court. In the recent case of *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, 5, Mr. Justice Field, speaking for the court, said: "As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preëmption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is, 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Leavenworth, Lawrence &c. Railroad Co.* v. *United States*, 92 U. S. 733; *Missouri, Kansas &c. Railway Co.* v. *Kansas Pacific Railway Co.*, 97 U. S. 491; *Railroad Co.* v. *Baldwin*, 103 U. S. 426. The terms of present grant are in some cases qualified by

other portions of the granting act, as in the case of *Rice* v. *Railroad Co.*, 1 Black, 358; but unless qualified they are to receive the interpretation mentioned."

In view of this late and clear declaration, it would be a waste of time to attempt a reëxamination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common law rule as to the necessity of identification to a conveyance has not been controlling in determining the scope and effect of a Congressional land grant. Yet reference may be had to the still later case of *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535, in which the doctrine that title passes by relation as of the date of the grant was held to exclude from a grant land which, at the date of the act, was held under a homestead claim, although the claim had been abandoned, and the land restored to the public domain before the filing of the map of definite location. It may also not be amiss to notice the case of *Schulenberg* v. *Harriman*, 21 Wall. 44. In that case land had been granted to the State of Wisconsin, to aid in the construction of a railroad. The language of the grant was like that in this: "There be, and is hereby, granted." A further provision was that if the road be not completed within ten years, "no further sales shall be made, and the lands unsold shall revert to the United States." The railroad was not completed within the time specified. Thereafter timber was cut and removed from these lands, and the question for consideration was as to the ownership of that timber. It was held that the timber was the property of the State; that by the grant, title to the land passed to the State upon the location of the route; and that, though the road was not completed within the time specified, and though there was the provision that the unsold lands should revert, yet the title still remained in the State, held under a condition subsequent, and held until the government should take some steps to assert a forfeiture.

Applying these well-settled rules to the cases at bar, there can be little difficulty in arriving at a conclusion. The grant to the Atlantic and Pacific was made in 1866; to the Southern

Pacific in 1871. They were grants *in præsenti.* When maps of definite location were filed and approved, the grants severally took effect by relation as of the dates of the acts. The map of definite location of the Atlantic and Pacific Company's road along the lands in controversy was filed and approved on April 11, 1872. Then the specific tracts were designated, and to them the title of the Atlantic and Pacific attached as of July 27, 1866. If anything in the land laws of the United States can be considered as thoroughly settled by repeated decisions, it is this. It matters not when the map of definite location of the Southern Pacific was filed and approved, whether before or after April 11, 1872; for when filed the grant could take effect by relation only as of March 3, 1871, and at that time, and for nearly five years theretofore, the title to these lands had been in the Atlantic and Pacific. It matters not that the act of 1871 in terms purports to bestow the same rights, grants and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of the rights and privileges; it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling cotemporaneous grants, as established by *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720, and *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406. Even if Congress had in terms expressed an intent to that effect in a subsequent act, it was not competent, by such legislation, to divest the rights already vested in the Atlantic and Pacific Company. So the case, in the best way of putting it for the defendant, is the case of two companies with conflicting grants, each of whose line of definite location has been approved by the Land Department. Unquestionably, the grant older in date takes the land.

Some stress seems to have been laid in the court below on the proviso to the act of 1871, which reads: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific

Railroad Company, or any other railroad company." But the language of this proviso is negative and restrictive, and not affirmative and enlarging. It says substantially that nothing in the grant to the Southern Pacific shall affect or impair other grants. Surely the declaration that this grant does not affect some other grant, does not make this grant any larger than it would have been without that declaration. It simply prevents it from having any effect, which, but for the declaration, it might be supposed to have on something else. If without those words it could take nothing granted to the Atlantic and Pacific, *a fortiori* with them it takes nothing.

But it is urged by counsel for defendant that no map of definite location of line between the Colorado River and the Pacific Ocean was ever filed by the Atlantic and Pacific or approved by the Secretary of the Interior. This contention is based upon these facts: The Atlantic and Pacific Company claimed that, under its charter, it was authorized to build a road from the Colorado River to the Pacific Ocean, and thence along the coast up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific Ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles County, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado River westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the Land Department, holding that the Atlantic and Pacific Company was authorized to build not only from the Colorado River directly to the Pacific Ocean, but also thence north to San Francisco, approved them as establishing the line of definite location. Subsequently, and when Mr. Justice Lamar was Secretary of the Interior, the matter was reëxamined, and it was properly held that under the act of 1866, the grant to the Atlantic and Pacific was exhausted when its line reached the Pacific Ocean. San Buenaventura was, therefore, held to be

the western terminus, and the location of the line approved to that point. The fact that its line was located, and maps filed thereof in sections, is immaterial. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is whether the filing a map of definite location from the Colorado River through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado River to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is. Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant; and when a map of such a line is filed, full information is given, and, so far as that line may legally extend, the law perfects the title. It surely cannot be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands.

In this connection, reference may be had to the contention of the Southern Pacific Company, that it filed its map of definite location on April 3, 1871, more than a year before the filing of its map by the Atlantic and Pacific Company; that, therefore, its title then attached to these lands, the same as to any other lands along its line; and that, if such title was displaced by any subsequent filing of the Atlantic and Pacific Company's map, it was only conditionally displaced; that is, displaced on condition that the Atlantic and Pacific Company should, by the final completion of its road, perfect its right thereto. But whatever title or right the Southern Pacific Company might acquire by a prior filing of its map was absolutely displaced when the Atlantic and Pacific Company's map was filed. Illy as it may accord with the common law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that

Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific. As said in the case of *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 497:

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

So now, whatever may have been the dates of filing by the respective companies, the case stands as though the lands granted to the Atlantic and Pacific had been identified in 1866, and title had then passed, and there never was a title of any kind vested in the Southern Pacific Company.

And whatever of plausibility there might be in this suggestion of counsel, based upon the old common law rules in respect to the effect of a lack of identification upon attempted conveyances between private parties, it fails entirely because its map of definite location was not filed by the Southern Pacific Company until long after the filing by the Atlantic and Pacific Company. It is true that the bills of complaint in these cases allege that "said Southern Pacific Railroad Company accepted said grant, and on April 3, 1871, did designate the line of its said road by a plat thereof, which it on that day filed in the office of the Commissioner of the General

Land Office, and did construct and complete said road in the manner and within the time prescribed, except that it did not connect with the Texas and Pacific Railroad, and on April 3, 1871, the odd sections of public land for thirty miles in width on each side of said route, to which the United States had full title, not reserved, sold, granted, appropriated and free from all claims and rights, were, by the Department of the Interior, ordered withdrawn from sale and entry and reserved."

This allegation apparently refers by its terms to the line of definite location, as provided for in section 3 of the act of July 27, 1866, inasmuch as it uses the words of that section, to wit, "at the time the line of said road is designated by a plat thereof." And if this were a matter vital to the case, it might be necessary to require that the bill be amended to conform to the proof, though it may be remarked that the allegations in the last part of the clause quoted, in respect to the withdrawal of lands, seem to indicate that the map of general route rather than that of definite location was referred to.

The distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of *Buttz* v. *Northern Pacific Railroad Co.*, 119 U. S. 55. The act under consideration in that case was that of July 2, 1864, 13 Stat. 365, making a grant to the Northern Pacific Railroad Company. The third section of that act, as the third of this, made the grant, and provided for the line of definite location. Section 6 authorized the fixing of the general route, and its language in respect to that matter is the same as that of section 6 of the act before us. It reads: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry," etc. Referring to this matter, it was said in the opinion in that case, on pages 71 and 72: "The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of

the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted or otherwise appropriated, and are free from preëmption, grant or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or preëmption of the adjoining odd sections within forty miles on each side, until the definite location is made. . . . The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or preëmption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preëmption, it has been the practice of the Department in such cases, to formally withdraw them."

As the act of July 27, 1866, the one before us, is in these respects exactly like that of the one before the court in that case, it must be held that here, as there, Congress provided for two separate matters; one the fixing of the general route, and the other the designation of the line of definite location; and an examination of the evidence shows that the map which

was filed on April 3, 1871, was simply one of general route, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached. As the map was filed within one month after the grant, it might be inferred that there had not been sufficient time to fix the line of definite location, though, of course, it would be possible, as counsel suggests, that the company had surveyed the line in anticipation of the grant, and the matter of time would not be decisive. But turning to the map itself, a copy of which is in evidence, we find that this is the certificate made thereon by the Southern Pacific Company:

To Hon. C. Delano, Secretary of the Interior, and Hon. Willis Drummond, Commissioner of General Land Office:

"Please to take notice that this map is filed by the Southern Pacific Railroad Company, of California, in the office of the Commissioner of the General Land Office, in the Department of the Interior, for the purpose of designating by the heavy red line traced thereon the general route of the line of railroad, as near as may be, from a point at or near Tehachapa Pass, by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River, adopted by the said Southern Pacific Railroad Company in pursuance of the power and authority granted to said company by the 23d section of the act of Congress of the United States, entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3, 1871, and in pursuance of the provisions of the act of July 27, 1866, referred to in said 23d section, and for the purpose of obtaining the benefit of the provisions of said acts of Congress.

"Chas. Crocker,

"*President, Southern Pacific Railroad Company.*"

Not only that, but upon the filing of the map, and on April 21, 1871, the Commissioner of the General Land Office sent to the receiver at Los Angeles a letter making a direction of withdrawal, in which he says, referring to this matter: "The com-

pany having filed a diagram designating the general route of said road, I herewith transmit a map showing thereon the line of route, as also the 20 and 30-mile limits of the grant, to the line of withdrawal for the Southern Pacific Railroad under the act of 1866, and you are hereby directed to withhold from sale or location, preëmption or homestead entry all the odd-numbered sections falling within those limits."

Further, there is in evidence an exemplification of a diagram in the Land Office, showing the limits of the grant to the Atlantic and Pacific Company, with the intersecting limits of the grant to the Southern Pacific Company, on which diagram appear two lines, one traced in blue, and marked "branch of the Southern Pacific Railroad;" and the other in red, somewhat divergent therefrom, marked "Southern Pacific Railroad, definite location." Still further, on the minutes of the proceedings of meetings of the directors of the Southern Pacific road, held on April 10, September 8, and October 1, 1874, appear resolutions similar in their character, but having reference to different parts of the line between Tehachapa Pass and the Texas Pacific Railroad.

The one passed at the meeting on April 10, 1874, is in these words:

"*Resolved*, That the line of railroad as it has been surveyed and laid out on map marked 'AA,' and described as follows: Commencing at a point in the northwest quarter (N.W. $\frac{1}{4}$) of section [three] (3), township two (2) north, range fifteen (15) west, San Bernardino base and meridian, and running thence in a southeasterly direction to the city of Los Angeles, and thence in an easterly direction to a point in the northeasterly quarter (N.E. $\frac{1}{4}$) of section twenty-seven (27), township one (1) south, range nine (9) west, San Bernardino base and meridian, being map and profile of section No. one, Southern Pacific Railroad and telegraph line authorized by the twenty-third section of the Texas Pacific Railroad act, approved March 3d, 1871, be and the same is hereby, adopted as the route of said railroad between the points named.

"(Signed) J. L. Willcutt, *Secty.*"

So, only at these late days was the line of definite location determined upon by the company. Of course, therefore, the map filed April 3, 1871, could not have been a map of that line, but was, as it states, only of the general route, and there was then no designation of lands to which the Southern Pacific Company's title could attach.

On the other hand, the Atlantic and Pacific Company did file its maps of definite location. This appears from the certificates thereon. In the one covering the line along the lands in controversy, the chief engineer of the company certifies that E. N. Robinson was a deputy engineer, and that the latter, "as shown by his field-notes, did actually survey and mark upon the ground, or cause to be surveyed and marked upon the ground, the line or route of the Atlantic and Pacific Railroad," etc., as delineated upon the map; and that his acts in the premises were duly approved and accepted on behalf of the company, by himself as chief engineer. And in the further official certificate of the company it is stated that the "map shows the line or route of the said Atlantic and Pacific Railroad in the county, . . . being a part of the line or route of said railroad, as definitely fixed in compliance with said acts of Congress," etc. These maps were received and approved by the Land Department as maps of definite location. It follows that in fact the line of definite location of the Atlantic and Pacific was established, and maps thereof filed and approved before any action in that respect was taken by the Southern Pacific Company. There never was a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands; and the plausible argument based thereon, made by counsel in behalf of the Southern Pacific Company, falls to the ground.

Again, it is urged that the grant to the Atlantic and Pacific having been forfeited, there is nothing now in the way of the Southern Pacific's grant attaching to these lands; that in the interpretation of rights under land grants, regard has always been had by this court to the intention of Congress; that it was the intention of Congress that these lands should pass to some company to aid in the construction of a railroad, either

the Atlantic and Pacific or the Southern Pacific; that they cannot now be applied to aid in the construction of the former company's road; and that, therefore, to carry into effect the intent of Congress, they should be applied to aid in the construction of the latter company's line. We think this contention is erroneous, both as to the law and the intent of Congress. It was held in the case of *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629, that, where a homestead right had attached to a tract at the time of the definite location of the railway company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railway company under its grant; that the grant only attached to lands which were the subject of grant at the time; and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time its grant became fixed. On page 644 the court observed: "The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds." The same doctrine was affirmed in *Hastings and Dakota Railroad* v. *Whitney*, 132 U. S. 357; *Sioux City &c. Land Co.* v. *Griffey*, 143 U. S. 32; *Bardon* v. *Northern Pacific Railroad*, 145 U. S. 535.

Neither can it fairly be said that it was the intent of Congress that these lands should pass conditionally to the Southern Pacific Company. Good faith must be imputed to Congress. It cannot be supposed that Congress intended to give to the Southern Pacific Company that which it had already given to the Atlantic and Pacific Company. It knew that it had granted lands to the Atlantic and Pacific for a road to the Pacific Ocean, and that that company was then engaged in constructing its road, and proceeding with as much rapidity as other Pacific companies had done. Within little over a month from the date of this grant to the Southern Pacific Company, and on April 20, 1871, it gave to the Atlantic and Pacific Company authority to issue bonds secured by a mortgage on its road, equipment, lands, franchises, privileges, etc. 17 Stat. 19, c. 33. Congress, therefore, was expecting that the Atlantic

and Pacific Company would construct its road, and, with this expectation, had no thought of giving to the Southern Pacific Company that which it had already given to the Atlantic and Pacific Company.

Further, as indicating the intent of Congress, reference may be had to the first proviso to section 3 of the act of 1866, which, by the terms of section 18 of that act and the act of 1871, becomes one of the conditions of the grant to the Southern Pacific Company. That proviso is: "*Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." That proviso may not be technically and strictly applicable to this case, in that a road crossing another may perhaps not be said to be found upon the line of such other road, or to be upon the same general line, yet the import of this proviso is clear, to the effect that Congress was not only not intending to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the later grant.

Not only that, but by section 9 of the original act it was provided "that if the Atlantic and Pacific make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road." In other words, the intent of Congress was that this road to the Pacific should be built; that if there was any delay on the part of the Atlantic and Pacific Company, it might itself take all needful and necessary measures to accomplish the building; and to that end of course, use all the lands it proposed to grant therefor. Can it be supposed that this purpose of Congress was forgotten, or that its intent was changed when it made the grant to the Southern Pacific, or that it had anything in contemplation other than that, after the completion of the Atlantic and Pacific road, and the

appropriation of the lands along its line to aid in that construction, the Southern Pacific Company might, if it saw fit to build a road from Tehachapa Pass to the Texas and Pacific Railroad, obtain the remainder of the lands along that line?

Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands, and, therefore, grantable by Congress, and is never to be taken as a floating authority to appropriate all tracts within the specified limits which at any subsequent time may become public lands. The question is asked, supposing the Atlantic and Pacific Company had never located its line west of the Colorado River, would not these lands have passed to the Southern Pacific Company under its grant? Very likely that may be so. The language of the Southern Pacific Company's grant is broad enough to include all land along its line and if the grant to the Atlantic and Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company.

But that is a matter of result from the happening of something neither intended nor expected. While it may have been within the knowledge of Congress as among the possibilities, that result was not the purpose sought to be accomplished by this legislation. If any other than the general rule as to land grants had been intended, it is to be expected that such intention would have been clearly expressed. So when intent is to be considered, the question is whether Congress intended, the title having once vested in the Atlantic and Pacific, that the Southern Pacific Company should stand waiting to take the lands at some future time, however distant, when the Atlantic and Pacific Company's title should fail.

Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but

the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit.

Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.

The decrees of the Circuit Court must be reversed, and the cases remanded with instructions to enter decrees for the plaintiff for the relief sought.

Mr. Justice Field, (with whom concurred Mr. Justice Gray,) dissenting.

I am not able to agree with the court in its judgment in these cases or in the reasons offered in its support.

The cases were fully and elaborately considered by the Circuit and District Judges in the court below. 46 Fed. Rep. 683, 692. Their opinions are not only able and convincing, but lead to conclusions which seem to me consonant with justice and fair dealing. To my sense of right, there is something repugnant in any other conclusion, in view of the

inducements held out by the government and the work done, and the expenses incurred, by the railroad company.

Congress desired to connect by a railway the States on the Mississippi with the Pacific Coast, and for that purpose, by the act of July 27, 1866, created a corporation known as the Atlantic and Pacific Railroad Company, and gave it a grant of lands to aid in the construction of a railway between Springfield, in the State of Missouri, and the Pacific Coast. 14 Stat. 292, c. 278. The 18th section authorized the Southern Pacific Railroad Company, a corporation under the laws of California, to connect with the Atlantic and Pacific Railroad at such point near the boundary line of California which it should deem most suitable for a railroad line to San Francisco, and in consideration thereof, and to aid in its construction, gave it grants of lands similar to those which the Atlantic and Pacific Railroad Company had received and subject to the same conditions and limitations.

On the 3d of March, 1871, Congress passed an act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road; and, for the purpose of connecting that road with the city of San Francisco, it authorized, by its 23d section, the Southern Pacific Railroad Company to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, as those contained in the grant by the act of July 27, 1866, with a proviso "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company." On the 3d of April following, one month only after the passage of this act, the Southern Pacific Company designated the line of its road from Tehachapa Pass, by way of Los Angeles to Fort Yuma on the Colorado River, on a map which it filed on that day in the office of the Commissioner of the General Land Office. Afterwards the Southern Pacific was amalgamated or consolidated with other companies, the consolidated company being called the Southern Pacific Railroad Company. It then proceeded to

build the railroad along the line designated from Tehachapa Pass, by way of Los Angeles, to the Colorado River, and completed the same within the time required by the act of Congress. Its several sections were examined from time to time and reported to the President of the United States, by commissioners appointed by him for that purpose; and the whole line was accepted by the President, and patents of the United States for the greater part of the lands thus earned were issued to the company. Ever since the completion and acceptance of the road the company has performed to the satisfaction of the government all the services, such as carrying the mails, transporting troops and supplies, in all respects as required by the act of Congress; and the services have been accepted by the United States.

The Atlantic and Pacific Railroad Company subsequently to this definite location of the Southern Pacific Company, and nearly a year after the construction of its road had been commenced, and on March 12, 1872, filed in the office of the Secretary of the Interior — not the office of the Commissioner of the General Land Office — two maps of portions of the line of road in the State of California, and some time afterwards filed maps of other portions of its line, but it never constructed any portion of the road authorized to be constructed by it in the State of California; and for its failure in that respect, Congress, on July 6, 1886, passed an act declaring a forfeiture of the land in that State. The proposed line of the Atlantic and Pacific Railroad, which was never built, crosses the line of the road of the Southern Pacific Company, which was built as stated.

The present suit is brought to cancel the patents issued to the Southern Pacific Company, and, wherever there is any portion for which a patent has not been issued, to annul its alleged title.

The opinion of the majority of the court proceeds upon the ground that the grant to the Atlantic and Pacific Railroad Company, though the road in aid of which it was granted was never constructed, and the grant was subsequently forfeited by the United States, operated to divest the government of

the fee of such lands so completely that the grant to the Southern Pacific Company to build its road could in no way be carried out; that its action, although taken with the approval of the officers of the government and strictly in conformity with its grant, gave nothing whatever to that company, and that the United States are for that reason authorized to ask for the cancellation of the patents and the surrender of the lands granted, necessarily carrying with them the railroad and other works constructed by the company. And this is prayed in the face of the evident intention of Congress that the Southern Pacific Company should have these identical lands, so far as the government had the right to grant them as its reward in part for building the road.

It is not denied or doubted, as counsel well observed, that the Southern Pacific Company "promptly, completely, in good faith and to the satisfaction of every department of the government having any concern with the matter, constructed and equipped its road, put it into operation and placed in possession of the government every facility and advantage sought by it in making the grants, and has thus fully earned its entire reward. And yet, in the face of all this, the government, by these suits, seeks to wrest these lands from the company, not because it wishes to apply them to some purpose of its own to which they had been devoted prior to the grant, nor because it needs them in order to enable it to fulfil some prior engagement with other parties, but simply in order to restore them to the public domain, where they were at the time of the grant, in order that it may deal with them as its own absolute property, and as it pleases." The cases would thus seem to be destitute of any substantial equity.

The opinion assumes that the grant to the Atlantic and Pacific Company when its map of definite location was filed, though that was after the concession to the Southern Pacific Company, took effect and vested an absolute title to the lands designated in the Atlantic and Pacific Company from its date, which could not be affected by any subsequent events which would make the concession to the Southern Pacific available. In support of that view it cites several decisions of the court,

in which it has been held that similar railroad grants were grants *in præsenti*, and operated only upon lands at the time free from exceptions stated, such as lands to which a pre-emption or homestead right has attached, or have been reserved for special purposes, and that lands thus excepted or reserved do not fall under the operation of the grants if subsequently the cause of the original exception or reservation has ceased, but remain as public or ungranted lands.

Such grants have been treated as grants *in præsenti* in determining controversies between parties as to the date of their respective titles under the grants, or against conflicting grants. They are grants *in præsenti*, so as to cut off all intervening claims except such as are expressly named; and if the work, in aid of which the grants are made, is executed in accordance with their provisions, the title of the grantees will take effect as of their date, except as to specially reserved parcels. We do not disagree with the majority of the court on this point. It is true, also, that lands excepted or reserved from such grants at their date are not subsequently brought under their operation if the cause or purpose of their exception ceases. They remain ungranted lands. Such was the case of *Bardon* v. *Northern Pacific Railroad Company*, 145 U. S. 535. But it is evident that such exceptions and reservations of one grant do not apply and control a second grant, unless such second grant is specially stated to be within them. When the second grant in question in this case was made, all the rights which the United States had in the lands described therein passed to the Southern Pacific Company, subject only to the rights specially reserved of the first grantee, and released of all restrictions upon their use except as thus designated. Until something was done under the first grant towards its execution, it was competent for Congress to give effect to other grants and to limit the extent of their subordination.

Neither grants *in præsenti*, nor grants with special exceptions or reservations, have ever been held, that I am aware of, to prohibit a second grant of the same lands subject to the condition that it shall not affect or impair any rights

under the elder grants. There can be no circumstances under which such second conditional grant may not be made. Whether it will ever become operative and pass the title to the lands described will depend upon circumstances which cannot be stated with certainty in advance. Many events may arise to defeat or limit the operation of the first grant. It may be forfeited, or portions of its lands may be surrendered and new legislation, taken in execution of the reserved power to alter, amend or repeal the act making the grant, may change the whole condition of the lands.

From these views it would seem that the questions arising in this case should not be difficult of solution. Before anything was done under the grant to the Atlantic and Pacific Railroad Company, even to indicate the route of the road it would construct, authority was issued by the government to the Southern Pacific Company to build a road north from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas and Pacific Railroad at or near the Colorado River, with a proviso, however, that the authority thus given should not in any respect impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or of any other railroad. Congress had power to confer such authority and to make a grant for its execution. Surely Congress can make a grant of lands which it owns or claims to own at any time, if it annex a condition that the grant shall not affect or impair the rights of a previous grantee. It would, as it seems to me, be an extravagant and utterly unwarranted assertion to say that Congress, having made a grant for a railroad to run in one direction, is thereby prohibited from making another grant for a railroad to run in a different direction, if a condition is annexed that the second grant shall not affect or impair the rights of the first grantee. The questions, and the only questions for consideration in such a case, would be, first, what are the rights thus reserved to which the second grant is subordinate, and, second, have they been affected or impaired by the later grant? The previous grant to the Atlantic and Pacific Railroad Company, made six years before, did not stand in the way of Congress making the conditional con-

cession to the Southern Pacific. If unlimited, it would have affected the extent of the grant to the first company. A limitation upon its operation was placed by the proviso. No line of railroad had been then defined or marked by the Atlantic and Pacific Railroad Company. It might, so far as Congress saw, have selected a different route from the one it did afterwards select. Congress waited six years for that company to make a selection before it made the concession to the Southern Pacific Company. The company was not bound to wait indefinitely for the years to elapse before moving in the enterprise it was to undertake, and to further which Congress had afforded assistance. The condition attached to the concession was not an exception from the grant of any lands that the Atlantic and Pacific Railroad Company might claim under its grant without performing its conditions. It merely rendered the concession to the Southern Pacific Company subordinate and subject to any rights that the Atlantic and Pacific Company may then have acquired or might thereafter acquire under its grant, upon the performance of its conditions. What, then, were those rights, present or prospective, which were reserved to the Atlantic and Pacific Company? Plainly they were the right to construct a railroad and telegraph to the Pacific Coast, from the Colorado River, by the most practicable route, with a right of way two hundred feet in width, and to use certain lands granted for that purpose to aid in their construction, and, when constructed, the right to operate the road and use the telegraph line. They were permissive rights, and not compulsory. Have they been affected or impaired by the concession to the Southern Pacific Company? In no respect whatever. They were affected and impaired by the company's failure to perform the conditions annexed to its grant, and in no other way, until its forfeiture was declared. It never did anything towards a compliance with its conditions except to file, in detached parts, what it termed a map of the location of its road six years after the date of the grant and one year after the Southern Pacific Company had located its road, under its concession, and commenced its construction. Its rights, whether present or prospective were never invoked,

and, in consequence, nothing was ever obtained in virtue of them. The building of another road in another direction by the Southern Pacific Company under its concession did not, therefore, affect or impair any rights of the Atlantic and Pacific, as none were ever claimed or exercised by it. Had the company performed the conditions of its grant and exercised its rights it would have taken the lands under the grant against any possible pretension of the Southern Pacific Company; but, having abandoned all such rights by simply refusing to do anything, the Southern Pacific Company rightly proceeded with its work and constructed its road. The grant to it was a full conveyance of all the rights of the United States free from all restraints except as specially designated, and the rights then reserved were never subsequently affected or impaired by the Southern Pacific Company, and they were lost entirely by the forfeiture of the grant.

The case, in a nutshell, is this: The grant to the Atlantic and Pacific Railroad Company was indeed prior in point of time and of right, and the grant to the Southern Pacific Railroad Company was subordinate to the prior grant. But when the prior grant was forfeited by the failure of the Atlantic and Pacific Railroad Company to perform its conditions, that grant fell off, and the underlying grant to the Southern Pacific Railroad Company, all the conditions of which had been performed, remained in full force and effect.

I consider the principle involved in these cases as one of great importance, more so than the value of the property, although that runs into millions of dollars, expended by the company upon the encouragement of the government. But it is infinitely more important that it should be established that the government and its officers are bound by the same principles of justice in their dealings which are held to govern the conduct of individuals.

In my opinion the judgment of the court below should be affirmed, and I am authorized to state that Mr. Justice Gray concurs with me in this dissent.

UNITED STATES *v.* COLTON MARBLE AND LIME COMPANY.

UNITED STATES *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

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

Nos. 862, 863, Argued November 9, 10, 1892. Decided December 12, 1892.

The proviso in the act of March 3, 1871, 16 Stat. 573, c. 122, granting lands in aid of the construction of the Southern Pacific Railroad, that the grant should "in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company," operated to exempt the indemnity lands of the Atlantic and Pacific Company from the grant to the Southern Pacific Company.

THESE cases were similar in many respects to those of *The United States* v. *The Southern Pacific Railroad Company et al.*, just decided. The lands involved were within the granted limits of the Southern Pacific Railroad Company, and the indemnity limits of the Atlantic and Pacific Railroad Company, and the contention on the part of the government was, that because they were within such indemnity limits they were not of the lands granted or intended to be granted to the Southern Pacific Company. In the first, the defendants claimed under the Southern Pacific Railroad Company, and were charged to be committing trespasses upon the lands, and the relief sought was, as in the two prior cases, to quiet the title of the plaintiff and to restrain the trespasses. In the second, a patent had been issued, and the legal title conveyed to the railroad company, and the relief sought was the cancellation of that patent, and a decree establishing the title of the government. In this case there was a further contention on the part of the government, and that was that the lands were *sub judice* at the time of the definite location of the Southern Pacific Company's road, inasmuch as they were within the exterior boundaries of a Mexican land grant known as the

Rancho San José, as those boundaries were marked on the surface of the ground by one of two official surveys, the accuracy of neither of which had then been determined. Decrees were entered below in favor of the defendants, dismissing the bills; from which decrees the government appealed to this court. See 39 Fed. Rep. 132; 40 Fed. Rep. 611; 45 Fed. Rep. 596; 46 Fed. Rep. 683.

Mr. Assistant Attorney General Maury for appellant.

Mr. James C. Carter for appellees.

These cases were argued with the preceding case, (Nos. 921, 922.) The argument of counsel on both sides is reported in full in that case, both the parts relating to the special question considered by the court in this case, and the other questions, involved in all the cases. Briefs, entitled in all the cases, were filed by *Mr. George W. Merrill*, *Mr. G. Wiley Wells* and *Mr. Daniel L. Russell*, on behalf of Joseph Hinkell, claiming adversely to the Southern Pacific Company; and *Mr. J. A. Anderson*, on behalf of several appellees in No. 863, submitted on *Mr. Carter's* brief.

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

The ordinary rule with respect to lands within indemnity limits is, that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, in a contest between two railroad companies, that no formal selection was necessary to give them to the one having the older grant, as against the other company. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1. And if the Atlantic and Pacific Company had constructed its road, it would be difficult in the light of that decision to avoid the conclusion that all the lands within the indemnity limits passed to that company. But this case does not rest upon that proposition. One thing which distinguishes the grant of 1871 to the Southern Pacific Railroad Company from most,

if not all other, land grants is the proviso somewhat considered in the opinion in the former cases, and which reads: "*Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

What is the significance of this proviso? Without it, certainly, the Southern Pacific, its grant being of later date, would be postponed to the Atlantic and Pacific; and on the filing by each company of a map of definite location, the title to the lands within the granted limits would vest in the Atlantic and Pacific Company, to the total and absolute exclusion of all claims on the part of the Southern Pacific. The proviso, therefore, was without significance, in respect to such lands. It in no manner strengthened the title of the Atlantic and Pacific, and took nothing away from the Southern Pacific. Yet it cannot be supposed that this proviso was meaningless, and that Congress intended nothing by it. Carefully inserted, in a way to distinguish this grant from ordinary later and conflicting grants, it must be held that Congress meant by it to impose limitations and restrictions different from those generally imposed in such cases, and it in substance declared that the Southern Pacific Company should not in any event take lands to which any other company had at the time a present or prospective right. As it could have no effect upon the lands within the granted limits, it must have been intended to have some effect upon those within the indemnity limits, they being the only lands upon which it could operate.

What were the prospective rights of the Atlantic and Pacific Company? Of course it could not be known at the time of the passage of the later act exactly where the lines of the two companies would be located, and where the point of crossing would be. Neither could it then be known that there would be any deficiency in the granted lands at the point of crossing, or that, if such deficiency existed, it would require all the indemnity lands to make good the loss. It might well be assumed that very likely the Atlantic and

Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency, in the granted limits. That right of selection was a prospective right, and if it was to be fully exercised, no adverse title could be created to any lands within the indemnity limits. Suppose, for instance, it should turn out that only half of the indemnity lands were necessary to make good the deficiency, and that one-half of such lands were well watered and valuable, while the remainder were arid and comparatively valueless, obviously the right of selection would be seriously impaired if it were limited to only the arid and valueless tracts. In fact, every withdrawal of lands from the aggregate of those from which selection could be made would more or less impair the value of the right of selection. The only way in which force can be given to this proviso is to hold that the indemnity lands of the Atlantic and Pacific were exempted from the grant to the Southern Pacific, for, if not exempted, the former company's prospective right of selection would be to that extent impaired. It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they are not lands in respect to which that company would have a right of selection, and might defer the exercise of that right until such time as suited it. Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific. Hence, it follows that the title to none of these indemnity lands passed or could pass to the Southern Pacific Company.

In this aspect of the case it becomes unnecessary to inquire whether the lands described in the second case were *sub judice* or not. If they were *sub judice*, they could not pass to either company; and if they were not, the Atlantic and

Pacific's prospective right of selection prevented the passing of title to the Southern Pacific.

The decrees in both cases will be reversed, and the cases remanded with instructions to enter decrees in favor of the government for the relief sought.

MR. JUSTICE FIELD, (with whom concurred MR. JUSTICE GRAY,) dissenting.

In these cases I dissent from the judgment of the court equally as from that in the cases just decided. It is now held that not only the lands within the granted limits of the Atlantic and Pacific Railroad Company passed to that company beyond the power of Congress to assign any portion of them for the construction of the Southern Pacific Company, although no work was done by the former corporation, and the grant to it was forfeited, but the indemnity lands also. The objections urged to the judgment in the other cases just decided possess greater force in these cases, for indemnity lands do not vest in any company until they are selected. Even if the Atlantic and Pacific Railroad Company had built the road, it would have had no indemnity lands until selection was made; much less can it be held that title vested in that company before any attempt was made to exhaust the lands within the granted limits.

I think the judgment in these cases should also be affirmed, and I am authorized to state that MR. JUSTICE GRAY concurs with me in this dissent.

BROWN *v.* BAXTER.

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

No. 1123. Submitted December 12, 1892. — Decided December 19, 1892.

A writ of error to the Court of Appeals of a State, to review a judgment of that court dismissing an appeal and remanding the case for further proceedings in the state court below, is dismissed for want of jurisdiction.

Syllabus.

THIS was an action begun and prosecuted to judgment in a Circuit Court of the State of Kentucky. From that judgment appeal and cross-appeal were taken to the Court of Appeals of the State. That court, after hearing, ordered "that said judgment be reversed on the original appeal and affirmed on the cross-appeal and cause remanded for further proceedings consistent with the opinion herein, which is ordered to be certified to said court."

The case was brought here by writ of error, to review a Federal question.

Mr. T. L. Burnett and *Mr. H. M. Lane* for plaintiff in error.

Mr. W. J. Lisle for defendant in error.

THE CHIEF JUSTICE: The writ of error is dismissed upon the authority of *Meagher* v. *Minnesota Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197; *Johnson* v. *Keith*, 117 U. S. 199.

MEANS *v.* BANK OF RANDALL.

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

No. 63. Submitted December 2, 1892. — Decided December 19, 1892.

L. desiring to purchase cattle from P., a bank paid the purchase money for L. to P., and P. delivered the cattle to the bank, and they were shipped by rail to M., in six cars, to sell, accompanied by P. and L. and one G. A bill of lading for four of the cars was issued in the name of L. A bill of lading was to be issued for the other two cars in the name of G., as a pass could be issued to only two persons on one bill of lading. G. had no interest in the cattle. The cattle in the six cars were delivered to M. A draft was drawn by L. against the shipment on M., and endorsed and delivered by L. to the bank, with the bill of lading for the four cars. The draft and bill of lading were presented to M., but the draft was not accepted or paid. Three hours afterwards M. sold the cattle but kept the proceeds because he claimed that L. was indebted to him on an old

account. *Held*, that the bank was entitled to recover the proceeds from M.

The bank had a lien upon, and a pledge of, all the cattle.

The transfer of the bill of lading was a transfer of the ownership of the cattle covered by it.

There was a verbal mortgage or pledge to the bank of the two car loads, and G. represented P., and through him the bank.

It was proper for the trial court, as a question of law, to direct a verdict for the bank.

The question whether a trial shall be postponed on account of the absence of a witness for the defendant, and the illness of one of his counsel, is a matter of sound discretion and will not be reviewed where no abuse is shown.

No specific instructions were prayed for by the defendant, and no request was made to direct a verdict for him, but he only requested the court generally to submit instructions to the jury.

THE case is stated in the opinion.

Mr. B. P. Waggener and *Mr. H. M. Jackson* for plaintiffs in error.

Mr. Edward H. Stiles and *Mr. Charles Blood Smith* for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action brought in the district court for the county of Cloud, in the State of Kansas, by the Bank of Randall, a Kansas corporation, doing business at Randall, in that State, against C. G. Means, W. W. Means, and C. H. Means, copartners as C. G. Means & Sons, to recover $6700, $4 protest fees, and $402 damages. The suit was accompanied by an attachment, and, before answer, was removed by the defendants, who were citizens of Missouri, into the Circuit Court of the United States for the District of Kansas.

The amended petition filed in the Circuit Court of the United States set forth the following cause of action: On September 14, 1887, one Patterson was the owner of 98 cattle, of the value of $6700, which he agreed to sell to one Lyons, who applied to one Bramwell, the cashier and agent of the

plaintiff, for a loan of $6700, to pay for the cattle, until he could ship them to Kansas City and sell them. It was agreed by Patterson, Lyons and the plaintiff, that if the plaintiff would advance and pay to Patterson $6600 and $100 for expenses, the plaintiff should have a lien upon the cattle, and retain the title to them, until the money was repaid; that the cattle should be shipped by Lyons as consignor, by way of the Missouri Pacific Railroad, to the defendants at Kansas City, Missouri; and that four car-loads of the cattle were to be shipped in the name of Lyons as consignor, and two car-loads in the name of one Guthrie as consignor. The defendants were engaged at the time in buying and selling live stock at Kansas City. In pursuance of that agreement, Patterson sold and delivered the 98 cattle to Lyons, and the plaintiff paid to Patterson the $6700. Lyons delivered the cattle on board the cars of the railroad company, in the town of Randall, consigned to the defendants at Kansas City, and received from the railroad company one bill of lading, for four cars, by which that company acknowledged the receipt of the cattle from Lyons, and agreed to deliver them to the defendants at Kansas City. This bill of lading Lyons endorsed and delivered to the plaintiff. No bill of lading was issued to Guthrie, but by agreement between the agent of the railroad company, Lyons, and the plaintiff, two cars were loaded each with 16 steers, and shipped to the defendants at Kansas City, as consignees, and Guthrie as consignor. The four cars for which the bill of lading was issued in the name of Lyons contained 66 steers in all. It was agreed by the company, Lyons and the plaintiff, that the plaintiff waived no title to the steers, or to the money to be derived from their sale, by permitting them to be shipped in the name of Guthrie; and that they should be delivered to the defendants with the other steers, and the proceeds be applied to the payment of the $6700. Thereupon, Lyons drew his draft on the defendants, dated September 14, 1887, whereby he directed them to pay to his order $6700, at sight, in Kansas City, which draft he endorsed and delivered to the plaintiff. The 98 steers were transported by the railroad company to Kansas City, and to the stock-

yards there, and on September 15, 1887, at 9 o'clock A.M. delivered to the defendants according to the contract set out in the bill of lading. The defendants received the steers, sold them for account of Lyons, converted the proceeds to their own use and benefit, and refused to pay the plaintiff for any of them or render to it any account of sales. At the time the steers were delivered to the defendants, the latter were advised by Lyons that the plaintiff had advanced the money to pay for the steers, and that Lyons had drawn his draft on the defendants and assigned it to the plaintiff. By those transactions, the plaintiff became the owner of the steers, and entitled to their proceeds. On September 15, 1887, at 11 o'clock A.M. the draft and bill of lading were presented to the cashier of the defendants, at their office in the Kansas City stock-yards, and payment demanded. The cashier, after examining the draft, directed the bank messengers who brought it to leave it at the Stock-Yards Bank, promising to pay it if they would do so. The draft was so deposited, and at 2.30 o'clock P.M. of the same day was presented by the messengers of that bank to the defendants at their office, payment was refused, and the draft was protested for non-payment. When the draft and bill of lading were first presented to the defendants, the steers had not been disposed of by them, and were being received by them from the cars. For more than twelve months before September 14, 1887, Lyons had been engaged in shipping stock to the defendants, and accustomed to drawing drafts in favor of the plaintiff and others against such shipments, and transferring the bills of lading and cattle so shipped to the parties holding such drafts on account of the shipments. The defendants, before September 15, 1887, were accustomed to and did pay all such drafts, and had never refused payment of any of the same. The defendants had not paid to the plaintiff any part of the $6700.

The defence set up in the answer to the amended petition was, that before the shipment of the cattle the defendants advanced to Lyons more than $7500, to be used by him to buy cattle for them, with the agreement that the cattle, when purchased, should be delivered by him to the defendants to

be sold by them on account of such advances, and that the cattle were to be delivered on board of the cars at Randall, Kansas; that the cattle in question were delivered to the defendants at Randall on board of the cars; that four cars thereof were consigned to the defendants as per the bill of lading; that no bill of lading was issued for the two cars shipped by Guthrie; that all of the cattle, at the time they were delivered to the defendants, were their property and in their possession before the bill of lading was delivered to the plaintiff; that Lyons and Guthrie accompanied the cattle from Randall to Kansas City and remained with them while in transit; that when the cattle reached Kansas City the defendants took them from the cars with the knowledge and authority of Lyons and Guthrie, and with like knowledge and authority sold the cattle and applied the proceeds in payment of the amount so advanced to Lyons; that the bill of lading was never endorsed to the plaintiff, and the latter had no right or authority, by virtue of its corporate power, to receive the same or take any title to it or the property represented by it; that the defendants had no knowledge or notice that Lyons had drawn any draft on them until the cattle had been received and sold by them and the proceeds applied as aforesaid; that the draft was not drawn with the knowledge, consent or authority of the defendants or any one of them; that, as to the two cars of cattle, no bill of lading was issued by the railroad company, and no delivery thereof, symbolic or otherwise, was made to the plaintiff; that the plaintiff did not have possession of any of the cattle at any time; and that the defendants had no notice that the plaintiff claimed to have any interest therein or lien thereon.

The case was tried before a jury, which was directed by the court to render a verdict for the plaintiff for $6681.55. The defendants objected and excepted to such direction, and prayed the court to submit instructions to the jury on the pleadings and evidence, which prayer the court refused, and to such refusal the defendants excepted. The verdict was rendered accordingly, and a judgment was entered thereon in favor of the plaintiff against the defendants for $6681.55. The defend-

ants made a motion for a new trial, which was denied; and then the court signed a bill of exceptions containing all the evidence offered or received on the trial. The defendants then sued out from this court a writ of error.

The evidence shows the following state of facts: Patterson owned the 98 head of cattle, which Lyons desired to buy, but he did not have the means. Lyons, in company with Patterson, applied to Bramwell, the cashier and agent of the plaintiff, to borrow from it $6700 to pay for the cattle and the expense of their shipment, until they could be sold at Kansas City. The plaintiff, after its cashier had examined the cattle and become satisfied that they would be sufficient security, agreed to pay the purchase price of them to Patterson, on the express condition that the plaintiff should have a lien upon, and a pledge of, the cattle as its security for making the advance, until they were shipped to and sold by the consignee at Kansas City. To that end, it was agreed that delivery of the cattle should be made by Patterson to the plaintiff, which was done, and that the plaintiff should have the title to, and right of possession of, the cattle until they were sold by the consignee and the plaintiff was reimbursed from the proceeds. Patterson, at the request and as the representative of the plaintiff, was to go with the cattle to Kansas City. The defendants' firm was selected as the consignee to receive and sell the cattle, which were shipped accordingly, on September 14, 1887, in six cars of the Missouri Pacific Railroad Company, accompanied by Patterson, Lyons and Guthrie. Guthrie desired to get a pass to Kansas City, and Lyons had arranged with him to go with the cattle. As under the rules of the railroad company, only two persons could get passes on account of a single shipment or billing of cattle, four of the cars were to be billed as shipped by Lyons, and the other two as shipped by Guthrie. A bill of lading for the four cars was issued by the company in the name of Lyons; but as Guthrie had not yet arrived, no bill of lading was issued to him for the two cars, but they were billed to him in his absence. Lyons transacted that part of the business with the agent of the railroad company, Bramwell being then at the bank. The

cattle were started on September 14, 1887, and reached the Kansas City stock-yards about 9 o'clock A.M. on September 15. After they were unloaded into the chutes of the Stock-Yards Company, they were delivered to the defendants, and between 2 and 3 o'clock P.M. on September 15 were sold by them to the Armour Packing Company for $6133.

At the time of the arrangement for the advance of the purchase money by the plaintiff, it was agreed that a draft for the amount advanced should be drawn by Lyons against the shipment on the defendants, to be accepted by them and paid out of the proceeds of the sale of the cattle. The draft was drawn and was endorsed and delivered by Lyons to the plaintiff, together with the bill of lading which had been issued for the four car-loads. On September 14, 1887, the plaintiff forwarded this draft, with the bill of lading attached to it, to the Bank of Commerce, its correspondent at Kansas City, for collection. It was received by that bank early on the following morning, and was given to its messenger for presentation and collection at the office of the defendants, which was in the Live Stock Exchange Building, at the stock-yards. Between 10 and 11 o'clock A.M. of the same day, and more than three hours before the defendants sold the cattle, the draft and bill of lading were presented by the messenger at the counter of the defendants, to their agent in charge of their office, who, after examining those papers, returned them to the messenger and told him to leave them at the Stock-Yards Bank, this being the custom at the stock-yards with respect to drafts which the messengers of other banks failed to collect on presentation. Between 2 and 3 o'clock P.M. of the same day, the draft was presented by the collector of the Stock-Yards Bank at the office of the defendants for payment; and between 3 and 4 o'clock P.M. of that day, it was presented by the cashier of that bank, and formerly protested by him for non-payment. The defendants converted the proceeds of the sale of the cattle to their own use and refused to pay the draft, giving as their reason for so doing that Lyons was indebted to them on an old account, and that they had a right to apply those proceeds thereon.

There was no dispute about the foregoing facts. In addition, Patterson and Lyons testified that on the morning of September 15, 1887, the day when the cattle reached Kansas City, one of the defendants was notified personally that the plaintiff had paid for the cattle, and that a draft therefor had been drawn on the defendants and delivered to the plaintiff. No money was paid by the defendants, and the only justification attempted by them was their claim of a right to apply the proceeds of the cattle on their old account against Lyons.

It is very clear that the furnishing by the plaintiff of the purchase money for the cattle, on the faith of the agreement by Lyons that they and their proceeds would be security for the amount, and that a draft would be drawn therefor on the consignee against the cattle, with the further agreement that a bill of lading was to be obtained and turned over to the plaintiff, constituted a lien upon and a pledge of all the cattle, so far as the defendants were concerned, they having acquired no new rights, and not having changed their position in any essential respect, on account of the transaction, even though the bill of lading issued did not by its terms include the two car-loads shipped in the name of Guthrie.

As to the four car-loads named in the bill of lading, that instrument represented the cattle; and the transfer of the ownership as well as of the right of possession was made as effectually by the transfer of the bill as it could have been by a physical delivery of the cattle. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386, 445; *Dows* v. *Nat. Exchange Bank*, 91 U. S. 618.

When the bill of lading was transferred and delivered as collateral security, the rights of the pledgee under it were the same as those of an actual purchaser, so far as the exercise of those rights was necessary to protect the holder. *Halsey* v. *Warden*, 25 Kansas, 128; *Emery* v. *Bank*, 25 Ohio St. 360; *Dows* v. *Nat. Exchange Bank*, 91 U. S. 618; *Bank* v. *Homeyer*, 45 Missouri, 145; *Bank of Green Bay* v. *Dearborn*, 115 Mass. 219; *Bank of Rochester* v. *Jones*, 4 Comstock, (4 N. Y.) 497; *Holmes* v. *German Security Bank*, 87 Penn. St. 525.

A bank which makes advances on a bill of lading has a lien to the extent of the advances, on the property in the hands

of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Gibson* v. *Stevens*, 8 How. 384; 3 Parsons on Contracts, 487.

As to the two car-loads shipped or billed in the name of Guthrie, for which no bill of lading was issued, Guthrie had no interest in them, and the shipment in his name was merely to procure for him a pass from the railroad company. What took place between Lyons and the cashier of the plaintiff, at the time when the draft and the bill of lading were delivered to the plaintiff, amounted, as to the two car-loads, to a verbal mortgage or pledge of the cattle in those two cars to the plaintiff, to secure its advance, and on the faith of it the advance was made. There is no conflict of testimony on this subject. There was a verbal mortgage or pledge of all the cattle to the plaintiff as security for its advance. Patterson delivered all the cattle to the plaintiff, and, at its request and as its agent, he was placed in charge of and accompanied the shipment. Guthrie, if representing any one, represented Patterson and through him the plaintiff. Patterson arranged with Guthrie that the latter should go.

As the verbal mortgage or pledge included all the cattle, and was accompanied by a delivery, it was good, at least as against the defendants, irrespective of any question of notice. The defendants were chosen as factors, they having before acted for the same parties in similar transactions, where drafts had been drawn on them against the shipments. They did not advance any money on account of this shipment, they parted with no interest, relinquished no legal right, and stood in no better position to dispute the validity of the mortgage or pledge than did Lyons himself. It was perfectly valid as against Lyons, and he could not have been heard to dispute it.

But the defendants had notice that the draft had been drawn by Lyons against the cattle and had been endorsed to

the plaintiff, and this was soon after the arrival of the cattle at Kansas City and several hours before they were sold. The draft was presented for payment, accompanied by the bill of lading, at the counter in the office of the defendants, and to their agent in sole charge there, between 10 and 11 o'clock A.M. of the day on which the cattle arrived; and the sale of the cattle to the Armour Packing Company was not made until between 2 and 3 o'clock P.M. on that day. Therefore, the defendants had legal notice of the existence and presentation of the draft and the bill of lading, between three and four hours before they sold the cattle and received the proceeds. They cannot occupy the position of innocent purchasers of the cattle.

The question resulting from the facts of the case was purely a question of law; and the verdict for the plaintiff was properly directed. If the question had been submitted to the jury, and they had found a verdict for the defendants, it would have been the duty of the court to set it aside.

In addition, the evidence shows that one of the defendants had explicit notice from Patterson and Lyons, shortly after the cattle arrived at Kansas City, that the plaintiff had advanced the money to pay for them, and that the draft was out against the defendants therefor.

The foregoing views are supported by the following cases: *National Bank* v. *Porter*, 73 California, 430; *Darlington* v. *Chamberlin*, 120 Illinois, 585; *Bates* v. *Wiggin*, 37 Kansas, 44; *Morrow* v. *Turney*, 35 Alabama, 131.

It is contended by the defendants that the Circuit Court erred in denying their motion for a postponement of the trial of the cause, based on the absence of a witness named Wells, and the illness of Mr. Waggener, one of their counsel.

But the testimony sought to be given by Wells was immaterial and incompetent. The question of the postponement of a trial is one ordinarily addressed to the sound discretion of the trial court, and in the present case no abuse of that discretion is shown. The defendants really had no defence to the suit; and the bill of exceptions shows that all which they could, under any circumstances, make out of their attempted defence was availed of.

Syllabus.

The bill of exceptions shows that the only position taken by the defendants at the close of the evidence was a prayer to the court "to submit instructions to the jury upon the pleadings and evidence." No specific instructions were prayed for, and no request was made to direct a verdict for the defendants. The defendants contented themselves with objecting and excepting to the direction of a verdict for the plaintiffs, and to the refusal of the court generally to submit instructions to the jury.

Judgment affirmed.

LLOYD *v.* PRESTON.

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

No. 59. Argued November 29, 30, 1892. — Decided December 19, 1892.

In 1881, H., a citizen of Ohio, through P., M. and others of Chicago, speculated in grain in the markets of the latter city, lost money, and settled with his Chicago creditors by agreeing to convert a narrow gauge railroad in Ohio, which he owned, into a standard gauge, and to extend the same to places named in the agreement, and to organize a new company to take the property thus altered and extended, and to cause the new company to issue bonds which the creditors were to take in satisfaction of their respective debts. The company was organized; the stock and bonds were issued and delivered to H., except a small amount of stock which was issued to sundry persons to enable them to become directors; and H. passed over the property to the company. The value of the property so conveyed was very much less than the face value of the stock and bonds so issued for it. No money payments of subscription to the stock were made by H. to the company. The railway company soon became insolvent, and in 1885, after recovery of judgments against it for amounts due and payable on its bonds, P., M. and the other creditors filed a bill in equity to compel H. to pay his subscriptions in cash. A part of the stock of H. having been passed over to L., the bill set forth that that transfer had been made for the benefit of H., and sought to make H. liable in like manner for that stock. H. answered to the bill. Afterwards he became insolvent, and made an assignment of his estate for the benefit of his creditors. The assignee then appeared, and set up that the only consideration for the original debts of P., M. and others was an illegal gambling transaction, by betting upon future

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values of wheat; that the claims which formed the sole consideration for the transfer of the bonds was a pretended balance of said winnings; and that the judgments were founded on the bonds so transferred and on no other consideration. There were other pleadings which need not be detailed. The allegations respecting the character of the grain transactions were, on motion, stricken out by the court below. *Held*,

(1) That the organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature;

(2) That P., M. and the other Chicago creditors had not only no knowledge or complicity in the company's illegal organization, but that they understood that the stockholders were to be subject to the liability imposed by the law of Ohio, namely, full payment in money or its equivalent, and, in addition, 100 per cent;

(3) That the evidence, if taken to be true, did not establish a gambling transaction between H. and P., M. and the other creditors;

(4) That, therefore, the defendant was not injured by the action of the court in striking out allegations regarding these transactions, and in afterwards passing upon them;

(5) That the same measure of liability applied to the stock of H. standing in L.'s name which applied to that standing in his own name;

(6) That as the attention of the court below was not called to the question of the allowance of interest, this court would not disturb the decree in that respect.

On October 12, 1881, Edward L. Harper was the owner of what was then known as the Columbus, Washington and Cincinnati Railroad, a narrow gauge road extending from Allentown to New Burlington, in the State of Ohio. Prior to that time Harper had been engaged in the purchase and sale of grain, in the city of Chicago, Illinois, through J. W. Preston & Co., W. E. McHenry, Preston & McHenry, and H. Eckert & Co., agents for W. E. McHenry and Preston & McHenry, and on account of such grain transactions the said persons made claims against Harper, which he disputed. By way of settlement and compromise of these claims, Harper entered into an agreement, October, 12, 1881, with the said Preston & McHenry, and their agents, which agreement, after naming the parties thereto, and setting out Harper's ownership of the said railroad, proceeds as follows:

"First. That the said Harper shall cause the gauge of said road to be changed to the standard gauge, and shall extend the same from its present terminus at Allentown, Ohio, on the

Dayton and Southwestern Railroad, to the town of Jeffersonville, on the Southern Ohio Railroad, and make the connection with the last-named road; also shall extend it from its present western terminus at New Burlington to the present line of the Little Miami Railroad, at or near the town of Corwin, and make connection therewith.

"Second. And the said Harper agrees to make said gauge and said extensions and connections with said roads within four months from the date of this contract.

"Third. And the said Harper further agrees within the same period of four months to cause to be organized under the laws of Ohio a railway company, to be named the Cincinnati, Columbus and Hocking Valley Railway Company, and to convey, or cause to be conveyed and transferred, to said company said railroad and extensions, and all the privileges, appurtenances and plant thereunto belonging, an unencumbered title therefor, except the mortgage bonds herein provided for.

"Fourth. And the said Harper further agrees to cause said company to issue its coupon bonds of one hundred, five hundred and one thousand dollars each, payable in forty years, with interest at six per cent per annum, payable semi-annually, which shall be secured by a first mortgage upon the said railroad and its extensions and the real and personal property and franchises of said company then owned or thereafter acquired by it, said first mortgage bonds not to exceed in the aggregate an amount equal to the rate of twenty thousand dollars per mile of the length of said road and extensions; and said Harper likewise agrees to cause said company to issue income bonds of one hundred, five hundred and one thousand dollars each, payable in forty years, properly secured, which shall not exceed in the aggregate twenty thousand dollars per mile, interest and principal of said bonds to be made payable in New York City.

"Fifth. And the said Harper further agrees to deliver to the said other parties hereto in payment of their respective claims said first mortgage bonds at the par value thereof, as follows:

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"To the said J. W. Preston & Co., seventy-five thousand five hundred and thirty-four dollars.

"To the said W. E. McHenry, twelve hundred and fifty dollars.

"To the said Preston & McHenry, one hundred and thirty-seven thousand and six hundred and twenty-two dollars.

"To the said H. Eckert & Co., agents for W. E. McHenry and Preston & McHenry, five hundred dollars, and likewise to deliver as a bonus at the par value thereof fifty per centum of the above amount respectively in said income bonds.

"Said deliveries to be made within four months from the date hereof at the Third National Bank of Cincinnati.

"And the said Howard Eckert & Co., J. W. Preston & Co., W. E. McHenry and Preston & McHenry, each for himself and themselves, agree to accept said first mortgage and income bonds in full payment of the indebtedness of said Harper to each of them respectively."

On November 7, 1881, a corporation was organized under the laws of the State of Ohio, under the name of the Cincinnati, Columbus and Hocking Valley Railway Company, the said Harper and five other persons being the incorporators, and the capital stock being fixed at $2,500,000, divided into 25,000 shares of the par value of $100 each. Of this stock Harper subscribed for 2500 shares, at the par value, and John L. Pfau, E. Snowden, J. H. Matthews, W. H. Harper, J. F. Gimperling, D. P. Hyatt and William C. Herron, of the State of Ohio, and George E. Clymer, of the State of Kentucky, subscribed for one share each. After the subscriptions were made, the stockholders met and elected a board of seven directors, composed of all the stockholders of the company except E. L. Harper and W. C. Herron. Immediately upon their election, on December 13, 1881, the board of directors met, all the members being present, and chose officers and adopted by-laws. At this meeting the following proposition was made to the directors by the said Harper:

"I hereby propose to broaden the gauge of the road now owned by me to a standard gauge, and extend the same on the west to near Corwin, on the Little Miami road, and also

to extend the east end to Jeffersonville, on the Springfield Southern road, say, about thirty miles of railroad, and hereby agree to sell the same to your company for eighteen hundred thousand dollars of the par value of the securities of your company, as follows, viz.:

"Six hundred thousand dollars of the first mortgage, forty years, six per cent bonds, issued at the rate of twenty thousand dollars per mile of constructed road.

"Six hundred thousand dollars of the income bonds, issued at the rate of twenty thousand dollars per mile of constructed road, and six hundred thousand dollars of the capital stock, including subscriptions already subscribed."

A motion to accept this proposition was carried by a unanimous vote of the directors.

At a meeting of the stockholders of the company, held on January 2, 1881, all the stockholders being present either in person or by proxy, the action of the directors in accepting the above proposition was ratified.

On June 20, 1882, a called meeting of the board of directors was held at the office of the company, in Cincinnati, Ohio, at which the following motion was unanimously carried:

"Whereas, the president, Mr. Gimperling, reports that E. L. Harper has complied with his contract made with the company for the construction of twenty-eight miles of railroad from Claysville Junction to Jeffersonville, Ohio, and that the chief engineer, H. Phillips, has certified to the Union Trust Co. of New York that the twenty-eight miles have been constructed in accordance with the terms of the contract: Therefore,

"*Resolved*, That the road be accepted from said E. L. Harper, and he be paid any balance in bonds, stock or money which may be due him on said contract, taking his receipt for the same."

There appears to have been no other meeting of the directors or stockholders, except a meeting of the directors, held on February 20, 1883, when B. D. Hyatt was elected president and general manager, and W. C. Herron was elected a director, to fill vacancies caused by the resignation of J. E. Gimperling.

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On February 11, 1882, Preston & McHenry and their agents gave to the said Harper a receipt for $214,000 in first mortgage bonds and $107,200 in income bonds of the said Cincinnati, Columbus and Hocking Valley Railway Company, in full satisfaction of their claims against him under the above agreement of October 12, 1881.

On June 5, 1885, Josiah W. Preston, Eugene H. Lahee, William E. McHenry, Charles J. Gilbert, William T. Baker, Murray Nelson, Abram Poole, Almore A. Kent, Selah Young, Jr., and James S. Sherman, of the State of Illinois, filed their bill in equity in the Circuit Court of the United States for the Southern District of Ohio, Western Division, against the Cincinnati, Columbus and Hocking Valley Railroad Company, E. L. Harper, John L. Pfau, E. Snowden, J. H. Matthews, D. P. Hyatt, W. H. Harper, W. C. Herron, Lewis Seasongood, W. D. Lee and John E. Gimperling, of the State of Ohio, and George E. Clymer, of the State of Kentucky, alleging that in a previous action in the same court certain of the individual complainants, or certain of the complainants jointly, had recovered judgments for divers amounts respectively against the said railway company; that thereupon writs of *fieri facias* had been issued against the property of the company and returned unsatisfied; and that, the company having become insolvent, and having abandoned all action under its charter, nothing could be accomplished through it or its officers by way of collecting unpaid stock subscriptions, or other credits due to said corporation.

The bill also alleges that no part of said subscriptions for the capital stock of the company by E. L. Harper and others has been paid; that the company was duly organized and incorporated under and by virtue of the laws of the State of Ohio, and that the capital stock of $2,500,000 was subscribed for as stated above. Also, that W. D. Lee, of the State of Ohio, became and is the holder of certain certificates representing 3000 shares, of the par value of $100 each, of the stock of the corporation; that said certificates were issued and delivered by the said company to the said W. D. Lee on or about June 1, 1882, at the special instance and request and

for the use and benefit of the said E. L. Harper; that nothing has been paid to the said company for the said stock; and that all of the amount due for the same is necessary to discharge the indebtedness of the corporation upon the said several judgment claims in the bill described.

The answer states the said Harper's ownership of the said narrow gauge railroad; that some claim was made by the said Preston & McHenry, and their agents against Harper, which he disputed; and that a settlement and compromise of this claim was effected by the article of agreement of October 12, 1881, above recited. The answer also sets out the incorporation and organization of the said company, and alleges that a proposition was made to the company by Harper, to convey to it the narrow gauge railroad property, upon the terms specified in the said agreement, and that the said proposition was accepted by the company, and bonds upon the property issued to Harper; that at the time Harper agreed to convey, and did convey, said road to the company, and it agreed to issue to him said bonds and stock in full satisfaction therefor, said company had not incurred any debt or obligation whatever, and that the obligation to issue said bonds was not incurred until said agreement was made by which Harper subscribed and paid for stock as above stated, and as part of the same transaction; and that the company did not issue nor become liable on said bonds on which said judgments were taken until June 2, 1882. Further answering, the defendant alleges that, pursuant to said agreement, he caused the company to execute and issue said bonds to the Union Trust Company of New York, and made said bonds payable to bearer, and thereupon caused to be delivered to Preston & Co. and others said bonds called for in the above-stated contract, and that they, with full knowledge of the history of the said transaction, as above appears, accepted said bonds, and received the same in full satisfaction of the said agreement; that said judgments were rendered on said identical bonds, so issued to Preston & Co. and others; and that no other stock of the company is owned or held by any person, nor has any ever been subscribed, held or owned by

any person or persons, except the said stock paid for by Harper by the transfer of the said road to the company.

To the answer a formal replication was filed, which was afterwards withdrawn, and an amended bill filed by the complainants on July 7, 1887, alleging that at the time the said proposition was submitted to the company each one of the said directors was either in the employment and under the pay of Harper, or otherwise under his direction and control; that the pretended acceptance by the directors of the said proposition was in fact the act of Harper, and was for the sole purpose of enabling Harper and other subscribers for the stock of the company, who are defendants in this cause, to escape their liability to complainants herein, and to defraud and defeat them and others in their rights as creditors of the corporation; and that such act was done without complainant's knowledge or consent. Also, that the railroad property transferred by Harper to the company was not worth one-fiftieth part of the amount of said bonds issued by the company to Harper in pretended payment therefor; that this fact was well known by Harper, and by said directors and stockholders who voted on said proposition, and that in considering and acting on said proposition no regard whatever was paid by the directors or any stockholder voting thereon to the actual value of the property so conveyed; but that, on the contrary, the directors and stockholders acted in this behalf solely at the dictation of Harper, and in disregard of the rights and interests of the corporation, and for the purpose of shielding and protecting Harper and themselves from their liability to complainants and others on account of their subscriptions for said stock. This amended bill prays that the said agreement between Harper and the company and its directors may be set aside and declared to be void as against the rights of claimants as creditors of the corporation.

To the amended bill Harper filed an answer, admitting that the said directors were either employed by or related to him, but he denies that their acceptance of his said proposition was the act of himself, and avers that it was just what it purported to be — the action of the company. He alleges that

the object of the organization of the company was well known to the complainants, and that they knew there was no money to be paid on any subscription for the stock, and that such subscription was a mere matter of form, adopted simply for the purpose of creating an organization having power to issue bonds; that Preston & Co. and others agreed with Harper, at the time of the making of the said contract, that he should become the owner of all the stock of the company, as well as the said bonds, as the consideration for the transfer to the company, of the said narrow gauge road and that the said contract was made in pursuance of the wishes and understanding of Preston and others, and that it was not made with any fraudulent purpose. All the allegations of the amended bill not admitted are denied. A replication to this answer was filed July 30, 1887.

On March 28, 1888, a supplemental bill was filed by complainants, in which Emma C. Preston appears as executrix of the estate of J. W. Preston, deceased. This supplemental bill alleges that since the filing of the original bill and the amended bill E. L. Harper became insolvent, and made an assignment for the benefit of his creditors, under the insolvent laws of the State of Ohio, and that Harlan P. Lloyd was duly appointed and is now acting as the sole trustee of all the property so transferred. Complainants therefore pray that said Lloyd, trustee, may be made a party defendant in the case, and be required to answer the premises and show cause.

On the same day, the said Harlan P. Lloyd filed an answer and cross-bill to the original bill, amended bill, and supplemental bill, and to intervening bills filed by other claimants. In this answer the said trustee alleges that the only consideration on which the said claim or claims upon which the said agreement of October 12, 1881, was based, was a gaming transaction, in the form of a deal in options in wheat in the market of the city of Chicago, in which transaction there was no wheat actually owned or bought or sold, but that the transaction was only a betting on the future prices of wheat in said market, in which the said complainants won from Harper, between January 1, 1881, and October 1, 1881, an amount

of money aggregating more than $600,000, of which Harper paid not less than $400,000; that the said claim was for the pretended balance of said winnings, and that said winnings formed the sole consideration for the transfer of the bonds of the said company to the complainants; and that the said judgments were founded on said bonds so transferred, and on no other consideration whatever. This answer prays that all of said petitions of complainants be dismissed. In his cross-bill the said trustee asks for a decree against Emma C. Preston, executrix, William E. McHenry, and Eugene H. Lahee in the sum of $400,000, the amount alleged to have been won by said complainants as aforesaid.

Complainants excepted to this answer for its insufficiency, and moved to strike out that portion thereof referring to the character of the grain transactions of Harper with Preston & Co. and others prior to October 12, 1881. To the cross-bill complainants demurred.

The court granted said exceptions and motion, and sustained said demurrer, to which action of the court the defendant Lloyd, trustee, excepted.

A final decree was entered in the cause in the said Circuit Court of the United States on March 15, 1889, providing for the recovery by complainants of the sum of $322,531.67 from E. L. Harper, being the aggregate amount of complainants' said judgments entered in the previous action, with interest, and for the recovery of the same amount from W. D. Lee. By this decree judgment was also entered against all the other defendants except George E. Clymer, who was not found, and Lewis Seasongood, who was not shown to have been a stockholder of the company, for the amount of their respective subscriptions.

The court further decreed that complainants are entitled to have the entire claim of said company against Harper, to wit, $300,000, with interest from January 5, 1885, allowed as against said Lloyd, trustee, for the purpose of securing to complainants their full proportion of the value of the credit of the company against Harper's estate, and to have the total sum obtainable upon said credit distributed between and paid to the complainants *pro rata*. 36 Fed. Rep. 54.

Exceptions were taken by the defendants E. L. Harper and H. P. Lloyd, trustee, to each and every part of the findings, order, judgment and decree of the court, and said defendants prayed an appeal, which was granted.

Upon this appeal the case is before this court.

Mr. H. P. Lloyd for appellants.

Our opponents seek, on three grounds, to prevent the trustee from setting up these gambling transactions as a defence in the case: (1) That Harper did not set this up in his original answer below; (2) That the question became *res judicata* by the decree of foreclosure in the prior suit upon the mortgage; (3) That the trustee stands in Harper's shoes and can make no defence which Harper could not have made.

At the time that Harper filed his original answer he was supposed to be in solvent circumstances, and was carrying on a large business. He had ample means, and was handling large sums of money. There may have been business considerations sufficient to control his mind and prevent his setting up the nature of this gambling debt. Whatever the reason, these considerations were such that he did not set them up. But he had an undoubted right to have availed himself of this defence at any proper stage in the proceedings in this case in the court below, and the fact that he did not do so, does not bar the trustee from the exercise of his undoubted right to do the same thing.

In the second place, it must be constantly borne in mind that Harper was not a party to the foreclosure case in which the decree was rendered against the defendant railway company. He was not called upon in that case to make any issue as to the illegal consideration, and made none. The decree in that case was binding only upon the parties to that action, and was *res judicata* only as to the matter which was directly in issue in that action. The issue presented in the answer of Lloyd was never passed upon in the other case.

But even if Harper could not have set up this failure of consideration, and the nature of the transaction as a gambling

Counsel for Appellees.

debt, on the ground that he could not take advantage of his own wrong, this objection does not lie against Lloyd, trustee, who came into court and stands there as the representative of the creditors. *Clements* v. *Moore*, 6 Wall. 299; *Casey* v. *Cavaroc*, 96 U. S. 467; *Sawyer* v. *Hoag*, 17 Wall. 610.

That this gambling transaction was in direct violation of the law of Illinois, where the business was done, will appear from an examination of the Illinois statute, and the decisions of the Illinois courts and of the United States Supreme Court thereupon. Rev. Stats. Illinois, 1874, pp. 372, 373, c. 38, §§ 130, 131, 135, 136; *Brown* v. *Alexander*, 29 Ill. App. 626; *West* v. *Carter*, 129 Illinois, 249; *Coffman* v. *Young*, 20 Ill. App. 76.

The gambling contract in the case at bar was illegal under the law of Ohio, where the action was brought for the foreclosure of the mortgage bonds, and where the decree of foreclosure was rendered. 2 Rev. Stats. Ohio, 1890, 2010, § 6934*a*.

The general rule of law prevailing throughout the United States is, that a contract made in violation of a statute is void; that when the plaintiff cannot establish his cause of action, without relying upon an illegal contract, he cannot recover. *Miller* v. *Ammon*, 145 U. S. 421; *Embrey* v. *Jemison*, 131 U. S. 336.

This gambling contract was also void as against public policy. *Embrey* v. *Jemison*, 131 U. S. 336; *Irwin* v. *Williar*, 110 U. S. 499; *Roundtree* v. *Smith*, 108 U. S. 269; *Pearce* v. *Rice*, 142 U. S. 28.

There was also manifest error in the decree rendered in the Circuit Court, so far as the same allowed anything against Lloyd, trustee, except the amount of Harper's original stock subscription of 2500 shares.

And further the assignment of Harper, as an insolvent, took place on the 21st of June, 1887. At this time interest ceased on all his obligations of every kind. The dividend to be declared must be computed upon the amount of his liabilities as they then existed.

Mr. J. W. Warrington for appellees.

Mr. Justice Shiras delivered the opinion of the court.

This was a bill filed by judgment creditors of the Cincinnati, Columbus and Hocking Valley Railway Company to compel E. L. Harper and others to pay their respective unpaid subscriptions to the capital stock of said company, in order that the same might be applied to the payment of complainants' judgments, which remained unsatisfied after proceedings at law.

The bare statement of the facts attending the organization of the railway company fully justifies the opinion of the court below "that the entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature."

It having been found, on convincing evidence, that the over-valuation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defences set up.

The first is set up by Harper himself, in his answer to the bill of complaint; the other by Lloyd, assignee for the benefit of creditors of Harper, and who filed an answer and likewise a cross-bill.

Harper's defence, beyond the allegation that the stock subscriptions had been fully paid up by a transfer of property to the railway company, consisted in the assertion that Preston & McHenry were estopped from alleging, as judgment creditors of the railway company, that the capital stock was not adequately and actually paid up, because they were cognizant of the proceedings by which the company was organized, and privy to the arrangement whereby the property referred to was taken in full payment of this stock; and that the other complainants claimed under and through Preston & McHenry, and were, therefore, affected by their knowledge and complicity in the transaction.

Issues were taken on this allegation of Harper, and it was found by the court below that Preston & McHenry did not agree or understand that the subscriptions to the capital stock of the railway company, whose bonds they agreed to take in payment of Harper's indebtedness to them, were to be paid by the simple transfer of the property to the railway company, but that they understood that the stockholders of the company were to be subject to the liabilities imposed by the law of Ohio, namely, full payment in money or its equivalent, and, in addition, one hundred per cent individual liability, and that they were in nowise chargeable with knowledge of or complicity in the company's illegal organization.

An examination of the evidence contained in the record satisfies us of the correctness of this conclusion of the court below.

This brings us to a consideration of the second ground of defence, which is the one advanced by Lloyd, the assignee. He alleges that the original indebtedness of Harper to Preston & McHenry, in payment of which they took the bonds of the railway company, arose out of gambling transactions in wheat deals at the Chicago Board of Trade; and he claimed, accordingly, that not only were the bonds void in their hands, but likewise the judgments obtained thereon against the railway company; and he further claimed, in his cross-bill, the recovery of a large sum of money paid by Harper to Preston & McHenry, on account of these alleged gambling transactions, before the settlement between the parties which resulted in their taking the railway bonds in payment of the balance due them.

It was the opinion of the court below that there was absolutely no testimony in support of either the answer or the cross-bill of the assignee.

The only evidence disclosed by the record, on this issue, appears at pages 46 and 47, and we fully concur with the court below that neither this evidence nor any offer of evidence made on behalf of the defence, if taken to be true, established the case of a gambling transaction.

Complaint is made by the assignee of the course of the court

below, in striking out of his answer, on motion, the allegations pertaining to the supposed gambling transactions, and in sustaining the demurrer to his cross-bill.

This action of the court was probably based on the view urged on behalf of the complainants, that Lloyd, as assignee, could not be heard, in this suit, to impeach the validity of the judgments obtained against the railway company, by going into an investigation of the nature of the original transaction out of which had arisen the indebtedness of Harper to Preston & McHenry, and in a settlement of which the bonds had been received by the latter.

But it does not appear to be necessary to inquire into the reasons of the action of the court below in this respect, nor to consider whether the legal position implied in that action was sound, because, as we have seen, and as the court below held, there was no evidence admitted or offered which sufficed to sustain the allegation that the transactions between Harper and Preston & McHenry were of a gambling character.

Hence, if those allegations had been permitted to stand in Lloyd's answer, there was no evidence to support them, and he was not injured by the order of the court in striking them out. But it is plain that the court treated those allegations as before it, applied the evidence to them, and held that they were not sustained; so that, even if the course of the court was somewhat irregular, in striking out the allegations, and in afterwards passing upon them and the evidence offered to support them, the defendants were not thereby injured.

This view of the case renders it unnecessary to consider the question whether Harper, as the owner of the capital stock of the railway company, was concluded by the judgments obtained by the complainants against the railway company, and whether he or his assignee can go behind them, to disclose the nature of the business transactions between Harper and Preston & McHenry.

There is an assignment of error to the decree wherein it subjects the estate of Harper, in the hands of his assignee, to liability on account of stock standing in the name of W. D. Lee. But the court below found, from the evidence, that Lee

took and held this stock for the use and benefit of Harper, and, though served, he permitted the bill, with its allegations to that effect, to go unanswered. The Ohio statute, applicable to railway companies, provides that "the term 'stockholders' shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another."

It does not appear, therefore, that the court erred in holding the same measure of liability to apply to Harper's stock standing in the name of Lee as to that standing in his own name. Nor does the objection that the decree was for an unnecessarily large amount, thus forming a basis for an inequitable division of the proceeds of the assets of Harper's estate, appear to be well founded. The amount of the decree is not, as suggested by the assignee, the joint and aggregate amount of the Harper and Lee stock, but is restricted to the aggregate amount of the judgments owned by the complainants.

Error is likewise assigned to the allowance of interest on the judgments after the date of Harper's assignment. It is claimed that, as against the estate in the hands of the assignee, interest ceased from the date of the assignment.

There is nothing before us to show that there are not funds in the hands of the assignee sufficient to pay Harper's debts in full, with interest to the date of payment, and as it does not appear that this matter was brought to the attention of the court below, when framing the decree, or at any time, we do not feel disposed to disturb the decree.

Finding no error in the record, the decree of the court below is

Affirmed.

The Chief Justice, not having heard the argument, did not take part in the decision of this case.

YESLER *v.* WASHINGTON HARBOR LINE COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 912. Argued October 24, 25, 1892. — Decided December 19, 1892.

An allegation — in a petition to a state court for a writ of prohibition to restrain State Harbor Commissioners from extending or locating harbor lines over wharves erected by and belonging to the petitioner — that the petitioner is and for thirty years past has been the owner of the wharf and of the uplands abutting on the shore upon which the wharf was constructed, does not set up or claim a title, right, privilege or immunity under the Constitution, or a statute of, or authority exercised under the United States, so as to give jurisdiction to this court to review the judgment of the highest court of the State denying the writ.

Such a judgment does not deprive the owner of the wharf of his property without due process of law; nor is it in conflict with the provisions of the act of September 19, 1890, (26 Stat. 426, 454, c. 907,) concerning the construction of wharves, etc., in navigable waters of the United States where no harbor lines are established.

The opinion of the state court in rendering the judgment refusing the writ of prohibition stated that the relator was not entitled to the writ because he had other remedies of which he might have availed himself. *Held*, that this was broad enough to sustain the decree, irrespective of the decision of a Federal question, if any such arose.

On October 28, 1890, the affidavit of J. D. Lowman, the attorney in fact of H. L. Yesler, was filed in the Superior Court of King County, State of Washington, stating:

"That said H. L. Yesler has lived in the city of Seattle upwards of thirty years; that he is now and has been for thirty years last past the owner of the following described property, to wit, the property commonly known as Yesler's wharf and dock and the upland abutting on the shore upon which said wharf and dock were constructed; that said property abuts upon the shores of Elliott Bay; that more than thirty years ago said Yesler, in aid of commerce and navigation, caused to be constructed in front of and to the westward of said premises, and extending into Elliott Bay, a wharf and dock at large expense, to wit, at the expense of one hundred

thousand dollars; that said Yesler, at large expense, for many years prior to June 6, 1889, maintained and kept up said wharf and docks in aid of commerce and navigation; that the fire which occurred on the 6th day of June, 1889, and which destroyed the city of Seattle, destroyed said wharves and docks; that immediately thereafter said Yesler caused said wharves and docks to be rebuilt at a large expense, to wit, at the expense of fifty-six thousand dollars, and has ever since maintained said wharves and docks and now maintains the same; that said wharves and docks are necessary aids to commerce and navigation and are largely used and have been largely used in building up and promoting the commerce of the city of Seattle and of the State of Washington.

"That under and by virtue of the act of the legislature of the State of Washington approved March 26, 1890, and entitled, 'An act for the appraising and disposing of the tide and shore lands belonging to the State of Washington,' affiant is entitled, as affiant believes, to the privilege of purchasing the space upon which the improvements were made by him as aforesaid upon the shore in front of the upland. Affiant further says that under and by virtue of the act of the legislature of the State of Washington approved March 28, 1890, entitled 'An act to create a board of harbor line commissioners,' prescribing their duties and compensation, the governor of the State appointed as such commissioners W. F. Prosser, Eugene Semple, H. F. Garretson, Frank Richards, and D. C. Guernsey; that the members of said Harbor Line Commission have duly qualified as such and entered upon the discharge of their duties as such commission and are about to take final action in the location and establishing of the harbor lines within the limits of the city of Seattle; that, as affiant is informed and believes, said commission propose and are about to locate and establish such harbor lines in such a way as to include within such harbor lines a large part of the improvements of affiant hereinbefore mentioned; that the extension of the harbor lines over said improvements is an attempt on the part of the said Harbor Line Commission to exercise unauthorized power and to do an act which is not within the jurisdic-

tion of the said Harbor Line Commission; that said Harbor Line Commission has not authority or jurisdiction under the laws of the State of Washington, as affiant is advised and believes, to embrace or include within the harbor lines to be located and established in front of the city of Seattle the wharves, docks or other improvements made therein; that after the fire of June 6, 1889, the said Yesler rebuilt, at large expense as aforesaid, the wharves and docks above mentioned, and did so upon the faith of protection afforded to said Yesler by the act of legislature approved March 26, 1890, above mentioned; that if the Harbor Line Commission aforesaid is not prevented by a writ of prohibition from this honorable court from extending the so-called harbor lines over the wharves and docks of said Yesler the said commission will so extend said lines and thus deprive said Yesler of the use and benefit of his said wharves and docks without compensation or due process of law, and cloud his title to the same in such a manner as greatly to embarrass and hinder the plaintiff in the legitimate use of his said property."

Deponent therefore prayed for a writ of prohibition, directed to the said Harbor Line Commissioners, to prohibit and restrain them and each of them "from extending, locating or establishing the harbor lines in front of the city of Seattle or in the harbor of the city of Seattle over the wharves and docks of the said H. L. Yesler, or any part thereof, and from filing the plat thereof in the office of the Secretary of State, or the duplicate thereof in the office of the clerk of the city of Seattle."

An alternative writ having been issued, defendants appeared and moved to quash. The cause was heard upon the motion, the motion denied, and judgment rendered that the writ be made absolute, "and that this court does hereby command said respondents and each of them absolutely and finally that they and each of them desist and refrain from any future proceedings in locating, establishing and extending the harbor lines mentioned and referred to in the affidavit of J. D. Lowman, made and filed herein on October 28, 1890, and in said alternative writ issued thereon, over, across and in front of

the premises of said relator herein, H. L. Yesler, mentioned in said alternative writ, to wit, the premises commonly known as Yesler's wharf and dock and the upland abutting on the shore of Elliott Bay, upon which said wharf and dock were constructed, and through the buildings thereon upon the shore of Elliott Bay and in the harbor of the city of Seattle, in said King County, or in such a manner as to embrace and include said premises and improvements, or any part thereof, within the harbor lines of said city of Seattle, until compensation shall be ascertained and paid as required by law to said relator, H. L. Yesler, for the taking or damaging of his said property and improvements thereby."

An appeal was prosecuted to the Supreme Court of the State of Washington, the judgment reversed, and the petition dismissed. The court held that, as against the State, a littoral owner, simply as such owner, could assert no valuable rights below the line of ordinary high tide, (*Eisenbach* v. *Hatfield*, 26 Pac. Rep. 539;) that Yesler had no right to the land in controversy, and, at the most, the only vested right he had was in the wharf constructed thereon; that even though he had a right to be compensated for his improvements, that would not enable him to prevent the establishment of harbor lines; that it could not be said that simply including the land under the wharf within the harbor lines, was such a taking or damaging of the wharf as would entitle its owner to compensation; and that it did not follow from such including within the harbor lines that the State had interfered or ever would interfere with his ownership or possession of the wharf. The court was also of opinion that Yesler's title was not of a nature to be clouded, and, even if it were, that the proceedings complained of could constitute no cloud thereon; and further, that as to the legislation of Congress upon the subject of navigation and harbor lines, the state legislation was not opposed thereto; and, besides, that the United States was the only party that could interfere in such case. It was also held that the writ of prohibition should only be granted in a clear case and when no other remedy was available, and that it was not satisfied that the ordinary proceedings in law or equity would

not completely protect petitioner's rights. *State ex rel. Yesler* v. *Prosser*, 27 Pac. Rep. 550.

A writ of error from this court was thereupon allowed.

The State of Washington was admitted into the Union, November 11, 1889, having a constitution containing the following provisions:

"Article XV. Harbors and Tide Waters. § 1. The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this State, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The State shall never give, sell or lease to any private person, corporation or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the State, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets and other conveniences of navigation and commerce.

"§ 2. The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks and other structures.

"§ 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided."

"Article XVII. Tide Lands. § 1. The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within

the banks of all navigable rivers and lakes: *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State.

"§ 2. The State of Washington disclaims all title in and claim to all tide, swamp and overflowed lands patented by the United States: *Provided*, The same is not impeached for fraud."

"ARTICLE XXVII. SCHEDULE. In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:

"§ 1. No existing rights, . . . contracts or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; . . .

"§ 2. All laws now in force in the Territory of Washington, which are not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: *Provided*, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation."

By a territorial law (Laws Wash. Ter., 1854, 357), it was provided that any person owning land adjoining any navigable waters or watercourse within or bordering upon the Territory might erect upon his own land any wharf or wharves, and might extend them so far into said waters or watercourses as the convenience of shipping might require; and that whenever any person should be desirous of erecting upon his own land any wharf at the terminus of any highway or at any accustomed landing place, he might apply to the county commissioners of the proper county, who, if they should be satisfied that the public convenience required the wharf, might authorize the same to be erected and kept up for any length of time, not exceeding twenty years.

On March 26, 1890, an act of the legislature of the State for the appraising and disposal of the tide and shore lands

belonging to the State was approved, the 11th section of which provided: "The owner or owners of any lands abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor, sound, inlet, lake or watercourse, shall have the right for sixty days following the filing of the final appraisal of the tide lands to purchase all or any part of the tide lands in front of the lands so owned: *Provided*, That if valuable improvements in actual use for commerce, trade or business have been made upon said tide lands by any person, association or corporation, the owner or owners of such improvements shall have the exclusive right to purchase the land so improved for the period aforesaid." 1 Hill's Stat. 758.

On March 28, 1890, an act was passed by the legislature of Washington, entitled "An act to create a Board of Harbor Line Commissioners, prescribing their duties and compensation." By the first section the Board of Harbor Line Commissioners was created, to consist of five disinterested persons to be appointed by the governor, and the third section is as follows:

"SEC. 3. The duties of the said Harbor Line Commissioners shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays and inlets of this State, wherever such navigable waters lie within or in front of the corporate limits of any city or within one mile thereof upon either side, and to perform all other duties provided and prescribed in article fifteen of the constitution of the State of Washington, and all such other duties as the law may prescribe, and wherever and whenever said Board of Harbor Line Commissioners shall have established the lines as herein provided, in any of the navigable waters of the harbors, estuaries, bays and inlets of this State, they shall file the plat thereof in the office of the Secretary of State, and a duplicate thereof in the office of the clerk of the city or town where harbor lines shall have been located; and from and after the filing of said plat, the harbor lines established as therein and thereon designated and displayed shall be, and the same are declared to be, the harbor line of that portion of the navigable waters of this State." 1 Hill's Stat. 736.

Opinion of the Court.

The defendants in error were duly appointed Harbor Line Commissioners under this act, and qualified and entered upon the discharge of their duties as such. They caused a survey to be made of the harbor of the city of Seattle, and located a harbor line along the entire harbor front and in front of the area occupied by Yesler with his wharf, and caused a plat to be made of the harbor front of the city, upon which was plainly marked the harbor line so located by them, together with the location of all improvements. It is stated by counsel that they also determined the width of the strip which the constitution reserved from sale, and caused a line to be marked on the plat indicating the inner line of this area.

Mr. Thomas R. Shepard and *Mr. A. H. Garland* for plaintiff in error. *Mr. Andrew F. Burleigh* and *Mr. Charles E. Shepard* were on *Mr. Shepard's* brief.

Mr. W. C. Jones, Attorney General of the State of Washington, for defendants in error.

Mr. John H. Mitchell and *Mr. Beriah Brown, Jr.*, filed a brief for Baer, intervenor.

Mr. T. N. McPherson and *Mr. Edwin B. Smith*, counsel for plaintiff in error in No. 639, filed a brief, by leave of court.

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

The averment in relator's petition is that "he is now and has been for thirty years last past the owner of the following-described property, to wit, the property commonly known as Yesler's wharf and dock and the upland abutting on the shore upon which said wharf and dock were constructed." It is said in argument that he is an original patentee of the United States, under the "Donation Act" of September 27, 1850, (9 Stat. 496, c. 76,) of a tract of about one hundred and sixty acres of land, entered by him in 1852, embracing all the

upland mentioned in the petition, and bounded on the west by the meander line of Elliott Bay. But this is not so stated in the petition, and whatever might be inferred as to the character and source of his ownership, it cannot reasonably be held that relator by this allegation specially set up or claimed a title, right, privilege or immunity under the Constitution, or a statute of, or authority exercised under, the United States in this behalf. In other words, the ground of our jurisdiction cannot be rested upon the denial by the state court of a right claimed by plaintiff in error, in respect to his ownership, under an act of Congress. But it is contended that the contemplated action of the Harbor Line Commissioners would be in violation of the provisions of the Fourteenth Amendment, as amounting to a deprivation of property without due process of law; and also that it would be in conflict with the act of Congress, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved September 19, 1890. 26 Stat. 426, 454, c. 907.

Section 7 of that act declares that it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulk-head, jetty or structure of any kind outside of established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage in said waters; and by section 12, in amendment of section 12 of the river and harbor act of August 11, 1888, the Secretary of War was authorized to cause harbor lines to be established when essential to the preservation and protection of harbors, beyond which no piers, wharves, bulk-heads or other works should be extended or deposits made, except under such regulations as might be prescribed from time to time by him. Penalties are denounced for the violation of either of these sections. We do not understand that any conflict of jurisdiction over the regulation of the

harbor of Seattle will be precipitated by what the defendants propose to do, or that relator could sustain his invocation of judicial interference on such a theory. If the location and establishment of harbor lines by these commissioners is actually in violation of the laws of the United States, their vindication may properly be left to the general government. It is obvious that the decision of the state court in this regard was not against any title or right of relator arising under a statute of the United States.

This brings us to consider whether the contemplated proceedings would deprive Yesler of his property without due process of law. The contention seems to be that a part of his improvements are included in the strip which the constitution of Washington forbids the State from selling, or granting or relinquishing its rights over, and that, therefore, the location and establishment of the harbor lines as proposed would amount to a taking of his property without compensation. The harbor line is the line beyond which wharves and other structures cannot be extended, and a map is exhibited by counsel which shows an inner line, delineating the inner boundary of the strip referred to. This inner line, which is six hundred feet distant from the harbor line, happens to cross the outer end of relator's wharf, but the harbor line is several hundred feet away.

By the 16th section of Article I of the constitution of Washington no private property can be taken or damaged for public use without just compensation. The similar limitation upon the power of the general government, expressed in the Fifth Amendment, is to be read with the Fourteenth Amendment, prohibiting the States from depriving any person of property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. The amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights. Assuming our jurisdiction to revise the judgment of a State tribunal upholding a law authorizing the taking of private property without compensation, to be un-

questionable, (*Kaukauna Co.* v. *Green Bay Co.*, 142 U. S. 254, 269,) we cannot accede to the position that the action of the Harbor Line Commissioners, in locating the harbor line and filing the plat, would take any of relator's property, or so injuriously affect it as to come within the constitutional inhibition. The filing of maps of definite location in the exercise of the power of eminent domain furnishes no analogy. The design of the state law is to prohibit the encroachment by private individuals and corporations on navigable waters, and to secure a uniform water front; and it does not appear from relator's application that the defendants have threatened in any manner to disturb him in his possession, nor that that which is proposed to be done tends to produce that effect. Whatever his rights, they remained the same after as before, and the proceedings, as the Supreme Court said, could not operate to constitute a cloud upon them from the standpoint of relator himself, for if nothing further could lawfully be done in the absence of legislation for his protection, that was apparent. The consequences which he deprecated were too remote to form the basis of decision. Whatever private rights or property he has by virtue of the Territorial act of 1854, or of the state act of 1890, whatever his right of access to navigable waters or to construct a wharf from his own land, we do not see that he would be deprived of any of them by the action he has sought to prohibit. It may be true that the width of the reserved strip as delineated on the map brings the inner line across the outer end of relator's wharf, in respect of which, as if it were the harbor line, he complains that his right under the act of March 26, 1890, to purchase the ground occupied by his improvements, would be interfered with; but the construction of that act is for the state court to determine, and the averments of the affidavit and alternative writ make no issue upon it, as affected by the constitutional provision. The commissioners are to locate and establish harbor lines, whereupon the area between the harbor line and the line of ordinary high tide, within not less than fifty nor more than six hundred feet of the harbor line is reserved, under the state constitution. Whether the end of relator's

wharf is within that area and the consequent effect, the record does not call upon us to consider.

It may properly be added that the decision of the Supreme Court indicates that in its opinion relator was not entitled to the writ of prohibition, because he had other remedies of which he might have availed himself. This was a ground broad enough to sustain the judgment irrespective of the decision of any Federal question, if such arose; but we have considered the case in the other aspect, as the ruling of the Supreme Court in this regard is perhaps not sufficiently definite for us justly to decline jurisdiction upon that ground.

Our conclusion is that no Federal question was so raised upon this record as to justify our interposition, and therefore the writ of error is

Dismissed.

HUNTINGTON *v.* ATTRILL.

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

No. 33. Argued April 26, 1892. — Decided December 12, 1892.

A bill in equity in one State to set aside a conveyance of property made in fraud of creditors, and to charge it with the payment of a judgment since recovered by the plaintiff against the debtor in another State upon his liability as an officer in a corporation under a statute of that State, set forth the judgment and the cause of action on which it was recovered; and also asserted, independently of the judgment, an original liability of the defendant as a stockholder and officer in that corporation before the conveyance. The highest court of the State declined to entertain the bill by virtue of the judgment, because it had been recovered in another State in an action for a penalty; or to maintain the bill on the original liability, for various reasons. *Held*, that the question whether due faith and credit were thereby denied to the judgment was a Federal question, of which this court had jurisdiction on writ of error.

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

A statute making the officers of a corporation, who sign and record a false

Citations for Plaintiff in Error.

certificate of the amount of its capital stock, liable for all its debts, is not a penal law in the international sense.

Whether a statute of one State is a penal law which cannot be enforced in another State is to be determined by the court which is called upon to enforce it.

If the highest court of a State declines to give full faith and credit to a judgment of another State, because in its opinion that judgment was for a penalty, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself whether the original cause of action was penal in the international sense.

If a judgment for a fixed sum of money, recovered in one State by a creditor of a corporation against one of its officers upon a liability for all its debts, imposed by a statute of that State for making and recording a false certificate of the amount of its capital stock, is sued on in a court of another State, and that court declines to enforce the judgment because of its opinion that the original liability was a penalty, the judgment is thereby denied the full faith, credit and effect to which it is entitled under the Constitution and laws of the United States.

In equity. The bill was dismissed by the Court of Appeals of Maryland, to which judgment this writ of error was sued out.

Mr. Hugh L. Bond, Jr. and *Mr. John K. Cowen* for plaintiff in error, (with whom was *Mr. E. J. D. Cross* on the brief,) cited: *Christmas* v. *Russell*, 5 Wall. 290; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; 2 Morawetz on Corporations, § 908 *et seq.*; *Neal* v. *Moultrie*, 12 Georgia, 104; *Livingston* v. *Jefferson*, 1 Brock. 203; *McKenna* v. *Fisk*, 1 How. 241; *Allen* v. *Pittsburg & Connellsville Railroad Co.*, 45 Maryland, 41; *Phillips* v. *Eyre*, L. R. 6 Q. B. 1; *Mitchell* v. *Harmony*, 13 How. 115; *Le Forest* v. *Tolman*, 117 Mass. 109; *Boyce* v. *Wabash Railway Co.*, 63 Iowa, 70; *Erickson* v. *Nesmith*, 4 Allen, 233; *Andrews* v. *Callender*, 13 Pick. 484; *Halsey* v. *McLean*, 12 Allen, 438; *S. C.* 90 Am. Dec. 157; *Erickson* v. *Nesmith*, 46 N. H. 371; *Flash* v. *Conn*, 109 U. S. 371; *Richardson* v. *N. Y. Central Railroad*, 98 Mass. 85; *Claflin* v. *Houseman*, 93 U. S. 130; *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188; *Chase* v. *Curtis*, 113 U. S. 452; *Union Iron Co.* v. *Pierce*, 4 Bissell, 327; *Railway Co.* v. *Whitton*, 13 Wall. 270; *Prescott* v. *Nevers*, 4 Mason, 326; *Parrott* v. *Barney*, 1 Sawyer, 423;

Citations for Defendant in Error.

Reed v. *Northfield*, 13 Pick. 94; *S. C.* 23 Am. Dec. 761; *Palmer* v. *York Bank*, 18 Maine, 166; *S. C.* 36 Am. Dec. 710; *Steere* v. *Field*, 2 Mason, 486; *Servis* v. *Marsh*, 38 Fed. Rep. 794; *Stanley* v. *Wharton*, 9 Price, 301; *Read* v. *Chelmsford*, 16 Pick. 128; *Gray* v. *Bennett*, 3 Met. (Mass.) 522; *Mitchell* v. *Clapp*, 12 Cush. 278; *Daniels* v. *Hart*, 118 Mass. 543; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *White* v. *How*, 3 McLean, 291; *Falconer* v. *Campbell*, 2 McLean, 195; *Huntington* v. *Attrill*, 8 Times Law Rep. 341 (P. C. February 17, 1892).

Mr. William A. Fisher, (with whom was *Mr. S. T. Wallis* on the brief,) for defendant in error cited: *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265; *Evans* v. *Sprigg*, 2 Maryland, 457; *First Nat. Bank* v. *Price*, 33 Maryland, 487; *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188; *Marrow* v. *Brinkley*, 129 U. S. 178; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512; *Boynton* v. *Ball*, 121 U. S. 457; *Cole* v. *Cunningham*, 133 U. S. 107; *Flash* v. *Conn*, 109 U. S. 371; *Maryland* v. *Baltimore & Ohio Railroad*, 3 How. 534; *United States* v. *Lathrop*, 17 Johns. 4; *Scoville* v. *Canfield*, 14 Johns. 338; *Breitung* v. *Lindauer*, 37 Michigan, 217; *Sturges* v. *Burton*, 8 Ohio St. 215; *S. C.* 72 Am. Dec. 582; *Shaler Quarry Co.* v. *Bliss*, 34 Barb. 309; *Mitchell* v. *Hotchkiss*, 48 Connecticut, 9; *Spies* v. *Illinois*, 123 U. S. 131, 163; *Chanute City* v. *Trader*, 132 U. S. 210; *Adams County* v. *Burlington & Missouri Railroad*, 112 U. S. 123; *State* v. *Youmans*, 5 Indiana, 280; *Ex parte McNiel*, 13 Wall. 236; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Smith* v. *Railroad Co.*, 99 U. S. 398; *Green* v. *Neal*, 6 Pet. 291; *Meade* v. *Beale*, Taney, 339; *Lorman* v. *Clarke*, 2 McLean, 568; *Holmes* v. *Railway Co.*, 5 Fed. Rep. 75; *Whitehead* v. *Entwhistle*, 27 Fed. Rep. 778; *Buford* v. *Holley*, 28 Fed. Rep. 680; *Price* v. *Wilson*, 67 Barb. 9; *Bird* v. *Hayden*, 2 Abbott's Pr. (N. S.) 61; *Garrison* v. *Howe*, 17 N. Y. 458; *Wiles* v. *Suydam*, 64 N. Y. 173; *Langdon* v. *New York &c. Railroad*, 58 Hun, 122; *Chase* v. *Curtis*, 113 U. S. 452; *Sayles* v. *Brown*, 40 Fed. Rep. 8.

Mr. Justice Gray delivered the opinion of the court.

This was a bill in equity, filed March 21, 1888, in the Circuit Court of Baltimore City, by Collis P. Huntington, a resident of New York, against the Equitable Gas Light Company of Baltimore, a corporation of Maryland, and against Henry Y. Attrill, his wife and three daughters, all residents of Canada, to set aside a transfer of stock in that company, made by him for their benefit and in fraud of his creditors, and to charge that stock with the payment of a judgment recovered by the plaintiff against him in the State of New York, upon his liability as a director in a New York corporation, under the statute of New York of 1875, c. 611, the material provisions of which are copied in the margin.[1]

The bill alleged that on June 15, 1886, the plaintiff recovered, in the Supreme Court of the State of New York, in an action brought by him against Attrill on March 21, 1883, a

[1] Sec. 21. If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.

Sec. 37. In limited liability companies, all the stockholders shall be severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company has been paid in, and a certificate thereof has been made and recorded as hereinafter prescribed. . . . The capital stock of every such limited liability company shall be paid in, one half thereof within one year and the other half thereof within two years from the incorporation of said company, or such corporation shall be dissolved. The directors of every such company, within thirty days after the payment of the last instalment of the capital stock, shall make a certificate stating the amount of the capital so paid in, which certificate shall be signed and sworn to by the president and a majority of the directors; and they shall, within the said thirty days, record the same in the office of the secretary of state, and of the county in which the principal business office of such corporation is situated.

Sec. 38. The dissolution for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution.

judgment for the sum of $100,240, which had not been paid, secured or satisfied; and that the cause of action on which that judgment was recovered was as follows: On February 29, 1880, the Rockaway Beach Improvement Company, Limited, of which Attrill was an incorporator and a director, became a corporation under the law of New York, with a capital stock of $700,000. On June 15, 1880, the plaintiff lent that company the sum of $100,000, to be repaid on demand. On February 26, 1880, Attrill was elected one of the directors of the company, and accepted the office, and continued to act as a director until after January 29, 1881. On June 30, 1880, Attrill, as a director of the company, signed and made oath to, and caused to be recorded, as required by the law of New York, a certificate, which he knew to be false, stating that the whole of the capital stock of the corporation had been paid in, whereas in truth no part had been paid in; and by making such false certificate became liable, by the law of New York, for all the debts of the company contracted before January 29, 1881, including its debt to the plaintiff. On March 8, 1882, by proceedings in a court of New York, the corporation was declared to be insolvent and to have been so since July, 1880, and was dissolved. A duly exemplified copy of the record of that judgment was annexed to and made part of the bill.

The bill also alleged that "at the time of its dissolution as aforesaid, the said company was indebted to the plaintiff and to other creditors to an amount far in excess of its assets; that by the law of the State of New York all the stockholders of the company were liable to pay all its debts, each to the amount of the stock held by him, and the defendant, Henry Y. Attrill, was liable at said date and on April 14, 1882, as such stockholder, to the amount of $340,000, the amount of stock held by him, and was on both said dates also severally and directly liable as a director, having signed the false report above mentioned, for all the debts of said company contracted between February 26, 1880, and January 29, 1881, which debts aggregate more than the whole value of the property owned by said Attrill."

The bill further alleged that Attrill was in March, 1882, and had ever since remained, individually liable in a large amount over and above the debts for which he was liable as a stockholder and director in the company; and that he was insolvent, and had secreted and concealed all his property for the purpose of defrauding his creditors.

The bill then alleged that in April, 1882, Attrill acquired a large amount of stock in the Equitable Gas Light Company of Baltimore, and forthwith transferred into his own name as trustee for his wife 1000 shares of such stock, and as trustee for each of his three daughters 250 shares of the same, without valuable consideration, and with intent to delay, hinder and defraud his creditors, and especially with the intent to delay, hinder and defraud this plaintiff of his lawful suits, damages, debts and demands against Attrill, arising out of the cause of action on which the aforesaid judgment was recovered, and out of the plaintiff's claim against him as a stockholder; that the plaintiff in June, 1880, and ever since was domiciled and resident in the State of New York, and that from February, 1880, to December 6, 1884, Attrill was domiciled and resident in that State, and that his transfers of stock in the gas company were made in the city of New York where the principal office of the company then was, and where all its transfers of stock were made; and that those transfers were, by the laws of New York, as well as by those of Maryland, fraudulent and void as against the creditors of Attrill, including the creditors of the Rockaway Company, and were fraudulent and void as against the plaintiff.

The bill further, by distinct allegations, averred that those transfers, unless set aside and annulled by a court of equity, would deprive the plaintiff of all his rights and interests of every sort therein, to which he was entitled as a creditor of Attrill at the time when those fraudulent transfers were made; and "that the said fraudulent transfers were wholly without legal consideration, were fraudulent and void, and should be set aside by a court of equity."

The bill prayed that the transfer of shares in the gas company be declared fraudulent and void, and executed for the

purpose of defrauding the plaintiff out of his claim as existing creditor; that the certificates of those shares in the name of Attrill as trustee be ordered to be brought into court and cancelled; and that the shares "be decreed to be subject to the claim of this plaintiff on the judgment aforesaid," and to be sold by a trustee appointed by the court, and new certificates issued by the gas company to the purchasers; and for further relief.

One of the daughters demurred to the bill, because it showed that the plaintiff's claim was for the recovery of a penalty against Attrill arising under a statute of the State of New York, and because it did not state a case which entitled the plaintiff to any relief in a court of equity in the State of Maryland.

By a stipulation of counsel, filed in the cause, it was agreed that, for the purposes of the demurrer, the bill should be treated as embodying the New York statute of June 21, 1875; and that the Rockaway Beach Improvement Company, Limited, was incorporated under the provisions of that statute.

The Circuit Court of Baltimore City overruled the demurrer. On appeal to the Court of Appeals of the State of Maryland, the order was reversed, and the bill dismissed. 70 Maryland, 191.

The ground most prominently brought forward and most fully discussed in the opinion of the majority of the court, delivered by Judge Bryan, was that the liability imposed by section 21 of the statute of New York upon officers of a corporation, making a false certificate of its condition, was for all its debts, without inquiring whether a creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, and without limiting the recovery to the amount of loss sustained, and was intended as a punishment for doing any of the forbidden acts, and was, therefore, in view of the decisions in that State and in Maryland, a penalty which could not be enforced in the State of Maryland; and that the judgment obtained in New York for this penalty, while it "merged the original cause of action so that a suit cannot be again maintained upon it," and "is also

conclusive evidence of its existence in the form and under the circumstances stated in the pleadings," yet did not change the nature of the transaction, but, within the decision of this court in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, was in its "essential nature and real foundation" the same as the original cause of action, and therefore a suit could not be maintained upon such a judgment beyond the limits of the State in which it was rendered. pp. 193–198.

The court then took up the clause of the bill, above quoted, in which it was sought to charge Attrill as originally liable under the statute of New York, both as a stockholder and as a director; and observing that "this liability is asserted to exist independently of the judgment," summarily disposed of it, upon the grounds that it could not attach to him as a stockholder, because he had not been sued, as required by the New York statute, within two years after the plaintiff's debt became due; nor as a director, because "the judgment against Attrill for having made the false report certainly merges all right of action against him on this account;" but that, if he was liable at the times and on the grounds "mentioned in this clause of the bill," this liability was barred by the statute of limitations of Maryland. pp. 198, 199.

Having thus decided against the plaintiff's claim under his judgment, upon the single ground that it was for a penalty under the statute of New York, and therefore could not be enforced in Maryland; and against any original liability under the statute, for various reasons; the opinion concluded: "Upon the whole, it appears to us that the complainant has no cause of action, which he can maintain in this State." p. 199.

Judge Stone, with whom Judge McSherry concurred, dissented from the opinion of the majority of the court, upon the ground that it did not give due effect to the act of Congress, passed in pursuance of the Constitution of the United States, and providing that the records of judgments rendered by a court of any State shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State whence they are taken. Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat.

§ 905. He began his opinion by saying: "I look upon the principal point as a Federal question, and am governed in my views more by my understanding of the decisions of the Supreme Court of the United States than by the decisions of the state courts." And he concluded thus: "I think the Supreme Court, in 127 U. S., meant to confine the operation of the rule that no country will execute the penal laws of another to such laws as are properly classed as criminal. It is not very easy to give any brief definition of a criminal law. It may perhaps be enough to say that, in general, all breaches of duty that confer no rights upon an individual or person, and which the State alone can take cognizance of, are in their nature criminal, and that all such come within the rule. But laws which, while imposing a duty, at the same time confer a right upon the citizens to claim damages for its nonperformance, are not criminal. If all the laws of the latter description are held penal in the sense of criminal, that clause in the Constitution which relates to records and judgments is of comparatively little value. There is a large, and constantly increasing, number of cases that may in one sense be termed penal, but can in no sense be classed as criminal. Examples of these may be found in suits for damages for negligence in causing death, for double damages for the injury to stock where railroads have neglected the state laws for fencing in their tracks, and the liability of officers of corporations for the debts of the company by reason of their neglect of a plain duty imposed by statute. I cannot think that judgments on such claims are not within the protection given by the Constitution of the United States. I therefore think the order in this case should be affirmed." pp. 200–205.

A writ of error was sued out by the plaintiff, and allowed by the Chief Justice of the Court of Appeals of Maryland, upon the ground "that the said Court of Appeals is the highest court of law or equity in the State of Maryland, in which a decision in the said suit could be had; that in said suit a right and privilege are claimed under the Constitution and statutes of the United States, and the decision is against the right and privilege set up and claimed by your petitioner

under said Constitution and statutes; and that in said suit there is drawn in question the validity of a statute of and an authority exercised under the United States, and the decision is against the validity of such statute and of such authority."

It thus appears that the judgment recovered in New York was made the foremost ground of the bill, was fully discussed and distinctly passed upon by the majority of the Court of Appeals of Maryland, and was the only subject of the dissenting opinion; and that the court, without considering whether the validity of the transfers impeached as fraudulent was to be governed by the law of New York, or by the law of Maryland; and without a suggestion that those transfers, alleged to have been made by Attrill with intent to delay, hinder and defraud all his creditors, were not voidable by subsequent, as well as by existing creditors, or that they could not be avoided by the plaintiff, claiming under the judgment recovered by him against Attrill after those transfers were made; declined to maintain his right to do so by virtue of that judgment, simply because the judgment had, as the court held, been recovered in another State in an action for a penalty.

The question whether due faith and credit were thereby denied to the judgment rendered in another State is a Federal question, of which this court has jurisdiction on this writ of error. *Green* v. *Van Buskirk*, 5 Wall. 307, 311; *Crapo* v. *Kelly*, 16 Wall. 610, 619; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134; *Crescent City Co.* v. *Butchers' Union*, 120 U. S. 141, 146, 147; *Cole* v. *Cunningham*, 133 U. S. 107; *Carpenter* v. *Strange*, 141 U. S. 87, 103.

In order to determine this question, it will be necessary, in the first place, to consider the true scope and meaning of the fundamental maxim of international law, stated by Chief Justice Marshall in the fewest possible words: "The courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123. In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word "penal" in our language.

In the municipal law of England and America, the words

"penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws. *United States* v. *Reisinger*, 128 U. S. 398, 402; *United States* v. *Chouteau*, 102 U. S. 603, 611. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. In the words of Chief Justice Marshall: "In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party." *Tayloe* v. *Sandiford*, 7 Wheat. 13, 17.

Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be "penal against the hundred, but certainly remedial as to the sufferer." *Hyde* v. *Cogan*, 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer *Bones* v. *Booth*, 2 W. Bl. 1226; *Brandon* v. *Pate*, 2 H. Bl. 308; *Grace* v. *M'Elroy*, 1 Allen, 563; *Read* v. *Stewart*, 129 Mass. 407, 410; *Cole* v. *Groves*, 134 Mass. 471. As said

by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, "it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action." *Woodgate* v. *Knatchbull*, 2 T. R. 148, 154; *Read* v. *Chelmsford*, 16 Pick. 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be "not like a penal law where a punishment is imposed for a crime," but "rather as a remedial than a penal law," because "the act indeed does give a penalty, but it is to the party grieved." *Lake* v. *Smith*, 1 Bos. & Pul. (N. R.) 174, 179, 180, 181; *Wilkinson* v. *Colley*, 5 Burrow, 2694, 2698. So in an action given by statute to a traveller injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver that the facts constituted an offence, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment; but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." *Reed* v. *Northfield*, 13 Pick. 94, 100, 101.

The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species: *private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and

are distinguished by the harsher appellation of *crimes* and *misdemeanors*." 3 Bl. Com. 2.

Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States. The general rules of international comity upon this subject were well summed up, before the American Revolution, by Chief Justice De Grey, as reported by Sir William Blackstone: "Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature, and *sequuntur forum rei*." *Rafael* v. *Verelst*, 2 W. Bl. 1055, 1058.

Crimes and offences against the laws of any State can only be defined, prosecuted and pardoned by the sovereign authority of that State; and the authorities, legislative, executive or judicial, of other States take no action with regard to them, except by way of extradition to surrender offenders to the State whose laws they have violated, and whose peace they have broken.

Proceedings *in rem* to determine the title to land must necessarily be brought in the State within whose borders the land is situated, and whose courts and officers alone can put the party in possession. Whether actions to recover pecuniary damages for trespasses to real estate, "of which the causes," as observed by Mr. Westlake (Private International Law, 3d ed. p. 213), "could not have occurred elsewhere than where they did occur," are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. By the common law of England, adopted in most of the States of the Union, such actions are regarded as local, and can be brought only where the land is situated. *Doulson* v. *Matthews*, 4 T. R. 503; *McKenna* v. *Fisk*, 1 How. 241, 248. But in some States and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to land in one State can be brought in another State depends on the view which the latter State takes of the

nature of the action. For instance, Chief Justice Marshall held that an action could not be maintained in Virginia, by whose law it was local, for a trespass to land in New Orleans. *Livingston* v. *Jefferson*, 1 Brock. 203. On the other hand, an action for a trespass to land in Illinois, where the rule of the common law prevailed, was maintained in Louisiana, Chief Justice Eustis saying: "The present action is, under our laws, a personal action, and is not distinguished from any ordinary civil action as to the place or tribunal in which it may be brought." *Holmes* v. *Barclay*, 4 La. Ann. 63. And in a very recent English case, in which the judges differed in opinion upon the question whether, since local venue has been abolished in England, an action can be maintained there for a trespass to land in a foreign country, all agreed that this question depended on the law of England. *Companhia de Mocambique* v. *British South Africa Co.* (1892) 2 Q. B. 358. See also *Cragin* v. *Lovell*, 88 N. Y. 258; *Allin* v. *Connecticut River Lumber Co.*, 150 Mass. 560.

In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. See, for example, *The Halley*, L. R. 2 P. C. 193, 204; *Phillips* v. *Eyre*, L. R. 6 Q. B. 1, 28, 29; *The M. Moxham*, 1 P. D. 107, 111; *Wooden* v. *Western New York & Pennsylvania Railroad*, 126 N. Y. 10; *Ash* v. *Baltimore & Ohio Railroad*, 72 Maryland, 144. But such is not the law of this court. By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought. *Smith* v. *Condry*, 1 How. 28; *The China*, 7 Wall. 53, 64; *The Scotland*, 105 U. S. 24, 29; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593.

Upon the question what are to be considered penal laws of one country, within the international rule which forbids such laws to be enforced in any other country, so much reliance

was placed by each party in argument upon the opinion of this court in *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, that it will be convenient to quote from that opinion the principal propositions there affirmed:

"The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties." p. 290.

"The application of the rule to the courts of the several States and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any State are to have such faith and credit given to them in every court within the United States as they have by law or usage in the State in which they were rendered." p. 291.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." pp. 292, 293.

"The statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State, doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. The cause of action was not any private injury, but solely the offence committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty, when recovered, would accrue to the State." p. 299.

Such were the grounds upon which it was adjudged in that case that this court, under the provision of the Constitution giving it original jurisdiction of actions between a State and citizens of another State, had no jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or a corporation of another State for a pecuniary penalty for a violation of its municipal law.

Upon similar grounds, the courts of a State cannot be compelled to take jurisdiction of a suit to recover a like penalty for a violation of a law of the United States. *Martin* v. *Hunter*, 1 Wheat. 304, 330, 337; *United States* v. *Lathrop*, 17 Johns. 4, 265; *Delafield* v. *Illinois*, 2 Hill (N. Y.) 159, 169; *Jackson* v. *Rose*, 2 Virg. Cas. 34; *Ely* v. *Peck*, 7 Conn. 239; *Davison* v. *Champlin*, 7 Conn. 244; *Haney* v. *Sharp*, 1 Dana, 442; *State* v. *Pike*, 15 N. H. 83, 85; *Ward* v. *Jenkins*, 10 Met. 583, 587; 1 Kent Com. 402–404. The only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are in effect laws of each State. *Claflin* v. *Houseman*, 93 U. S. 130, 137; Platt, J., in *United States* v. *Lathrop*, 17 Johns. 22; *Ordway* v. *Central Bank*, 47 Maryland, 217. But in *Claflin* v. *Houseman* the point adjudged was that an assignee under the bankrupt law of the United States could assert in a state court the title vested in him by the assignment in bankruptcy; and Mr. Justice Bradley, who delivered the opinion in that case, said the year before, when sitting in the Circuit Court, and speaking of a prosecution in a court of the State of Georgia for perjury committed in that State in testifying before a commissioner of the Circuit Court of the United States, "It would be a manifest incongruity for one sovereignty to punish a person for an offence committed against the laws of another sovereignty." *Ex parte Bridges*, 2 Woods, 428, 430. See also *Loney's case*, 134 U. S. 372.

Beyond doubt, (except in cases removed from a state court in obedience to an express act of Congress in order to protect rights under the Constitution and laws of the United States,) a Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the State, or of the people thereof,

to recover a penalty imposed by way of punishment for a violation of a statute of the State, "the courts of the United States," as observed by Mr. Justice Catron, delivering a judgment of this court, "having no power to execute the penal laws of the individual States." *Gwin* v. *Breedlove*, 2 How. 29, 36, 37; *Gwin* v. *Barton*, 6 How. 7; *Iowa* v. *Chicago &c. Railway*, 37 Fed. Rep. 497; *Ferguson* v. *Ross*, 38 Fed. Rep. 161; *Texas* v. *Day Land & Cattle Co.*, 41 Fed. Rep. 228; *Dey* v. *Chicago &c. Railway*, 45 Fed. Rep. 82.

For the purposes of extra-territorial jurisdiction, it may well be that actions by a common informer, called, as Blackstone says, "popular actions, because they are given to the people in general," to recover a penalty imposed by statute for an offence against the law, and which may be barred by a pardon granted before action brought, may stand on the same ground as suits brought for such a penalty in the name of the State or of its officers, because they are equally brought to enforce the criminal law of the State. 3 Bl. Com. 161, 162; 2 Bl. Com. 437, 438; *Adams* v. *Woods*, 2 Cranch, 336; *Gwin* v. *Breedlove*, above cited; *United States* v. *Connor*, 138 U. S. 61, 66; *Bryant* v. *Ela*, Smith (N. H.) 396. And personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person — such as attainder, or infamy, or incompetency of a convict to testify, or disqualification of the guilty party to a cause of divorce for adultery to marry again — are doubtless strictly penal, and therefore have no extra-territorial operation. Story on Conflict of Laws, §§ 91, 92; Dicey on Domicil, 162; *Folliott* v. *Ogden*, 1 H. Bl. 123, and 3 T. R. 726; *Logan* v. *United States*, 144 U. S. 263, 303; *Dickson* v. *Dickson*, 1 Yerger, 110; *Ponsford* v. *Johnson*, 2 Blatchford, 15; *Commonwealth* v. *Lane*, 113 Mass. 458, 471; *Van Voorhis* v. *Brintnall*, 86 N. Y. 18, 28, 29.

The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to

punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in *Dennick* v. *Railroad Co.*, 103 U. S. 11.

In that case, it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a Circuit Court of the United States held in the State of New York by an administrator of the deceased, appointed in that State.

Mr. Justice Miller, in delivering judgment, said: "It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offence was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." 103 U. S. 17, 18.

That decision is important as establishing two points: 1st. The court considered "criminal laws," that is to say, laws

punishing crimes, as constituting the whole class of penal laws which cannot be enforced extra-territorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 605, where the Chief Justice, speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: "The question, however, is one of general law, and we regard it as settled in *Dennick* v. *Railroad Co.*"

That decision has been also followed in the courts of several States. *Herrick* v. *Minneapolis & St. Louis Railway*, 31 Minnesota, 11; *Chicago &c. Railroad* v. *Doyle*, 60 Mississippi, 977; *Knight* v. *West Jersey Railroad*, 108 Penn. St. 250; *Morris* v. *Chicago &c. Railway*, 65 Iowa, 727; *Missouri Pacific Railway* v. *Lewis*, 24 Nebraska, 848; *Higgins* v. *Central New England Railroad*, 155 Mass. 176.

In the case last cited, a statute of Connecticut having provided that all actions for injuries to the person, including those resulting instantaneously or otherwise in death, should survive; and that for an injury resulting in death from negligence the executor or administrator of the deceased might maintain an action to recover damages not exceeding $5000, to be distributed among his widow and heirs in certain proportions; it was held that such an action was not a penal action, and might be maintained under that statute in Massachusetts by an administrator, appointed there, of a citizen thereof, who had been instantly killed in Connecticut by the negligence of a railroad corporation; and the general principles applicable to the case were carefully stated as follows: "These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall

be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction." 155 Mass. 180.

The provision of the statute of New York, now in question, making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is in no sense a criminal or *quasi* criminal law. The statute, while it enables persons complying with its provisions to do business as a corporation, without being subject to the liability of general partners, takes pains to secure and maintain a proper corporate fund for the payment of the corporate debts. With this aim, it makes the stockholders individually liable for the debts of the corporation until the capital stock is paid in and a certificate of the payment made by the officers; and makes the officers liable for any false and material representation in that certificate. The individual liability of the stockholders takes the place of a corporate fund, until that fund has been duly created; and the individual liability of the officers takes the place of the fund, in case their statement that it has been duly created is false. If the officers do not truly state and record the facts which exempt them from liability, they are made liable directly to every creditor of the company, who by reason of their wrongful acts has not the security, for the payment of his debt out of the corporate property, on which he had a right to rely. As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against

the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country.

The decisions of the Court of Appeals of New York, so far as they have been brought to our notice, fall short of holding that the liability imposed upon the officers of the corporation by such statutes is a punishment or penalty which cannot be enforced in another State.

In *Garrison* v. *Howe*, the court held that the statute was so far penal that it must be construed strictly, and therefore the officers could not be charged with a debt of the corporation, which was neither contracted nor existing during a default in making the report required by the statute; and Chief Justice Denio, in delivering judgment, said: "If the statute were simply a remedial one, it might be said that the plaintiff's case was within its equity; for the general object of the law doubtless was, beside enforcing the duty of making reports for the benefit of all concerned, to enable parties proposing to deal with the corporation to see whether they could safely do so." "But the provision is highly penal, and the rules of law do not permit us to extend it by construction to cases not fairly within the language." 17 N. Y. 458, 465, 466.

In *Jones* v. *Barlow*, it was accordingly held that officers were only liable for debts actually due, and for which a present right of action exists against the corporation; and the court said: "Although the obligation is wholly statutory, and adjudged to be a penalty, it is in substance, as it is in form, a remedy for the collection of the corporate debts. The act is penal as against the defaulting trustees, but is remedial in favor of creditors. The liability of defaulting trustees is measured by the obligation of the company, and a discharge of the obligations of the company, or a release of the debt, bars the action against the trustees." 62 N. Y. 202, 205, 206.

The other cases in that court, cited in the opinion of the Court of Appeals of Maryland in the present case, adjudged only the following points: Within the meaning of a statute of limitations applicable to private actions only, the action against an

officer is not "upon a liability created by statute, other than a penalty or forfeiture," which would be barred in six years, but is barred in three years as "an action upon a statute for a penalty or forfeiture where action is given to the party aggrieved," because the provisions in question, said the court, "impose a penalty, or a liability in that nature." *Merchants' Bank* v. *Bliss*, 35 N. Y. 412, 417. A count against a person as an officer for not filing a report cannot be joined with one against him as a stockholder for debts contracted before a report is filed, that being "an action on contract." *Wiles* v. *Suydam*, 64 N. Y. 173, 176. The action against an officer is an action *ex delicto*, and therefore does not survive against his personal representatives. *Stokes* v. *Stickney*, 96 N. Y. 323.

In a later case than any of these, the court, in affirming the very judgment now sued on, and adjudging the statute of 1875 to be constitutional and valid, said that "while liability within the provision in question is in some sense penal in its character, it may have been intended for the protection of creditors of corporations created pursuant to that statute." *Huntington* v. *Attrill*, 118 N. Y. 365, 378. And where such an action against an officer went to judgment before the death of either party, it was decided that "the original wrong was merged in the judgment, and that thus became property with all the attributes of a judgment in an action *ex contractu*;" and that if, after a reversal of judgment for the plaintiff, both parties died, the plaintiff's representatives might maintain an appeal from the judgment of reversal, and have the defendant's representatives summoned in. *Carr* v. *Rischer*, 119 N. Y. 117, 124.

We do not refer to these decisions as evidence in this case of the law of New York, because in the courts of Maryland that law could only be proved as a fact, and was hardly open to proof on the demurrer, and, if not proved in those courts, could not be taken judicial notice of by this court on this writ of error. *Hanley* v. *Donoghue*, 116 U. S. 1; *Chicago & Alton Railroad* v. *Wiggins Ferry*, 119 U. S. 615; *Wernwag* v. *Pawling*, 5 Gill & Johns. 500, 508; *Coates* v. *Mackey*, 56

Maryland, 416, 419. Nor, for reasons to be stated presently, could those decisions, in any view, be regarded as concluding the courts of Maryland, or this court, upon the question whether this statute is a penal law in the international sense. But they are entitled to great consideration, because made by a court of high authority, construing the terms of a statute with which it was peculiarly familiar; and it is satisfactory to find no adjudication of that court inconsistent with the view which we take of the liability in question.

That court and some others, indeed, have held that the liability of officers under such a statute is so far in the nature of a penalty, that the creditors of the corporation have no vested right therein, which cannot be taken away by a repeal of the statute before judgment in an action brought thereon. *Victory Co.* v. *Beecher*, 97 N. Y. 651, and 26 Hun, 48; *Union Iron Co.* v. *Pierce*, 4 Bissell, 327; *Breitung* v. *Lindauer*, 37 Michigan, 217, 230; *Gregory* v. *German Bank*, 3 Colorado, 332. But whether that is so, or whether, within the decision of this court in *Hawthorne* v. *Calef*, 2 Wall. 10, 23, such a repeal so affects the security which the creditor had when his debt was contracted, as to impair the obligation of his contract with the corporation, is aside from the question now before us.

It is true that the courts of some States, including Maryland, have declined to enforce a similar liability imposed by the statute of another State. But, in each of those cases, it appears to have been assumed to be a sufficient ground for that conclusion, that the liability was not founded in contract, but was in the nature of a penalty imposed by statute; and no reasons were given for considering the statute a penal law in the strict, primary and international sense. *Derrickson* v. *Smith*, 3 Dutcher (27 N. J. Law), 166; *Halsey* v. *McLean*, 12 Allen, 438; *First National Bank* v. *Price*, 33 Maryland, 487.

It is also true that in *Steam Engine Co.* v. *Hubbard*, 101 U. S. 188, 192, Mr. Justice Clifford referred to those cases by way of argument. But in that case, as well as in *Chase* v. *Curtis*, 113 U. S. 452, the only point adjudged was that such statutes were so far penal that they must be construed

strictly; and in both cases jurisdiction was assumed by the Circuit Court of the United States, and not doubted by this court, which could hardly have been if the statute had been deemed penal within the maxim of international law. In *Flash* v. *Conn*, 109 U. S. 371, the liability sought to be enforced under the statute of New York was the liability of a stockholder arising upon contract; and no question was presented as to the nature of the liability of officers.

But in *Hornor* v. *Henning*, 93 U. S. 228, this court declined to consider a similar liability of officers of a corporation in the District of Columbia as a penalty. See also *Neal* v. *Moultrie*, 12 Georgia, 104; *Cady* v. *Sanford*, 53 Vermont, 632, 639, 640; *Nickerson* v. *Wheeler*, 118 Mass. 295, 298; *Post* v. *Toledo &c. Railroad*, 144 Mass. 341, 345; *Woolverton* v. *Taylor*, 132 Illinois, 197; Morawetz on Corporations (2d ed.) § 908.

The case of *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, on which the defendant much relied, related only to the authority of the legislature of a State to compel railroad corporations, neglecting to provide fences and cattle-guards on the lines of their roads, to pay double damages to the owners of cattle injured by reason of the neglect; and no question of the jurisdiction of the courts of another State to maintain an action for such damages was involved in the case, suggested by counsel, or in the mind of the court.

The true limits of the international rule are well stated in the decision of the Judicial Committee of the Privy Council of England, upon an appeal from Canada, in an action brought by the present plaintiff against Attrill in the Province of Ontario upon the judgment to enforce which the present suit was brought. The Canadian judges, having in evidence before them some of the cases in the Court of Appeals of New York, above referred to, as well as the testimony of a well known lawyer of New York that such statutes were, and had been held by that court to be, strictly penal and punitive, differed in opinion upon the question whether the statute of New York was a penal law which could not be enforced in another country, as well as upon the question whether the view taken by

the courts of New York should be conclusive upon foreign courts, and finally gave judgment for the defendant. *Huntington* v. *Attrill*, 17 Ontario, 245, and 18 Ontario App. 136.

In the Privy Council, Lord Watson, speaking for Lord Chancellor Halsbury and other judges, as well as for himself, delivered an opinion in favor of reversing the judgment below, and entering a decree for the appellant, upon the ground that the action "was not, in the sense of international law, penal, or, in other words, an action on behalf of the government or community of the State of New York for punishment of an offence against their municipal law." The fact that that opinion has not been found in any series of reports readily accessible in this country, but only in 8 Times Law Reports, 341, affords special reasons for quoting some passages.

"The rule" of international law, said Lord Watson, "had its foundation in the well recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of some one representing the public, were local in this sense, that they were only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which had for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex loci*, ought to be admitted in the courts of any other country. In its ordinary acceptation, the word 'penal' might embrace penalties for infractions of general law, which did not constitute offences against the State; it might, for many legal purposes, be applied with perfect propriety to penalties created by contract; and it, therefore, when taken by itself, failed to mark that distinction between civil rights and criminal wrongs, which was the very essence of the international rule."

After observing that, in the opinion of the Judicial Committee, the first passage above quoted from *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290, "disclosed the proper test for ascertaining whether an action was penal within the meaning of the rule," he added: "A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in

favor of the State whose law had been infringed. All the provisions of municipal statutes for the regulation of trade and trading companies were presumably enacted in the interest and for the benefit of the community at large; and persons who violated those provisions were, in a certain sense, offenders against the state law as well as against individuals who might be injured by their misconduct. But foreign tribunals did not regard those violations of statute law as offences against the State, unless their vindication rested with the State itself or with the community which it represented. Penalties might be attached to them, but that circumstance would not bring them within the rule, except in cases where those penalties were recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the public in the character of a common informer. An action by the latter was regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community."

He had already, in an earlier part of the opinion, observed: "Their lordships could not assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the statute of 1875 in the State of New York. They had to construe and apply an international rule, which was a matter of law entirely within the cognizance of the foreign court whose jurisdiction was invoked. Judicial decisions in the State where the cause of action arose were not precedents which must be followed, although the reasoning upon which they were founded must always receive careful consideration and might be conclusive. The court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced, and, in the second place, whether its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a court might find itself in the position of giving effect in one case, and denying effect in another, to suits of the same character, in consequence

of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal."

In this view that the question is not one of local, but of international law, we fully concur. The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess* v. *Seligman*, 107 U. S. 20, 33; *Texas & Pacific Railway* v. *Cox*, 145 U. S. 593, 605, above cited. If a suit on the original liability under the statute of one State is brought in a court of another State, the Constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court. *New York Ins. Co.* v. *Hendren*, 92 U. S. 286; *Roth* v. *Ehman*, 107 U. S. 319. But if the original liability has passed into judgment in one State, the courts of another State, when asked to enforce it, are bound by the Constitution and laws of the United States to give full faith and credit to that judgment, and if they do not, their decision, as said at the outset of this opinion, may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it. This was directly adjudged in *Wisconsin* v. *Pelican Ins. Co.*, above cited. The difference is only in the appellate jurisdiction of this court in the one case or in the other.

If a suit to enforce a judgment rendered in one State, and which has not changed the essential nature of the liability, is brought in the courts of another State, this court, in order to determine, on writ of error, whether the highest court of the latter State has given full faith and credit to the judgment,

must determine for itself whether the original cause of action is penal in the international sense. The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38. So if the state court, in an action to enforce the original liability under the law of another State, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another State, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability.

Whether the Court of Appeals of Maryland gave full faith and credit to the judgment recovered by this plaintiff in New York depends upon the true construction of the provisions of the Constitution and of the act of Congress upon that subject.

The provision of the Constitution is as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Art. 4, sect. 1.

This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, "was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them;" and had three distinct objects: first, to declare, and

by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, §§ 1307, 1308.

Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof, by enacting that "the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from which they are taken." Rev. Stat. § 905, reënacting Act of May 26, 1790, c. 11, 1 Stat. 122.

These provisions of the Constitution and laws of the United States are necessarily to be read in the light of some established principles, which they were not intended to overthrow. They give no effect to judgments of a court which had no jurisdiction of the subject-matter or of the parties. *D'Arcy* v. *Ketchum*, 11 How. 165; *Thompson* v. *Whitman*, 18 Wall. 457. And they confer no new jurisdiction on the courts of any State; and therefore do not authorize them to take jurisdiction of a suit or prosecution of such a penal nature, that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other State than that in which the penalty was incurred. *Wisconsin* v. *Pelican Ins. Co.*, above cited.

Nor do these provisions put the judgments of other States upon the footing of domestic judgments, to be enforced by execution; but they leave the manner in which they may be enforced to the law of the State in which they are sued on, pleaded, or offered in evidence. *McElmoyle* v. *Cohen*, 13 Pet. 312, 325. But when duly pleaded and proved in a court of that State, they have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated; and a refusal to give them the force and effect, in this respect, which they had in the State in which they

were rendered, denies to the party a right secured to him by the Constitution and laws of the United States. *Christmas* v. *Russell*, 5 Wall. 290; *Green* v. *Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Insurance Co.* v. *Harris*, 97 U. S. 331, 336; *Crescent City Co.* v. *Butchers' Union*, 120 U. S. 141, 146, 147; *Carpenter* v. *Strange*, 141 U. S. 87.

The judgment rendered by a court of the State of New York, now in question, is not impugned for any want of jurisdiction in that court. The statute under which that judgment was recovered was not, for the reasons already stated at length, a penal law in the international sense. The faith and credit, force and effect, which that judgment had by law and usage in New York was to be conclusive evidence of a direct civil liability from the individual defendant to the individual plaintiff for a certain sum of money, and a debt of record, on which an action would lie, as on any other civil judgment *inter partes*. The Court of Appeals of Maryland, therefore, in deciding this case against the plaintiff, upon the ground that the judgment was not one which it was bound in any manner to enforce, denied to the judgment the full faith, credit and effect to which it was entitled under the Constitution and laws of the United States.

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

Mr. Chief Justice Fuller dissenting.

This suit was not an action at law to recover judgment in Maryland upon the judgment in New York, nor was it an ordinary creditor's bill brought by a creditor to reach equitable assets. The judgment and execution had no extra-territorial force, and Huntington was a judgment creditor in New York only. It was the bill of a creditor at large to set aside an alleged fraudulent transfer, judgment not being essential under the statute of Maryland in that behalf. It could not have been sustained at all but for that act, and it did not assume to proceed upon the theory that the transfer was invalid because

made with intent to defeat the collection of the judgment as such. The judgment of another State could not be made executory in Maryland either at law or in equity.

The ground of relief in this case was the charge that Attrill had transferred certain stock in April, 1882, with intent to hinder, delay and defraud the plaintiff of his lawful suits, debts and demands in respect of a liability of Attrill to him as a stockholder and as a director of the Rockaway Company, which accrued in 1880, upon the statute of New York, under which that company was organized. An action upon this liability, either as stockholder or director, was barred by the statute of limitations of Maryland, and so the Maryland court held. The judgment recovered in New York in 1886 by Huntington against Attrill upon the alleged liability as a director was, however, referred to and made part of the bill, and in this judgment that cause of action had been merged. And it was averred that the transfer was fraudulent as to the indebtedness arising "out of the cause of action on which the judgment hereinbefore recited has been recovered," which was set forth in detail.

The New York statute was made part of the pleading and admitted as a fact by the demurrer; and while the Maryland court held that the judgment was conclusive evidence of its existence in the form and under the circumstances stated in the pleadings, it regarded it as not changing the character of the liability upon which it was based. The record established the relation of debtor and creditor at the time stated and the amount and fact of the indebtedness, but nothing further.

As plaintiff had no judgment in Maryland, and had not sought to recover one, the pleader, in order to make out the alleged fraud as perpetrated in 1882, went into the original cause of action at large, and invited the attention of the court to its nature. The question at once arose whether the courts of Maryland were constrained to enforce such a cause of action, although record evidence of its maintenance in New York existed in the form of a judgment there. The court held that the liability was not one arising upon contract, but one imposed

upon Attrill as a wrongdoer; that under the statute no inquiry was to be made whether the creditor had been deceived and induced by deception to lend his money or to give credit, or whether he had incurred loss to any extent by the inability of the corporation to pay, nor was the recovery limited to the amount of the loss sustained; that all that it was necessary to show was that the act had been committed, and thereupon any creditor was entitled to recover the full amount of his debt. See *Torbett* v. *Eaton*, 113 N. Y. 623; *S. C.* 49 Hun, 209; *Huntington* v. *Attrill*, 118 N. Y. 365. Hence the court concluded that the liability was in the nature of a penalty within the rule theretofore laid down by the courts of New York: *Merchants' Bank* v. *Bliss*, 35 N. Y. 412; *Wiles* v. *Suydam*, 64 N. Y. 173; *Stokes* v. *Stickney*, 96 N. Y. 323; *Chase* v. *Curtis*, 113 U. S. 452; *Flash* v. *Conn*, 109 U. S. 371; and by the courts of Maryland: *Bank* v. *Price*, 33 Maryland, 487; *Norris* v. *Wrenschall*, 34 Maryland, 492. Its enforcement was therefore declined, and the bill dismissed.

It was for the Maryland court to determine whether such enforcement would either directly or indirectly involve the execution of the penal laws of another State; and although it might have been mistaken in the conclusion arrived at, such error does not give this court jurisdiction to review its judgment. State courts do not adjudicate in the matter of the enforceability of statutory delicts at their peril.

In my opinion, the Maryland court gave all the force and effect to the judgment in question to which it was entitled. The pleadings were necessarily confined to the equities arising out of the original cause of action, and full faith and credit were accorded to the judgment as matter of evidence. Its effect as such could not render it incompetent for the state court to decide for itself the question which was raised upon the record. As there presented, it was for that court to say whether the obligation on Attrill to pay the sum for which the judgment was given was an obligation which the Maryland court was bound to recognize as proper foundation for relief in equity in respect of the transfer of April, 1882.

Statement of the Case.

I think that no Federal question was involved, and that the writ of error ought to be dismissed.

MR. JUSTICE LAMAR and MR. JUSTICE SHIRAS, not having heard the argument, took no part in the decision of this case.

POTTS *v.* WALLACE.

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

No. 41. Argued November 14, 1892. — Decided December 12, 1892.

The directors of a corporation organized under the laws of Pennsylvania voted to make an assignment of the property of the corporation for the benefit of its creditors, which vote was ratified by the stockholders. They further voted to make a mortgage to secure a claim of one of the directors as a preferred claim. The assignment was made without making the mortgage. In an action by the assignee to enforce payment from a stockholder of his subscription to the stock, *held*, that the defendant could not set up the failure to make the mortgage as invalidating the assignment.

When the assets of an insolvent corporation, organized under the laws of Pennsylvania, fail to meet the liabilities of the company by an amount equal to or greater than the sum due the company from a stockholder by reason of unpaid subscriptions to his stock, the assignee has an action at law against him to recover such unpaid subscriptions without first resorting to equity for an assessment.

In an action against a stockholder in an insolvent corporation to recover unpaid subscriptions to his stock for the benefit of creditors, it is no defence to show that when the corporation was solvent he offered to pay in full and his offer was declined, if it also further appear that he refused to be absolved from his contract, and stood upon his rights as a stockholder until the company became embarrassed.

When the plaintiff's evidence makes out a *prima facie* case, and the defendant, after going into his evidence, does not go to the jury on the question of fact, he abandons his defence, so far as it depends on his own evidence, and takes the position that the plaintiff's evidence does not make out a case.

THIS was an action brought originally in the New York Supreme Court, and afterwards removed into the Circuit

Court of the United States for the Eastern District of New York, by Henry Potts, Jr., as assignee of the Chester Tube and Iron Company, plaintiff, against William H. Wallace.

The Chester Tube and Iron Company was a corporation of Pennsylvania, duly incorporated under the provisions of an act of assembly of that State, approved April 29, 1874, entitled "An act to provide for the incorporation and regulation of certain corporations," for the purpose of the manufacture of iron or steel, or of any article of commerce made from them. The place where the business of the corporation was to be transacted was Chester, Delaware County, in the State of Pennsylvania, and the capital stock was fixed at one hundred thousand dollars, divided into two thousand shares of the par value of fifty dollars each. The whole amount of the capital stock was subscribed for by the defendant, William H. Wallace, and six other persons, who had associated themselves together for the purpose of forming the corporation. The charter or agreement of association was dated the 13th day of December, 1877, and letters patent were issued by the governor of Pennsylvania on the 5th day of January, 1878. The charter was signed by the associates, and William S. McManus, Augustus B. Wood, William H. Wallace, Patrick Reilly, and John Shotwell were named therein as directors for the first year.

In and by this charter the defendant Wallace subscribed for three hundred shares of the stock, and he continued to hold his position as director of the company until the 6th day of July, 1880, when, at a meeting of the board then holden, he resigned, his resignation was accepted, and on the 14th day of July, 1880, one F. C. Shotwell was elected to take his place. There was no meeting of the board of directors from January 21, 1880, to July 6, 1880.

At a meeting of the board on August 3, 1880, the following resolution was adopted:

"Whereas it has become apparent that, in order to enable this company to meet its liabilities, some indulgence on the the part of its creditors is necessary, therefore, resolved, that the president is authorized to negotiate for and effect an exten-

sion of the claims against the company upon such terms as he may deem most likely to make it meet its indebtedness; and in the event of his failure to accomplish such extension, the president is authorized to execute, under the corporate seal, with his attestation, a deed of general assignment for all the estate and property of the company for the benefit of its creditors *pro rata* and without preference."

On the 14th day of September, 1880, a deed, purporting to be a deed of assignment by the Chester Tube and Iron Company, by its president, William S. McManus, under its seal, was executed to Henry Potts, Jr., and was recorded the same day in the recorder's office of Delaware County, Pennsylvania. This deed purported to convey and transfer to Henry Potts, Jr., as assignee, all the property and estate of the company of every description, in trust, to sell and dispose of the same, and to collect all the claims of the company, conduct all the steps necessary for the purpose of converting the assets into cash, and to divide the same without preference among the creditors of the corporation, with the further provision that should there be any surplus, after paying the debts, the same should be returned to the corporation.

In pursuance of the provisions of the Pennsylvania statutes, regulating such assignments, Henry Potts, Jr., on October 20, 1880, executed his bond, conditioned for the faithful performance of his duties as assignee, in the penalty of $191,000, which bond was approved by the Court of Common Pleas of Delaware County. Henry Potts, Jr., assumed the trust and proceeded with the execution of the same so far as to file an account, which account was confirmed by the court of Delaware County. On the 5th of March, 1882, a petition was filed in said court, alleging the death of Henry Potts, Jr., and, on the same day, an order was made appointing Henry W. Potts as assignee to fill the vacancy occasioned by the death of Henry Potts, Jr., and directing him to give a bond, with sureties, in the sum of $44,000, and such bond was filed on March 6, 1882; and on December 16, 1882, the Supreme Court of New York, County of Kings, in which the action brought by Henry Potts, Jr., against the defendant Wallace was still pending, ordered that

Henry W. Potts, as assignee of the Chester Tube and Iron Company, be substituted as plaintiff in the place of Henry Potts, Jr., deceased.

On the 22d day of June, 1883, on the petition of Henry W. Potts, assignee, the said action was removed to the Circuit Court of the United States for the Eastern District of New York, and at the May term, 1888, came on to be tried before the Hon. E. Henry Lacombe, Circuit Judge, and a jury, and resulted in a verdict for the defendant on the 9th day of May, 1888.

On February 5, 1889, judgment was entered on the verdict in favor of the defendant and against the plaintiff, and on the 5th day of April, 1889, a writ of error was allowed and the cause was brought thereby into the Supreme Court of the United States.

The record discloses, in addition to the foregoing facts, that the defendant's answer admitted that he had subscribed for three hundred shares of stock, had not paid anything on account of the same, and that demand for payment had been made on him by the plaintiff as assignee.

To meet the *prima facie* case thus made out against him, the defendant put in evidence proceedings of the stockholders on August 12, and of the board of directors on August 20. At these meetings the president and treasurer were directed to execute and deliver to A. B. Wood, trustee, a bond and mortgage of the company for $11,200, to secure money advanced by him, as trustee for John E. and Mary D. Browning, for the use of the company, and also to assign to A. B. Wood all the company's interest in the leasehold, machinery and fixtures of the company, in payment of $12,260, due Wood for money advanced by him individually for the use of the company. The resolutions of the stockholders and of the directors, at these meetings directed the president that, after the mortgage and assignment to A. B. Wood were executed and delivered, he should execute the deed of general assignment provided for by the resolution of August 3, 1880.

The defendant likewise put in evidence, under objection by the plaintiff, the proceedings of a meeting of the directors held

on September 16, 1880, wherein resolutions were passed declaring the act of the president in executing and delivering the deed of assignment to have been void and without authority, and in fraud of the rights of the company, and contrary to the will of the directors and stockholders. These resolutions further provided that the said pretended assignment should be repudiated, that notice of this action should be given to Henry Potts, Jr., and that the president should be and was removed from office, and D. F. Houston elected to take his place.

The defendant likewise offered evidence tending to show that several times during the year 1879 and early in 1880, when the affairs of the company were in an apparently prosperous condition, he offered to pay to the treasurer of the company the amount of his subscription, $15,000, and demanded his stock; that the treasurer, acting, as he testified, under directions of the president, refused to accept the money and to deliver the stock. The defendant likewise proved his resignation as director on July 6, 1880.

The record further discloses that, after the defendant had put in the foregoing evidence, the plaintiff called W. S. McManus, the president, who testified that he had never refused to accept defendant's subscription money or to deliver the stock, and that he gave no instructions to the treasurer to refuse defendant's payment or to refuse to deliver his stock. He also testified that he continued to consult with the defendant about the affairs of the company down until July, 1880.

The record further shows that, on the closing of the testimony, it was conceded by the counsel for the plaintiff and the defendant respectively that there was no question of fact to be submitted to the jury; that thereupon the counsel for the plaintiff requested the court to direct the jury to find a verdict for the plaintiff, which request was denied, and this ruling was excepted to; that the court, on motion of defendant's counsel, directed a verdict in favor of the defendant; and that the plaintiff's counsel duly excepted to the ruling in that behalf. The jury, under the direction of the court, found a verdict for the defendant.

Argument for Defendant in Error.

Mr. Sidney Ward for plaintiff in error.

Mr. B. F. Tracy for defendant in error.

I. All duties and obligations imposed upon the defendant by his subscription were fully discharged and cancelled by the refusal on the part of the company, while it continued solvent, to receive the payment and performance tendered.

(*a*) The contract of subscription between the defendant and the company was a mutual contract and gave rise to mutual obligations and duties.

That the subscription, at its date, was a valid contract, is not disputed. *Richmondville Union Seminary* v. *MacDonald*, 34 N. Y. 379, 381; *Parker* v. *Northern Central Michigan Railroad*, 33 Michigan, 23; *Marsh* v. *Burroughs*, 1 Woods, 463; *Burrall* v. *Bushwick Railroad*, 75 N. Y. 211; *Pittsburgh & Connellsville Railroad* v. *Graham*, 36 Penn. St. 77; *Custar* v. *Titusville Gas & Water Co.*, 63 Penn. St. 381; *Melvin* v. *Hoyt*, 52 N. H. 61.

(*b*) The contract of subscription being one of "sale and purchase" the obligation on the part of the defendant to pay his subscription was fully discharged at the time he tendered performance, and the same was refused.

Upon tendering the property and after giving the buyer a reasonable time to accept the property and pay for the same, the seller may regard the contract as abandoned by the purchaser, he being put in default by his refusal to pay. *Westfall* v. *Peacock*, 63 Barb. 209; *Des Arts* v. *Leggett*, 16 N. Y. 582; *Billings* v. *Vanderbeck*, 23 Barb. 546; *Slingerland* v. *Morse*, 8 Johns. 474.

(*c*) The defendant took all necessary steps to release himself from liability as a stockholder. In view of the action taken by the treasurer and president, a formal tender by the defendant of the amount of his subscription was not necessary. The defendant on several occasions demanded his stock of the treasurer and offered to pay for the same, but in every instance the treasurer, acting under the instructions of the president, refused to issue the stock. A further tender

became unnecessary, when it was reasonably certain that the offer would be refused. *Hills* v. *Albany Exchange Bank*, 12 Fed. Rep. 93; *Currie* v. *White*, 45 N. Y. 822; *Woolner* v. *Hill*, 93 N. Y. 576.

It was within the province of the president and treasurer of the corporation to issue the stock, they being authorized by the by-laws to sign all certificates of stock, and their refusal to issue stock was the refusal of the properly authorized agents of the corporation.

(*d*) It is conceded that the general rule of law in regard to unpaid stock subscriptions is that "unpaid subscriptions to stock are assets, and have frequently been treated by courts of equity as if impressed with a trust *sub modo* in the sense that neither the stockholders nor the corporations can misappropriate subscriptions so far as creditors are concerned."

But the equities of creditors are not regarded to the exclusion of all other equities. In the absence of statutes creditors may have equitable claims against stockholders, but not legal rights. Cases may and do arise where the right of a subscriber to be released from his obligation is paramount to any rights of creditors.

We do not doubt that a subscriber to the capital stock of the company cannot be discharged from the obligation which he has assumed until payment has been actually made, or the obligation to pay has been extinguished in some lawful manner. And we further concede that where the obligation to pay exists, any arrangement between the company and its debtor, by which a fictitious payment is attempted to be substituted for an actual payment, is a fraud upon the creditors, and may be disregarded by a receiver in bankruptcy, and the payment of the balance actually due enforced. There is no reported case that goes beyond this.

Wherever a pretended payment has been set aside and disregarded, it has been put on the express ground that the alleged payment was a fiction, and made in fraud of the creditors of the corporation. No such question is involved in the case at bar.

The defendant was a subscriber for the stock of the cor-

poration; payment of this subscription could not be enforced except by tender of the stock. The promise of the corporation to deliver the stock was the consideration of the defendant's promise to pay. The contract was executory. When the defendant offered to pay and demanded his stock and the corporation refused to deliver it, the corporation violated its contract and the defendant was discharged therefrom.

At the time of the bankruptcy, the defendant had ceased to be a subscriber for the stock. He was under no obligation whatever to the corporation. Of course, if it could be alleged that this was a mere device for the purpose of relieving the defendant from his obligation, a different question would be presented. No such thing is pretended. This distinction is pointedly made by Grover, J., in *Mills* v. *Stewart*, 41 N. Y. 384, 386. See also *Small* v. *Herkimer Manufacturing Co.*, 2 N. Y. 330; *Sawyer* v. *Hoag*, 17 Wall. 610; *Clark* v. *Bever*, 139 U. S. 96, 113; *Handley* v. *Stultz*, 139 U. S. 417, 430; *Pacific Bank* v. *Eaton*, 141 U. S. 227.

II. In any event the plaintiff has mistaken his remedy. There is no foundation for an action at law.

This is an action at law in the nature of debt to recover from the defendant the full amount of the capital stock for which he had at one time subscribed. Conceding for the sake of the argument, that the breach by the corporation of the contract of subscription might not relieve him from liability to certain creditors, it is plain that, as between the defendant and the corporation, its refusal to accept his money and deliver him his stock would prevent it from suing him on his subscription, and therefore the plaintiff cannot recover in its right.

At common law an assignee of an insolvent corporation could recover from a stockholder only when the corporation itself could have recovered if the assignment had not been made.

The corporation law of Pennsylvania, under which the Chester Tube and Iron Company was organized, provides that the officers and stockholders organized under or accepting the provisions of the act shall not be individually liable for the debts of the corporation otherwise than in the act provided.

Opinion of the Court.

The act provides for making stockholders parties to an action against the corporation, the levying of an execution against the corporation, and, if it be returned unsatisfied, that the deficiency may be satisfied out of the property of the stockholders so made parties, etc.

This liability, whether limited or not, is a security provided by law for the benefit of creditors, over which the corporation has no control; and, consequently, an attempted assignment by the corporation of the statutory liability of shareholders is inoperative, although made for the equal benefit of all the creditors. *Wright* v. *McCormack*, 17 Ohio St. 86; *Dutcher* v. *Marine Bank*, 12 Blatchford, 435; *Lane's Appeal*, 105 Penn. St. 49; *Bell's Appeal*, 105 Penn. St. 88.

It is evident on the face of the complaint that the statutory liability has not been pursued. The remedy of the plaintiff, if he has any against this defendant, is in equity. The complaint does not contain the allegations necessary for a bill in equity. See also *Terry* v. *Anderson*, 95 U. S. 628; *Mills* v. *Scott*, 99 U. S. 25; *Hatch* v. *Dana*, 101 U. S. 205; *McLean* v. *Eastman*, 21 Hun, 312; *Chandler* v. *Keith*, 42 Iowa, 99.

III. The assignment was invalid. It was made by the president pursuant to a resolution of the board of directors and he did not follow the instructions, conditions and authority contained in the resolution.

IV. This is not a question of irregularity which the company could waive, but a question of defect of title. If the president had no power to execute the assignment as he did, then the plaintiff obtained no title, and he cannot maintain this action, for his own proof discloses the defect of title.

V. The plaintiff cannot secure a reversal of this judgment upon the ground that there was any issue of fact which the court should have submitted to the jury.

Mr. Justice Shiras delivered the opinion of the court.

The assignments in error are nineteen in number, but they present substantially but one question: Did the court err, in view of all the evidence, in directing the jury to find a verdict for the defendant?

There were no findings of fact by the court or jury, and no charge or opinion of the court is shown by the record. We are therefore left to draw the materials upon which we are to revise the judgment of the court below from the various offers of evidence and exceptions thereto, read in the light afforded by the respective briefs and arguments of counsel.

Taken in logical order, the first ground of defence is found in the position that the assignment to Potts for the benefit of creditors was invalid, and the want of validity is supposed to be found in the fact that, in executing the deed of assignment, the president did not follow certain instructions and conditions imposed upon him by the board. Undoubtedly, the act of the president, in executing and delivering the deed of assignment, was fully warranted by the resolution of the board of August 3, 1880, but it is claimed that, by reason of proceedings at the stockholders' meeting, held on August 12, and at a meeting of the board of directors on August 20, the authority of the president, granted by the resolution of August 3, was modified, or made conditional on certain other acts that he was to do.

At the stockholders' meeting a resolution was passed directing the president, directors and officers of the company to execute a bond and mortgage to secure A. B. Wood, one of the directors, for certain trust moneys he had advanced to the company, and also to make an assignment to said board of the leasehold and fixtures of the company in payment of moneys alleged to have been advanced by him for the use of the company.

The resolution of the board of directors of August 3, authorizing the president to make a deed of assignment for the benefit of creditors, was laid before the stockholders, and, upon motion, was approved and ratified; and the president was authorized to execute a general assignment after the mortgage and assignment of lease to A. B. Wood should be duly executed and delivered.

At the meeting of the board, held on August 20, 1880, the action of the stockholders in directing the execution of a mortgage and assignment of the lease to A. B. Wood was reported, and was, by a resolution, approved.

Opinion of the Court.

It would seem that the mortgage and assignment of lease to Wood were never executed, and that the president on September 14, 1880, executed and delivered the deed of assignment to Potts.

As already stated, this action of the president in making the deed of assignment, without the mortgage and assignment to Wood having been executed, was sought to be repudiated by the board at a meeting held on September 16, 1880.

Whether the proposition to secure Wood, one of the directors of an insolvent company, by a mortgage covering all the property of the company, would have been valid as against the other creditors of the company, is more than doubtful. However that may be, the record does not show that any steps were ever taken to prevent the assignment to Potts from taking effect. There is no evidence that Potts was ever notified of the action of the directors, attempting to make the deed of general assignment subject to a prior mortgage and assignment in favor of Wood. Nor does it appear that any effort was made in the court having jurisdiction of the subject to set aside the deed to Potts. On the contrary, it appears that the assignee was suffered to proceed in the execution of his duties as assignee by filing his bond and inventory and an account, and, upon the death of Henry Potts, Jr., no objection was made on behalf of Wood or the company to resist the appointment of a successor.

The proposition that Wallace, when called upon by the assignee to pay for his stock, could take refuge in the abortive attempt of the directors to prefer one of their own number, seems to us to be altogether inadmissible.

Another ground of defence urged was that the plaintiff had mistaken his remedy; that the proceeding to enforce the liability of Wallace should have been by a bill in equity.

We might dismiss this position by the observation that it does not appear to have been taken by the defendant in his answer, or to have been brought to the attention of the court at the trial.

As, however, for other reasons, the case has to go back for another trial, it may be well for us to briefly consider the merits of the suggestion.

It is undoubtedly true that, in Pennsylvania, in the case of an insolvent corporation, its assets, including unpaid capital stock, constitute a trust fund, and that such fund cannot be appropriated by individual creditors, by means of attachments or executions directed against particular assets, but should be distributed, on equitable principles, among the creditors at large.

Accordingly, it was ruled by the Supreme Court of Pennsylvania in *Lane's Appeal*, 105 Penn. St. 49, and in *Bell's Appeal*, 105 Penn. St. 88, cases cited by defendant's counsel, that a bill in equity is a proper remedy whereby to subject the property of an insolvent corporation to the claims of its creditors.

Some general expressions were used in those opinions, cited in the brief of defendant's counsel, which seem to countenance the proposition that the only remedy in each case is by a bill in equity. But an examination of the facts of the cases and of the reasoning of the opinions clearly shows that what the court meant was that the proceeding must, in some form, be a remedy for all, and not for some, of the creditors — that the remedy must be coextensive with the nature of the property as a trust fund.

That this is the proper reading of those cases is shown by the later case of *Citizens' Savings Bank* v. *Gillespie*, 115 Penn. St. 564, 572. That was the case of a suit brought by an assignee of an insolvent bank for the benefit of creditors against a subscriber for stock remaining unpaid, and the Supreme Court, per Paxson, C. J., said:

"There being no assessment in evidence, the learned judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If the unpaid subscriptions were required to pay the creditors, no assessment was necessary, under the authority of *Yeager* v. *Scranton Trust Company*, (14 Weekly Notes of Cases, 296.) . . . It was there said that 'the uncontradicted evidence shows that it was necessary to collect the whole of this stock subscription in order to pay the sums due the depositors of this insolvent corporation.'

There is not even an apparent conflict between the case referred to and the later cases of *Lane's Appeal*, 105 Penn. St. 49, and *Bell's Appeal*, 115 Penn. St. 88, 564. Those were creditors' bills, filed against insolvent corporations, to compel the payment by the stockholders of their unpaid subscriptions, and it was held that, in such cases, there must be an account taken of the amount of debts, assets and unpaid capital, and a decree for an assessment of the amount due by each stockholder. The reason of this is plain. Upon the insolvency of a corporation a stockholder is liable for only so much of his unpaid subscription as may be required to pay the creditors. Hence, he may not be called upon in an arbitrary way to pay any sum that an assignee or creditor may demand. It is, therefore, requisite to ascertain, in an orderly manner, the extent of the stockholders' liability before proceedings are commenced to enforce it. But the necessity for this does not exist when the whole amount is required to pay the debts. Hence, *in such cases*, as was said in *Yeager* v. *Scranton Bank*, *supra*, *an assessment is not essential. The assignee may sue at once, for all is required.*"

At the trial in the present case, (see page 27 of the record,) the counsel for the defendant consented to take the statement of the company's clerk, without contradicting it, that the assets of the company appeared to be $250,000 and the liabilities $270,000 to $275,000. It was not necessary, therefore, to have a preliminary assessment against Wallace, as the jury could have found, under the concession of his counsel, that the entire amount of his unpaid stock was necessary to meet the indebtedness of the corporation. We understand the concession to mean that the debts exceeded the assets, including the unpaid subscriptions of the defendant and the other stockholders. If we are wrong in this, the defendant can show the facts, and invoke, if he be so advised, the doctrine of *The Savings Bank* v. *Gillespie*, if, indeed, that doctrine will avail him.

We are now brought to the last and most substantial ground urged by the defence, the one on which, we may conjecture, that the court below chiefly relied in directing the jury to find

their verdict for the defendant. It is thus expressed in the brief of the defendant's counsel:

"All duties and obligations imposed upon the defendant by his subscription were fully discharged and cancelled by the refusal on the part of the company, while it continued solvent, to receive the payment and performance tendered."

It may be readily conceded that if the evidence in the case disclosed that the defendant's offer of payment and performance was refused by the company while solvent, and that the defendant availed himself of such refusal, and declared himself off from his contract of subscription, the defendant was thereby exonerated from the obligation of his subscription, and that his liability to pay would not be revived by the subsequent insolvency of the company and by the demands of the assignee.

The record discloses a very different state of facts.

The defendant was himself one of the original corporators, and was, by the articles of association, made one of the directors of the company. This position he continued to occupy until July 6, 1880, which date, according to the uncontradicted evidence, was subsequent to the actual insolvency of the company.

John Shotwell testified that he was treasurer and secretary of the company from the time of its organization to its failure; that he ascertained that the company was in embarrassed circumstances in the spring of 1880; that he had a habit of going to the defendant's office, and talking with him about the company's affairs; that the company's notes went to protest in August. The resolution of the board to make the assignment for the benefit of creditors was adopted on August 3, 1880. Certainly, up until July 6, 1880, Wallace indicated no intention to withdraw himself from the company. On the contrary, he continued, from time to time, to declare his readiness to pay his subscription and to stand on his rights as a stockholder. He himself testified that he learned that the company was in trouble in June, 1880; that the president consulted with him in regard to the company's affairs after that; that these consultations continued down to two or three

months before the final collapse; that defendant's firm continued to be agents of the company up to the time of its failure; and that what he was seeing the president about was business connected with the company, the selling of goods and collecting of accounts due, etc.; and that so long as he considered the stock good he was ready to take it and pay for it.

Even, therefore, if the company had, while solvent, refused to receive payment and to issue a certificate of stock, the evidence shows that the defendant did not elect to declare himself absolved from his contract, but stood upon his rights, as a stockholder and director, until the company's affairs had become involved in embarrassment. It was then too late for the defendant to change his position. If, on August 3, 1880, the day on which the directors resolved to make an assignment, the affairs of the company had been prosperous and its stock valuable, Wallace was still in a position to demand his stock and to compel payment to himself of any dividends that might be declared.

So that, even if the company and the defendant had then agreed that the latter should then be exonerated from his liability to the company, such an agreement would have been void as against the creditors of the insolvent company. In *Sawyer* v. *Hoag, Assignee*, 17 Wall. 610, it was held that the relations of a stockholder to the corporation, and to the public who deal with the latter, are such as to require good faith and fair dealing in any transaction between him and the corporation, of which he is part owner and controller, which may injuriously affect the rights of creditors or of the general public, and a rigid scrutiny will be made into all such transactions in the interest of creditors; and that it was not competent for the insolvent company to make a valid agreement with a stockholder to exonerate him from his liability. In other words, the doctrine laid down was that the governing officers of a corporation cannot, by agreement, or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In *Hawley* v. *Upton*, 102 U. S. 314, 316, it was said, per

Waite, C. J., that "it cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation must pay his subscription if required to meet the obligations of the corporation. A certificate in his favor for the stock is not necessary to make him a subscriber. All that need be done, so far as creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock represents. If such an obligation exists, the courts can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished."

In *Burke* v. *Smith*, 16 Wall. 390, 394, it was said, per Strong, J.: "It has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors or the State shall lose the benefit of his subscription. Every such arrangement is regarded in equity not merely as *ultra vires*, but as a fraud upon other stockholders, upon the public, and upon the creditors of the company."

In *Upton* v. *Tribilcock*, 91 U. S. 45, it was held that "the original holder of stock in a corporation is liable for unpaid instalments of stock without an express promise to pay them; and a contract between a corporation, or its agents and him, limiting his liability therefor, is void both as to the creditors of the company and its assignee in bankruptcy."

It requires no argument to show that if a company cannot, by agreement in any form, when in insolvent circumstances, release the obligation of a subscriber to its stock, much less can it attain the same end by declining to accept payment of his subscription; and it is equally obvious that, even if such refusal is made when the company is supposed to be prosperous, yet if the stockholder declines to acquiesce in such refusal, and persists in maintaining his position as a stockholder and director until insolvency has supervened, it is then too late for him to claim the benefit of the company's refusal.

We have thus far dealt with this aspect of the case as if the company had, in point of fact, refused to accept the defendant's subscription money and to recognize him as a stockholder. But an examination of the record shows that there was no such refusal by the company either before or after it became insolvent.

The defendant's witnesses, consisting of Shotwell, the treasurer, of William Bispham, a partner of the defendant, and of the defendant himself, testified that several times during the year 1879 and the early part of 1880 the defendant had offered to pay the amount of his subscription, which the treasurer refused to accept, and the treasurer testified that, in so refusing, he was acting under the instructions of the president. But the president, when called on behalf of the plaintiff, denied that he had ever refused to accept the defendant's subscription money or to give him his stock, and denied that he had ever instructed the treasurer to do so.

With the testimony in this condition, the counsel of both parties conceded of record that there was no question of fact to be submitted to the jury, and requested the court to give peremptory instructions to the jury, and the court accordingly directed the jury to find for the defendant.

As the plaintiff had clearly made out a *prima facie* case before the defendant went into his evidence, and as the defendant did not ask to go to the jury on the questions of fact, he might well be regarded as having abandoned his defence so far as that depended on the evidence adduced by himself, and as having taken the position that the plaintiff's evidence did not make out a case.

But, even if it should, for the sake of the argument, be conceded that the jury did find that the treasurer, in refusing to accept the money, obeyed instructions given him by the president, such action on the part of the president was not the action of the company, and did not bind the company or its creditors.

The president had no legal power or authority to deplete the coffers of the company, by instructing the treasurer to refuse to accept subscription money when tendered.

In *Bank of the United States* v. *Dunn*, 6 Pet. 51, it was

held that an agreement by the president and cashier that the endorser on a note shall not be liable on his endorsement, does not bind the bank; that it is not the duty of the cashier and president to make such contracts, nor have they the power to bind the bank, except in the discharge of their ordinary duties.

It is true that if the acts of the president are ratified by the corporation, or if the corporation permits a general course of conduct, or accepts the benefit of his act, they will be bound by it. But the general rule is that the president cannot act or contract for the corporation, except in the course of his usual duties.

And the rule is still stronger against the power of the president to bind the corporation by giving up its securities or releasing claims in its favor.

In the present instance, there is no evidence whatever of ratification by the directors of the alleged act of the president in reference to the defendant's obligation. It does not appear that they knew anything about it, and it is plain that the company received no benefit from it.

Upon the facts disclosed by the record, we are clearly of opinion that the court below erred in instructing the jury to find for the defendant and in entering judgment on the verdict.

The judgment is

Reversed, with directions to grant a new trial, and for further proceedings in conformity with this opinion.

APPENDIX.

I.

AMENDMENT OF RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

Ordered, That Rule 32 of this court be, and the same is hereby, amended so as to read as follows:

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, Chapter 236, or under Section 5 of the act of March 3, 1891, Chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

(Promulgated November 28, 1892.)

II.

ASSIGNMENTS TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

ORDER.

There having been an Associate Justice of this Court appointed since the last term closed, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, HENRY B. BROWN, Associate Justice.

For the Seventh Circuit, JOHN M. HARLAN, Associate Justice.

For the Eighth Circuit, DAVID J. BREWER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

Monday, October 17, 1892.

ORDER.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, SAMUEL BLATCHFORD, Associate Justice.

For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, LUCIUS Q. C. LAMAR, Associate Justice.

For the Sixth Circuit, HENRY B. BROWN, Associate Justice.

For the Seventh Circuit, MELVILLE W. FULLER, Chief Justice.

For the Eighth Circuit, DAVID J. BREWER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

Monday, December 19, 1892.

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CERTIORARI.

In each of these cases defendant in error sued plaintiff in error under the Interstate Commerce act, to recover alleged overcharges on the transportation of corn and recovered judgment, to each of which judgments the defendant below sued out a writ of error to the Circuit Court of Appeals. The cases being heard there the judgment in each was reversed, upon the ground that the jury should have been instructed to find a verdict for the defendant, and the cases were remanded for further proceedings in accordance therewith. On petitions for writs of *certiorari* to the Court of Appeals to bring up the records and proceedings, *held*, that the petitions should be denied. *Chicago & Northwestern Railway Co.* v. *Osborne*, 354.

CHALLENGE.

See CRIMINAL LAW, 3, 4, 5, 6.

CHARTER-PARTY.

See ADMIRALTY.

CHATTEL MORTGAGE.

See BAILMENT.

CHICAGO.

See ILLINOIS CENTRAL RAILROAD;
RIPARIAN OWNER, 2, 3.

CIRCUIT COURTS OF THE UNITED STATES.

For the purpose of determining the amount of compensation to be paid to a marshal of the United States for attending Circuit and District Courts, under Rev. Stat. § 829, *Held*, that the court is "in session" only when it is open by its order, for the transaction of business, and that if it be closed by its own order for an entire day, or for any given number of days, it is not then in session, although the current term may not have expired. *McMullen* v. *United States*, 360.

See JURISDICTION, C.

CITIZENSHIP.

See JURISDICTION, C, 2, 3, 4.

CLAIMS AGAINST THE UNITED STATES.

See ALABAMA CLAIMS.

See ALABAMA CLAIMS;
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JURISDICTION, B, 17, 18; C, 4;
STATUTE, D, 1, 3, 4;
TAXATION, 1, 3.

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CORPORATION.

COURT AND JURY.

his own evidence, and takes the position that the plaintiff's evidence does not make out a case. *Potts* v. *Wallace*, 689.

See BAILMENT;
CONTRACT, 3;
CUSTOMS DUTIES, 2;
EVIDENCE, 10;
PRACTICE, 2.

CRIMINAL LAW.

1. The provision in section 845 of the Revised Statutes of the District of Columbia that when the judgment in a criminal case is death or confinement in the penitentiary the court shall, on application of the party condemned, to enable him to apply for a writ of error, "postpone the final execution thereof," etc., relates only to the right of the accused to a postponement of the day of executing his sentence, in case he applies for it in order to have a review of an alleged error; and, with the exception of this restriction, the power of the court was left as it had been at common law. *In re Cross*, 271.
2. In trials for felonies it is not in the power of the prisoner either by himself or his counsel, to waive the right to be personally present during the trial. *Lewis* v. *United States*, 370.
3. The making of challenges is an essential part of the trial of a person accused of crime, and it is one of his substantial rights to be brought face to face with the jurors when the challenges are made. *Ib.*
4. Though no specific exception was taken in this case by the prisoner, based upon the fact that he was called upon to challenge jurors not before him, a general exception, taken to the action of the court in prescribing the method of procedure, was sufficient. *Ib.*
5. Where no due exception to the language of the court in instructing the jury is taken at the trial, this court cannot consider whether the trial court went beyond the verge of propriety in its instructions. *Ib.*
6. On the trial of the case, after the accused had pleaded not guilty to the indictment, the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, one to be given to the district attorney and one to the counsel for the defendant, and further directed each side to proceed with its challenges, independently of the other, and without knowledge on the part of either as to what challenges had been made by the other. To this method of proceeding, the defendant at the time excepted, but was required to proceed to make his challenges. He challenged twenty persons from the list of thirty-seven persons from which he made his challenges, but in doing so he challenged three jurors who were also challenged by the government. The government challenged from the list of thirty-seven persons five persons, three of whom were the same persons challenged by the defendant. This fact was made to appear from the lists of jurors used by the government in making its challenges and the defendant in

CUSTOMS DUTIES.

ESTOPPEL.

EVIDENCE.

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ILLINOIS CENTRAL RAILROAD.

PRACTICE.

PROHIBITION, WRIT OF.

PUBLIC LAND.

RAILROAD.

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REMOVAL OF CAUSES.

The petition of a city in a state court, against the lessor and the lessee of a parcel of land, to condemn it for the purpose of extending a street, cannot be removed into the Circuit Court of the United States upon the ground of a separable controversy between the lessee and the plaintiff. *Bellaire* v. *Baltimore & Ohio Railroad Co.*, 117.

RIPARIAN OWNER.

1. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. *Illinois Central Railroad Co.* v. *Illinois*, 387.
2. The fee of the made or reclaimed ground between Randolph Street and Park Row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph Street, is in the city, and subject to the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the right of riparian ownership, and is at full liberty to exercise it. *Ib.*
3. The city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph Street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves,

D. Statutes of States.

1. The Court of Appeals of the State of New York having held that a judgment obtained before the passage of the act of the legislature of that State of June 20, 1879, reducing the rate of interest, (Sess. Laws 1879, 598, c. 538,) is not a "contract or obligation" excepted from its operation under the provisions of § 1, this court accepts that construction as binding here. *Morley* v. *Lake Shore & Michigan Southern Railway Co.*, 162.
2. A statute of a State, which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of non-residence, is not applicable to actions in a Circuit Court of the United States, held within the State, under Rev. Stat. § 914. *Southern Pacific Co.* v. *Denton*, 202.
3. Public grants susceptible of two constructions must receive the one most favorable to the public. *Hamilton Gas Light & Coke Co.* v. *Hamilton City*, 258.
4. Although a legislative grant to a corporation of special privileges may be a contract, when the language of the statute is so explicit as to require such a construction, yet if one of the conditions of the grant be that the legislature may alter or revoke it, a law altering or revoking the exclusive character of the granted privileges cannot be regarded as one impairing the obligation of the contract. *Ib.*

SUBMERGED GROUND.

See Illinois Central Railroad, 4, 5;
Navigable Waters.

SUPREME COURT.

This court does not consider itself bound by expressions touching its jurisdiction found in an opinion in a case in which there was no contest on that point. *Cross* v. *Burke*, 82.

See Jurisdiction, B.

TAXATION.

1. The surrender of the power of taxation by a State cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power. *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 279.
2. The exemption from taxation conferred upon the Wilmington & Raleigh Railroad Company by the act of January 3, 1834, incorporating it, was